



Esevwe v University of Nairobi (Cause 836 of 2018 & 2218 of 2017 (Consolidated)) [2023] KEELRC 1585 (KLR) (30 June 2023) (Judgment)

Neutral citation: [2023] KEELRC 1585 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 836 OF 2018 & 2218 OF 2017 (CONSOLIDATED)**

**J RIKA, J
JUNE 30, 2023**

BETWEEN

FRANK ESEVWE CLAIMANT

AND

UNIVERSITY OF NAIROBI RESPONDENT

JUDGMENT

1. The Claimant initially filed Claim against the Respondent, on November 8, 2017, registered as Cause Number 2218 of 2017.
2. He filed the present Claim on May 31, 2018. It was ordered with the consent of the Parties, on June 4, 2018, that the files are consolidated, with the present Claim being the reference file.
3. He states that he has been a Driver, working for the Respondent at the College of Agriculture and Veterinary Sciences, at Kabete.
4. He was at the forefront of agitating for better terms and conditions of service for fellow Drivers. He had initiated several actions in Court, to this end. Various orders had been issued against the Respondent. Top Officers of the Respondent subsequently confronted the Claimant, demanding that he withdraws these actions, and desists from filing further actions.
5. The Claimant states that he declined these demands, which resulted in the Respondent taking retaliatory and malicious actions against him. The actions include: -
 - a. Withdrawing the bus which had been assigned to the Claimant, and reassigning it, to another Driver at Chiromo Campus.
 - b. Allowing the Claimant to proceed on sick-off and thereafter, raising a staff movement advice, claiming the that he was on unauthorized leave.



- c. Refusing to have the Claimant attended at the Respondent's health facilities even after the Claimant was diagnosed to have severe depression.
 - d. Withholding the Claimant's salary for several months without justification.
 - e. Removal from the payroll from February 2018, to September 2019, a period of 21 months, with arrears of salary totalling Kshs 1,332, 324.
 - f. The Claimant fell into bank loan default, with a balance of Kshs 752,050, as at November 5, 2021. The Court has an obligation to order the Respondent to clear this outstanding loan.
6. The Claimant appealed to the Respondent severally to cease these adverse actions to no avail. The Claimant states that the conduct of the Respondent amounts to unfair labour practice.
7. He prays for Judgment against the Respondent for: -
- a. Declaration that the Respondent's machinations against the Claimant are discriminative, unfounded, unfair and wrongful.
 - b. Declaration that refusal to allow the Claimant to be attended at the Respondent's health facilities, and delay in payment of salary, is unfair and wrongful.
 - c. Prohibition against the Respondent, by itself, appointed Officers, Servants, Employees and or Agents from intimidating, harassing, effecting and/ or commencing any disciplinary actions whatsoever against the Claimant on account of the pending suits or other suits initiated against the Respondent, or on account of his involvement in championing for better working conditions at the workplace.
 - d. General damages for loss and damage suffered by the Claimant as a result of the Respondent's unwarranted acts.
 - e. Payment of all withheld salaries and allowances over a period of 21 months, amounting to Kshs 1,332,324.
 - f. Payment of the Claimant's outstanding loan at KCB at Kshs 1,591,592 and arrears at Kshs 752,000.
 - g. Payment of all interests and penalties on the said loan.
 - h. Such other orders the Court may deem fit to grant.
 - i. Costs of the Claim.
8. The Respondent relies on the Statement of Response filed in the original Claim, dated April 10, 2018. It is admitted that the Claimant is an Employee of the Respondent. The Respondent denies taking any retaliatory and malicious actions against the Claimant. It is denied that the Respondent violated the Claimant's right to fair labour practice. The Claim is scandalous, vexatious and does not disclose any reasonable cause of action. The Respondent prays that the Claim is dismissed with costs.
9. The Claimant gave evidence and rested his Claim, on July 26, 2022. The Respondent's Acting Deputy Registrar, Harrison Akala, gave evidence for the Respondent on January 26, 2023, closing the hearing. The Claim was last mentioned on February 28, 2023, when the Parties confirmed filing and exchange of their Closing Submissions.
10. The Claimant restated the contents of his Statement of Claim, and witness statement, in his evidence. He adopted as exhibits, his documents on record. His salary was withheld without reason. He was



unwell and presented medical evidence to the Respondent. The Respondent alleged that the Claimant was away without authorization, and removed him from the payroll. The Doctor had issued him sick-off days. The Respondent ignored medical evidence. The Respondent alleged to remove the Claimant from the payroll for absenteeism.

11. He was granted normal leave in March 2018. The Respondent continued to withhold his salary, maintaining that the Claimant was away without authorization. There were work tickets, showing the Claimant was at work, yet his salary was not paid.
12. Cross-examined, the Claimant told the Court that he was actively on duty, from February 2018 to October 2019. He reported at his workplace. He was suffering depression. His Doctor gave him sick-off days. He reported at the Respondent's Health Services. Sick-off was from February 13, 2018 to March 29, 2018. His leave application was not approved by the Head of Department. The form indicates approval was pending. It was to end on March 29, 2018. He resumed at the main campus. He was assigned duty. Work tickets show that he was on duty. He fell ill on December 19, 2017. It is not true that he only informed the Respondent about his illness, in February 2018. He could not ascertain that the Respondent's Vice-Chancellor, received his documents. Receipt has not been denied.
13. He was transferred to Kibwezi in November 2017. He was there for 2 months. It is not true that he was there for only 4 days. He defaulted on his KCB loan. The Respondent guaranteed the loan. He did not exhibit the loan agreement before the Court. The work tickets were signed by the Transport Officer. Redirected, he told the Court that his documents were filed in Court in October 2021. The Respondent did not raise any issues regarding them. The documents are unchallenged.
14. Harrison Akala relied on his witness statement and documents filed by the Respondent on November 11, 2018. The Claimant failed to report to work as instructed. He was deployed to Kibwezi from Kabete. He did not report. The Respondent was not involved in his KCB loan transaction.
15. Cross-examined, Akala stated that there was a letter from Dr. Kigamwa dated December 2017 on record. It states that the Claimant suffered severe depression. He was on treatment from December 2017, to February 2018.
16. The Respondent raised unauthorized leave form in February 2018. It was a week after the Respondent received the Doctor's letter. The Claimant requested for transfer. The Director advised that the case required consideration. The Claimant applied for leave. It is still pending at the Head of Section. The Head of Section approved. Akala did not have evidence to show that leave was not approved. The Head of Department gives the final approval. The Claimant wrote to the Respondent saying he was attending clinic at Nairobi. Akala would not say if this letter was received by the Respondent.
17. The Claimant was not paid salary while he was not on duty. The daily work tickets show he was driver number 6. He drove vehicle registration KAR O5L. He was present on May 9, 2018. He was present in July and August 2018. In November 2019, he was at Mosoriot College. His salary was reinstated in October 2019.
18. He was issued a letter to show cause, but there was no disciplinary hearing. He did not work in continuity, going by the work tickets on record. The Respondent is not bound to pay his bank loan. The Respondent did not have an attendance register. Redirected, Akala told the Court that the Claimant attended work, once or twice every month.
19. The issues are: whether the Claimant was subjected to unfair labour practices by the Respondent; whether he is owed arrears of salary; whether the Respondent should be prohibited from taking the actions against the Claimant as pleaded; and whether the Respondent should pay the Claimant's bank loan, interest and penalties.



The Court Finds

20. The Claimant was a Driver, working for the University of Nairobi, the Respondent herein, as at the time this Claim was heard and closed.
21. He was employed on February 17, 2012. He was confirmed to the position after completion of probation, on June 17, 2012. He was based at Nairobi.
22. On September 25, 2017, he was redeployed to College of Agriculture and Veterinary Sciences at Kibwezi. Transfer was made against the background of an Internal Memo dated September 15, 2017, from the Transport Coordinator, to the Registrar Administration, that Staff who had worked in one station for more than 5 years, be transferred.
23. The Claimant's assertion that he was victimized by the Respondent, on account of his agitating for better terms for his colleagues, is not supported by evidence. Transfer from Nairobi to Kibwezi was made against the background of an institutional policy, for movement of Staff who had stayed at one station for over 5 years. The policy affected other Staff as well.
24. He did not clarify to the Court if his agitation for better terms and conditions of service for his colleagues, was made within the confines of legitimate trade union activity. Was he acting as a member and leader of a registered Trade Union?
25. There is no evidence that any Management Officer from the Respondent, confronted him, and demanded that the Claimant withdraws any Claim pending in Court. If such demands and threats were made, the proper recourse would have been for the Claimant, to raise matter the before the respective Courts, where the various Claims were pending. Filing a fresh Claim, to seek remedy for demands and threats made in other Claims, was not the proper recourse. Every Court has the responsibility to protect the integrity of its own proceedings.
26. Assignment of duties and tools of work to an Employee, is the prerogative of an Employer. The Court does not understand how the reassignment of the bus the Claimant was driving to another Employee, would result in unfair labour practice. The Claimant's obligation was to report to work, and go by the instructions issued by his Employer.
27. The complaints regarding withholding of salary and raising of staff movement advice for unauthorized leave, appears to the Court to have taken place owing to inadequate communication between the Parties, rather than deliberate acts that can be construed as unfair labour practices, on the part of the Respondent.
28. The Respondent transferred the Claimant from Nairobi to Kibwezi with immediate effect, on September 25, 2017. The Claimant wrote the following day, on September 26, 2017 complaining that he had a family in Nairobi. His young Children schooled in Nairobi. He sought details of the work he was going to perform at Kibwezi.
29. He wrote later stating that he had reported on September 29, 2017, and found the Manager at Kibwezi confused; there was no vehicle to be assigned to the Claimant; and his family was still at Nairobi.
30. The Manager at Kibwezi, Moses Kioko, wrote to the Principal on January 26, 2018, stating that indeed the Claimant had reported on October 30, 2017 at Kibwezi. Staff movement advice was raised on October 2, 2017. The Claimant proceeded to exhaust his remaining leave days, and reported back on November 13, 2017. Kioko states that the Claimant stayed at Kibwezi for 4 days, and left on November 17, 2017, to make a follow up on his request for retransfer to Nairobi, and payment of transfer and hardship allowance.



31. On November 22, 2017, the Claimant wrote to the Deputy Vice-Chancellor a letter, complaining that he had been sitting idle at Kibwezi because there was no vehicle for him to drive. He complained that there were Officers who wanted him to be fired, alleging that he had failed to report at Kibwezi.
32. On April 3, 2018, the Claimant wrote to the Respondent, stating that he had suffered depression while at Kibwezi, and remained on medication, as indicated in the report prepared by Dr Kigamwa. He stated that he suffered loneliness at Kibwezi; he did not sleep well; and even harboured thoughts of killing himself.
33. The Claimant appears to have genuinely suffered depression, as confirmed in the medical report of Dr. Kigamwa.
34. The Claimant however, does not seem to have communicated his illness to the Respondent properly, and look the liberty to stay away from work, and provide medical evidence to justify his absence, after he had already been away.
35. Between the date he left Kibwezi on November 17, 2017, and the time he wrote his letter dated April 3, 2018 complaining about the hardships he endured at Kibwezi, was a period of 4 months. Did he ever report back to Kibwezi after November 17, 2017? He applied for annual leave between March 12, 2018 and March 29, 2018. Leave was approved by his Section Head, but not his Departmental Head. Without full approval, the Claimant cannot have been away validly.
36. His diagnosis with severe depression and treatment by Dr Kigamwa does not seem to the Court to have been properly communicated to his Seniors, and this gap in communication was compounded by the fact that the Claimant had unwillingly been transferred to Kibwezi, and was frantically seeking retransfer to Nairobi.
37. The Respondent removed the Claimant from the payroll without adequate consideration, of the medical challenges the Claimant was going through, on February 7, 2018. This default may be attributable to lack of constructive dialogue between the Claimant and the Respondent, surrounding transfer and severe depression. It is not even clear, whether the letters from Dr Kigamwa, Consultant Psychiatrist, explaining the Claimant's medical condition, reached the Deputy- Vice-Chancellor.
38. Upon the removal of the Claimant from the payroll, the Claimant could not get medical attention at the Respondent's medical facilities. He at one point, on March 7, 2018, depressingly wrote to the Respondent's Chief Medical Officer, asking the Chief Medical Officer to inject him with a lethal drug, so that he dies, to avoid further suffering.
39. On August 15, 2019, the Respondent wrote to the Claimant, charging that the Claimant had remained absent from his place of work, without permission, from February 21, 2018. He responded on August 21, 2019, rehashing the grievances over his transfer and severe depression, and stoppage of salary from February 7, 2018. He pointed out that the Respondent had not suspended him or taken him through a disciplinary hearing and dismissed him.
40. After the letter to show cause and the response by the Claimant, there was no disciplinary hearing. The Respondent instead wrote to the Claimant on August 28, 2019, advising him to resume duty.
41. There is evidence that even when the Claimant was alleged to have been away, he was assigned duty on certain days, as shown in the work tickets on record. The Respondent considered the Claimant was still its Employee, even after stopping his salary.
42. The Respondent does not seem to have responded to the Claimant's plea for retransfer from Kibwezi to Nairobi; and does not seem to have seriously considered the Claimant's medical condition, which



- was exacerbated by the transfer. The Claimant does not appear to have effectively communicated his problems to the Respondent. When eventually the Respondent restored the Claimant to the payroll, nothing was said by the Respondent, about the mutuality of obligations over the past over one year, which had been severely affected by the lack of clear communication between the Parties.
43. The Respondent was not party to the loan agreement between the Claimant and KCB. The Respondent cannot be called upon to intermeddle in the loan agreement, through an order that the Respondent deposits any amount of money in the Claimants' loan account. The loan is a matter between the Claimant and the KCB, to the exclusion of third parties.
 44. The Court does not find the actions by the Respondent unfair or wrongful; the Claimant was not victimized on account of his agitation for workers' rights and prohibition against the Respondent for such victimization is unfounded; there was lack of clear communication between the Claimant and the Respondent, which is not the same thing as unfair labour practice; there is no justification for payment of general damages; and there is no basis for shifting the KCB loan burden, from the Claimant to the Respondent.
 45. Part of the problem with communication, was that the Claimant suffered severe depression, which psychiatrists characterize as a form of mental illness. The Respondent did not acknowledge that the Claimant was mentally ill. The symptoms of mental illness, included the Claimant's letter to the Respondent's Chief Medical Officer, expressing his wish to be injected with a lethal drug, so that he dies to escape his earthly pains. Lack of acknowledgement of the illness by the Respondent, led to lack of reasonable accommodation accorded to the Claimant by the Respondent. It led to a situation, where the Claimant felt, that the Respondent was deliberately involved in unfair labour practices.
 46. There is a strong case, for payment of the Claimant's arrears of salary and allowances. He remained an Employee of the Respondent, even when his salary was unreasonably stopped. The contract of employment was never suspended or terminated. There was continuity of the contract. Neither transfer to Kibwezi, nor the Claimant's alleged absence from duty, resulted in termination of the contract. As shown in the work tickets, the Respondent continued to assign the Claimant duties, even when it was considered that the Claimant had deserted. The Respondent did not bring any disciplinary proceedings against the Claimant for desertion, or for any form of unauthorized absence from work. By advising the Claimant to resume duty in the end, the Parties cleared any doubts on their employer –employee relationship. They affirmed that their contract was alive, well and in continuity. The Respondent made the right decision in advising the Claimant to continue working, but qualified that decision inappropriately, through its advice that the Claimant would not be paid his arrears of salary and allowances, from the date the Respondent stopped payment. The Parties are in an ongoing relationship, and the Court encourages them to retain that relationship. The Claimant should perhaps tone down his militant agitation of what he perceives as workers' rights, or channel his agitation through structured dialogue and legitimate trade union activity.
 47. The prayer for arrears of salary and allowances equivalent to 21 months, is allowed at Kshs 1,332,342.
 48. No order on the costs and interest.

In Sum It Is Ordered

- a. The Respondent shall pay to the Claimant arrears of salary and allowances at Kshs 1,332,324.
- b. No order on costs and interest.



DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY VIA E-MAIL,
AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE
MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 30TH DAY OF JUNE 2023.

JAMES RIKA

JUDGE

