



**Zetort Communications Ltd v Wamalwa (Employment and Labour Relations Appeal 7 of 2023) [2024] KEELRC 1389 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1389 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA**  
**EMPLOYMENT AND LABOUR RELATIONS APPEAL 7 OF 2023**  
**JW KELI, J**  
**JUNE 13, 2024**  
**(FORMERLY BUNGOMA E007 OF 2023)**

**BETWEEN**

**ZETORT COMMUNICATIONS LTD ..... APPELLANT**

**AND**

**ELYNE ELIZABETH WAMALWA ..... RESPONDENT**

*(An Appeal from the Ruling of the Honourable C.S. Mutai,  
SPM delivered on 24/2/2023 in Bungoma Cause No. 13 of 2019)*

**JUDGMENT**

**Representation:**

For Appellant- Muchemi & Co. Advocates

For Respondents- Wamalwa Simiyu & Company Advocates

1. The Appellant, being dissatisfied with the ruling of the Honourable C.S. Mutai, SPM, delivered on 24/2/2023 in Bungoma CMEL Cause No. 13 of 2019 Between Elyne Elizabeth Wamalwa versus Zetort Communications Ltd, filed the Memorandum of Appeal dated 21<sup>st</sup> March 2023 and Record of Appeal dated 19<sup>th</sup> January 2024 and received in Court on the 21<sup>st</sup> February 2024, seeking the following orders: -
  - a. This Appeal be allowed.
  - b. The ruling of the Honourable C.S. Mutai in Bungoma Cause No. 13 of 2019 be and is hereby set aside.
  - c. The costs of this Appeal be and are hereby awarded to the Appellant



2. The Appeal was premised on the following grounds that: -
  - i. The Learned Magistrate erred in law by undermining the principle of justice and fairness espoused in Article 50 of the Constitution on the right to a fair hearing, grossly denying the Appellant an opportunity to present its defence case.
  - ii. The Learned Magistrate erred in law failing to appreciate that the reason behind Article 50 of the Constitution is to promote justice and fairness, failure to which any judgement of that Honourable Court is likely to result in a mistrial.
  - iii. The Learned Magistrate erred in law by wishing away the holding of the Supreme Court of Uganda in *Banco Arabe Espanol v Bank of Uganda* [1999]2 EA 22 that “the hearing and determination of disputes, should be fostered rather than hindered.” Thus warns courts against turning a litigant away from the seat of justice.
  - iv. The Learned magistrate erred in law by giving a Ruling which was clearly against the weight of the evidence.
  - v. The Learned Magistrate erred in law by ignoring and disregarding precedent amounting to great injustice to the Appellant.
3. The Appeal was canvassed by way of written submissions. The Appellant’s written submissions drawn by Muchemi & Co. Advocates were dated 7<sup>th</sup> February 2024 and received in court on 22<sup>nd</sup> February 2024. The Respondent’s written submissions drawn by Wamalwa Simiyu & Company Advocates were dated 13<sup>th</sup> February 2024 and received in court on 14<sup>th</sup> March 2024.

### **Background to the appeal**

4. The Respondent/Claimant filed a suit Bungoma CMEL Cause No. 13 of 2019 against the Appellant for wrongful termination. Vide the Claim dated 7<sup>th</sup> July 2019 and filed on 22<sup>nd</sup> March 2023, the Respondent/Claimant sought for the following reliefs: -
  - a. A declaration that the purported termination offends the Constitution of Kenya 2010 and particularly Articles 40,47 and 50 thereof, the Employment Act 2007, and fair labour practices and consequently wrongful and that the Claimant is entitled to the most appropriate redress.
  - b. As prayed for in paragraph 23 of the Claim above
  - c. An order directing the respondent to issue a certificate of service to the respondent. (\*sic, ought to read Claimant)
  - d. Costs & Interest.  
(pages 9-14 of the record is the Respondent’s claim).
5. The Appellant/Respondent filed a response dated 3<sup>rd</sup> October 2019 to the Claim. The Response was received in the Trial Court on 4<sup>th</sup> October 2019(pg. 15-17 of the Record).
6. The Respondent/Claimant filed a Reply dated 11<sup>th</sup> October 2019 to the defendant’s statement of Defence and received in Trial Court on 18<sup>th</sup> October 2019(pg. 18-19 of the Record).
7. The Appellant/Respondent on 6<sup>th</sup> October 2021 filed a Notice of Motion Application dated 5<sup>th</sup> October 2021 before the Trial Court seeking orders that: -



- i. This Honourable Court be pleased to certify the matter as urgent and hear it ex parte in the first instance.
  - ii. This Honourable Court be pleased to order the Claimant's case to be re-opened and heard for purposes of cross-examination of the claimant.
  - iii. This Honourable Court be pleased to recall the Claimant's witness number 1. Elyne Elizabeth Wamalwa for further examination in chief, for further cross-examination and re-examination respectively for the purposes of adducing evidence
  - iv. Costs of this application be in the cause.
8. The application dated 5<sup>th</sup> October 2021 was based on the grounds on the face of the application and the supporting affidavit of Michael Paul Obura to the effect that, the Respondent/Claimant's Advocate had served the Appellant/Respondent's Advocate with a Hearing Notice on 23<sup>rd</sup> July 2021 indicating that hearing was coming up on 29<sup>th</sup> September 2021(MPO-1), and when the Appellant/ Respondent went for hearing on that date, it discovered that interpartes hearing was on 23<sup>rd</sup> September 2021 and the Respondent/Claimant had presented her case and closed it without the Appellant/Respondent being accorded an opportunity to cross-examine her. The Appellant/Respondent indicated that the Respondent/Claimant fixed the hearing date without inviting the Appellant and fixed the same on an inconvenient date and proceeded to conduct the hearing without involving the Appellant. The Appellant prayed that in the interest of justice, the Trial Court recall the witness for cross-examination without regard to procedural technicalities under Article 159(2)d of the Constitution (pages 34 to 42 of the Record). The Appellant filed submissions on the application (pages 43 to 54 of the Record).
9. The application dated 5<sup>th</sup> October 2021 was allowed by the Trial Court vide a ruling of 14<sup>th</sup> January 2022(Pg. 78 to 80 of the Record) and the Respondent/Claimant's case was re-opened for cross-examination and re-examination on 26<sup>th</sup> April 2022(Pg.-84 of the Record).
10. On 22<sup>nd</sup> April 2022, the Appellant/Respondent filed a list of Documents dated 19<sup>th</sup> April 2022(pg. 30); its documents (Pg. 24-26 & 31-33), the List of Witnesses dated 19<sup>th</sup> April 2022(pg. 29), and the Witness Statement of David Njau Mburu(undated) (pg.- 27-28).
11. On the 14<sup>th</sup> June 2022, the Appellant/Respondent filed the Notice of Motion application dated 13<sup>th</sup> June 2022 before the Trial Court seeking orders that:-
- i. This Honourable Court be pleased to order the Re-opening of the Defendant's case.
  - ii. The Honourable Court be pleased to admit the Witness Statement of David Njau Mburu, List of Documents, and List of Witnesses both dated 19<sup>th</sup> April 2022 as properly filed.
  - iii. This Honourable Court be pleased to allow David Njau Mburu to testify.
  - iv. The costs of this Application be in the cause.
12. The Application dated 13<sup>th</sup> June 2022 was based on the grounds on the face of the application and supported by the Affidavit sworn by Michael Paul Obura on 13<sup>th</sup> June 2022, which grounds were identical to those in the Notice of Motion application dated 5<sup>th</sup> October 2021(*supra*), save the addition that, the court on 23<sup>rd</sup> September 2021, exercised its inherent powers and closed the Defence case suo moto (Page 55 to 59 of the Record).



13. The Respondent/Claimant filed a Replying Affidavit sworn on 8<sup>th</sup> July 2022 objecting to the application dated 13<sup>th</sup> June 2022 citing prejudice, as the Appellant/Applicant would file new documents and statements that were not there before she closed her case (Pg. 60-61 of the Record).
14. The Appellant on 24<sup>th</sup> August 2022 filed submissions dated on an even date to its application (Pages 62 to 65 of the Record). The Appellant did not place on the Record of Appeal the Respondent/Claimant's submissions on the application dated 8<sup>th</sup> September 2022, but the same were filed by the Respondent with her Submissions in this appeal.
15. The Honourable Court (Hon. C.S. Mutai, SPM.) delivered his ruling dated 25<sup>th</sup> February 2023 on the application dated 13<sup>th</sup> June 2022 dismissing the same with costs (Pg. 66-68 of the record).

## **Determination**

### **Issues for determination.**

16. The Appellant in its submissions identified the following issue for determination in the appeal against the Ruling of Hon. C.A.S Mutai of 25<sup>th</sup> February 2023, namely: -
  - a. Whether the Trial Court undermined the Appellant's right to a fair hearing by failing to reopen the Defence Case for the purposes of examination -in- chief, and admission of Defendant's documents.
17. The Respondent did not identify specific issues for determination but submitted on the Grounds of Appeal 1, 2 & 3 cumulatively and Ground 4 & 5 cumulatively.
18. The Court sitting on appeal from trial Court is guided by the settled law that it must reconsider the evidence, re-evaluate the evidence itself, and draw its own conclusions bearing in mind it has neither seen or heard the witnesses and should make allowance for that fact. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1948] EA123.
19. The court having considered the grounds of the appeal considered the issue identified by the Appellant as what was before it for determination namely:-

### **Whether the Trial Court undermined the Appellant's right to a fair hearing by failing to re-open the Defence Case for the purposes of examination-in-chief, and admission of Defendant's documents.**

20. The facts of the case as per the Record of Appeal was that the Trial Court proceeded with hearing *ex parte* on the 24<sup>th</sup> September 2023 (pages 74-75) where the Respondent testified and closed their case as well as the Respondent's for non-attendance.
21. Vide application dated 5<sup>th</sup> October 2021 the Appellant sought for the Trial Court to re-open the Claimant's case for purposes of cross-examination (page 36-40). The Trial Court vide its ruling dated 14<sup>th</sup> January 2022 allowed the application limited to cross-examination of PW1( see page 79 the Claimant who was the only witness).
22. On the 14<sup>th</sup> of January 2022 the Claimant's case was re-opened and Mr. Wekesa Advocate for the Appellant proceeded to cross-examine the Claimant (page 80-84). The counsel for the Appellant then asked for a mention date. The purpose of the mention date was not indicated.
23. On 14<sup>th</sup> June 2022 the Appellant filed a further application dated 13<sup>th</sup> June 2022 before the trial court seeking for the court to re-open the defence case and for the court to admit the witness statement of



- David Njau Mburu , its list of documents and list of witness all dated 19<sup>th</sup> April 2022 as properly filed. The appellant also sought for David Njau Mburu to be allowed to testify(pages 55-59). The application was opposed by the Claimant on the ground that having closed her case she would be prejudiced if the application was allowed (pages 60-61).
24. The Trial Court on the 24<sup>th</sup> of February 2023 rendered its ruling dismissing the application dated 13<sup>th</sup> June 2022 precipitating the instant appeal
  25. In submissions the Appellant submits that they deserve their day in court to tender their evidence. That they filed the said documents on the 22<sup>nd</sup> April 2022 and were on record. That the Claimant would not be prejudiced as they had opportunity to cross-examine the defence witness.
  26. To buttress its case the Appellant relied on the provisions of Article 50 (2)(k) of the Constitution on the right of accused person to a fair trial which includes right to adduce and challenge evidence and Section 145(1) of the Evidence Act on right to examination- in-chief.
  27. The Appellant further relined on the decision of Court of Appeal in Martha Wangari Karua v the Independence Electoral & Boundaries Commission and others Nyeri Civil Appeal No. 1 of 2017 where the court held:- “The rules of natural justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing however weak his or her case may be.” The appellant cited other decisions to the same effect.
  28. The Appellant further relied on the provisions of Article 159 (2)(d) of the Constitution which provides:- “(d) justice shall be administered without undue regard to procedural technicalities;” to submit it was unfair to dismiss the Appellant unheard and urged that the case be remitted to the trial for hearing on merit.
  29. In opposition to the appeal the Respondent submits that from the record of appeal at pages 60-61 and 70-90 the appellant fully participated in the pre-trial conference where it filed necessary documents and took a hearing date, that the Claimant’s case was re-opened at the behest of the appellant for cross-examination after which the Appellant made application to file its documents and list of witnesses. The Respondent further stated that her submissions on the application dated 8<sup>th</sup> September 2022 before the Trial Court were not placed on the Record of Appeal and produced the same with her submissions in the appeal.

## Decision

30. From the above outline of facts, the Court finds that the Appellant sought three reliefs in the Application dated 13<sup>th</sup> June 2022 before the Trial Court being to re-open the defence case and for the court to admit the witness statement of David Njau Mburu , list of documents and list of witnesses all dated 19<sup>th</sup> April 2022 as properly filed. The Appellant also sought for David Njau Mburu to be allowed to testify(pages 55-59).
31. The Claimant’s case had closed on the 14<sup>th</sup> of January 2022 after being re-opened for the Appellant to cross-examine. The court found that the request for defence case could have been made at the same time as the application to re-open the Claimant’s case. The Application was filed after 5 months of closure of the Claimant’s case for the same reasons as the first application but this time seeking to introduce evidence and witnesses.
32. A reading of Order 11 of the Civil procedure Rules is to effect that before a date fixed for hearing, pretrial takes place and among the check list is Order 11(7) to wit: ‘2) It shall be the duty of every party and or his advocate to strictly comply with the provisions of rule 3(2) and to give such information as the



- judge may require, including but not limited to the number of the witnesses expected to be called and the nature of their evidence, to enable the court to consider and settle the length of time which will probably be required for the hearing of the suit.”(emphasis given)
33. The Appellant did not disclose in its application the reasons for non- compliance with Order 11 of the *Civil Procedure Rules*. The Appellant relied on the right to examination- in -chief under Article 145(1) of the *Evidence Act* to wit;-“1) The examination of a witness by the party who calls him shall be called his examination-in-chief.”
  34. The Respondents submitted there was compliance with fair hearing from the record.
  35. I perused the record. On the 5<sup>th</sup> May 2021 one Wamalwa Advocate fixed the case for hearing in the absence of the Appellant for 23<sup>rd</sup> September 2021 and the Magistrate ordered notice to issue.
  36. On the 23<sup>rd</sup> of September 2021 the case was not heard. The hearing was deferred to 24<sup>th</sup> September 2021. The court finds that when the matter was deferred to 24<sup>th</sup> September 2021 there was no record of service to defence (page 74 ). The typed proceedings are erroneous. The handwritten record stated, “Hg deferred to 24/9/2021”. A perusal of the impugned ruling indicates this issue of Trial Court having deferred the hearing date to the next day was not addressed. The Court then holds that the Appellant was not afforded an opportunity to be heard on 24<sup>th</sup> September 2021.
  37. On the issue of filing witness statements and documents after the closure of the Claimant’s case, I find that section 145 of the *Evidence Act* does not help the Appellant’s case as the provision just explains what is examination chief and the manner of giving evidence by witnesses. The issue of prejudice to the Respondent whose case had closed was not addressed in the ruling of the Trial Court. The Court found before the date of 24<sup>th</sup> September 2021 the Appellant had indicated to the trial court it was ready to proceed with the hearing and dates were fixed but the hearing taken out for various reasons including on 12<sup>th</sup> November 2020 when the Appellant requested for adjournment to another date stating it intended to settle the matter.
  38. The Court is satisfied from the foregoing the Appellant had been granted ample opportunity to present its case save for the actual hearing date as deferred by the court triggering the two applications and the instant appeal. The Court finds the Trial Court would have prejudiced the Claimant’s case were it to allow the evidence of the defence to be introduced after closure of the Claimant’s case.
  39. The Appellant has relied on several decisions to effect that they should not be sent away from seat of justice without a hearing . In Court of Appeal in Martha *Wangari Karua v The Independence Electoral & Boundaries Commission and Others* Nyeri Civil Appeal No. 1 of 2017 where the court held:- ‘ the rules of natural justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing however weak his or her case may be.’”
  40. The Court finds that Article 159 (2)(d) of the *Constitution* which provides that:-“(d) justice shall be administered without undue regard to procedural technicalities;” is not panacea for lazy litigants. Such litigants cannot be allowed to hold the court in ransom by waving Article 159(2)(d). The Court found the hearing date of 24<sup>th</sup> September 2021 was irregular for lack of notice of the new date which appears to have been given by the Trial Court suo moto. The ruling by the Learned Magistrate erroneously relied on the date of 23<sup>rd</sup> September 2021 on which day the hearing never proceeded as per the record. It was the date of 24<sup>th</sup> September 2021 that set in motion both applications for opening the Claimant’s case and closure of defence.
  41. The Court holds that the right of hearing is met when the opportunity is granted for hearing of parties. In the instant case, the Appellant was denied the opportunity to be heard on 24<sup>th</sup> September 2021



when the court deferred the scheduled hearing from 23<sup>rd</sup> September 2021. Change of date of hearing of a case calls for notice to the absent party.

42. The appeal is allowed and the Ruling of the Honourable C.S. Mutai, SPM delivered on 24/2/2023 in Bungoma Cause No. 13 of 2019 is set aside and replaced with an Order that there was miscarriage of justice. All proceedings of the Trial Court are set aside. The Court Orders the hearing of the suit denovo by the Trial Court. The defence witness statements and documents filed in court 22<sup>nd</sup> April 2022 are deemed as filed. The Claimant is at liberty to file further statements and or documents in reply as the Trial Court may direct. The Trial Court to hear the case on a priority basis as just delayed is justice denied.
43. The Appellant having failed to comply with Order 11 of the *Civil Procedure Rules* timely is to pay throw-away costs to the Respondent which the court assesses at Kshs. 50,000 payable within 30 days of this judgment failing which to attract interest at court rates from the date of judgment. Each party is to bear its costs in the appeal.

44. It is so Ordered.

**DATED, SIGNED, AND DELIVERED ON THE 13TH DAY OF JUNE 2024 IN OPEN COURT  
AT KAKAMEGA**

**J.W. KELI**

**JUDGE**

In The Presence of

C/A Lucy Macheso

For Appellant: Absent

For Respondent: Absent

