



**Ndeta v Western Express Coach Limited (Employment and Labour Relations Cause E577 of 2021) [2024] KEELRC 13325 (KLR) (3 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13325 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E577 OF 2021**

**AN MWAURE, J  
DECEMBER 3, 2024**

**BETWEEN**

**NICHOLAS LITUNYA NDETA ..... CLAIMANT**

**AND**

**WESTERN EXPRESS COACH LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed a Statement of Claim dated 16<sup>th</sup> July 2021.

**Claimants' Case**

2. The Claimant avers that he worked at the respondent company as a long distance driver.
3. The Claimant avers that he was earning a salary of Kshs. 33,100/= per month.
4. The Claimant avers that he began working for the Respondent in August 2014 and resigned from the respondent company on or about 29<sup>th</sup> March 2021 on medical grounds having developed lumbago, which the respondent formally accepted.
5. The Claimant avers that when he resigned, the respondent owed him salary arrears of Kshs. 178,886/= on account of unpaid salary arrears for January to March 2021 and the year 2019.
6. The Claimant also claims for leave pay of Kshs. 231,700/= having been granted unpaid leave by the respondent in the year 2020 during the Covid-19 pandemic.
7. The Claimant avers that after resignation, the respondent has failed, refused and/or neglected to pay him his terminal benefits for every year worked (8 years) at Kshs. 33,100/= per year amounting to Kshs. 264,800/=.



8. The Claimant avers that he blames the respondent for his medical condition as a result of the work he was doing.

### **Respondent's case**

9. In opposition to the Claim, the Respondent filed its response dated 28<sup>th</sup> February 2023 with leave of court on 30<sup>th</sup> January 2023.
10. The Respondent admits that it employed the Claimant as a driver for its bus fleet till on or about 11<sup>th</sup> March 2021 when he formally resigned.
11. The Respondent denies owing the Claimant's terminal dues amounting to Kshs.178,886/=.
12. The Respondent avers that it paid all the outstanding arrears upon the Claimant's resignation and does not owe any money at the time he was leaving employment.
13. The Respondent avers that after mutually agreeing with the claimant, the claimant proceeded on paid leave and the Respondent's business closed down as a result of the economic crisis brought by the Covid-19 pandemic and lockdown imposed by the government.
14. The Respondent avers that the Claimant utilized his leave as the company policy was to utilize all leave days for the year therefore the claim for unpaid leave is to be denied.
15. The Respondent avers that it paid the Claimant's dues upon his resignation and accepted vide a letter dated 29<sup>th</sup> March 2021.
16. The Respondent avers that the Claimant is not entitled to the relief sought and prays that the Claimant's suit be dismissed with costs.

### **Evidence in court**

17. The Claimant (CW1) adopted his witness statement dated 16<sup>th</sup> July 2021 as his evidence in chief together with the list of documents dated 10<sup>th</sup> July 2021 as exhibits 1 to 4.
18. CW1 testified that he was to be paid his dues as per the respondent's letter dated 29<sup>th</sup> March 2021 but the respondent did not pay as outlined in the said letter.
19. The respondent did not participate in the court proceedings despite being served with notices therefore the matter proceeded undefended.

### **Claimant's submissions**

20. The Claimant submitted that the respondent admitted to owing salary up to 31<sup>st</sup> March 2021, salary arrears and final dues. The respondent's letter dated 29<sup>th</sup> March 2021 stated as follows:  

“Please note that you will be paid your salary up to 31<sup>st</sup> March 2021 less any salary advances already paid to you together with the outstanding salary arrears as earlier communicated to you.

"Please arrange to see the undersigned. for payment plan of your final dues..."
21. The Claimant submitted that there is no evidence to show that the respondent did pay the final dues. They only paid him salary up to 31<sup>st</sup> March 2021, salary arrears and final dues and therefore judgment should be entered against them with respect to salary arrears and terminal benefits as prayed.



22. The Claimant submitted that with respect to leave given by the court on 30<sup>th</sup> January 2023, the respondent filed a statement of response to the memorandum of claim stating that he did not proceed on leave, it was mutually agreed between parties for the amounts to be paid in lieu of leave and that this was to be paid upon compensation.
23. The Claimant submitted that the respondent did not adduce any evidence to support that the outstanding leave amount was paid to him upon his resignation. The Claimant prays to be granted the prayer as prayed.
24. It is in the Claimant's submissions that it was the respondent's responsibility to maintain records and to provide those records to refute the claims set out in the memorandum of claim. However, the respondent failed to present any evidence to support its case.
25. In conclusion, the Claimant submitted that this Honourable Court allow the memorandum of claim as prayed.

### **Analysis and determination**

26. Having considered the pleadings, evidence and submissions on record, there are two issues for the Court's determination:
  - a. Whether the claimant was paid his final dues according to the letter dated 29<sup>th</sup> March 2021
  - b. Whether the Claimant is entitled to the relief sought.

### **Whether the claimant was paid his final dues according to the letter dated 29<sup>th</sup> March 2021**

27. In *Michael Wanjau GATHERU V Nakumatt Holdings Limited* [2018] KEELRC 1899 (KLR) the court held that the claimant gave requisite notice and the Respondent did not make any payment.
28. In this instant case, the Claimant resigned on medical grounds as he had developed lumbago. This was by his letters dated 11<sup>th</sup> March 2021 and the Respondent accepted the resignation and undertook to pay him the salary for that month and arrears. The acceptance letter is dated 3<sup>rd</sup> March 2021.
29. The Respondent in its letter dated 29<sup>th</sup> March 2021 stated that it will pay the Claimant his salary up to 31<sup>st</sup> March 2021 less any salary advances already paid together with any outstanding salary arrears as earlier communicated.
30. Sections 107, 108 and 109 of the *Evidence Act* provide as follows:

“ 107

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either said.



109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall be on any particular person.”

31. The Respondent did not produce evidence to court as to the payment of the salary of that last month of the claimant’s employment and payment of arrears. In the absence of the same the claimant is entitled to the two reliefs premised being salary for March 2021 and salary arrears.
32. The respondent did not controvert the prayers hereto as he did not file a response and did not testify in court. Neither did they file their submissions. The two reliefs are deserved.
33. As for prayers for developing lumbago the Claimant has not presented before this Honourable Court an evidence as to how he developed his medical condition while working for the respondent. The Claimant also has not adduced any evidence to show that he requested the respondent for special equipment to allow him to sit while driving for long distances. The court finds and holds that the prayer for general damages for developing lumbago while working for the respondent is declined.
34. The reliefs which the claimant deserves in the view of the foregoing, are as hereunder
  - a. Salary arrears - Kshs.178,886/=
  - b. March 2021 salary - Kshs.33,100/=All totalling - Kshs.211,986/=
- c. Leave pay is not proved and there is no proof of entitlement of terminal benefits and so the two are declined.
- d. The Claimant will have the costs of the suit and interest at court rates at 14% per annum from date of this judgment till full payment.

Order accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 3<sup>RD</sup> DAY OF DECEMBER, 2024.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

