

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

APPEAL NUMBER E177 OF 2024

JAMES MURISHO T/A LAIBON HOTEL.....APPELLANT

-VERSUS

JOSPHAT MUOKI KILUTA.....RESPONDENT

*(Being an Appeal from the Judgment and Decree of the Hon. L.B. Koech (SPM)
delivered on 24th May 2025 in Nairobi MCELRC Cause No. 362 of 2019)*

CORAM

Before Lady Justice J.W.Keli

C/A Otieno

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. L.B. Koech (SPM) delivered on 24th May 2025 in Nairobi MCELRC Cause No. 362 of 2019) between the parties filed a Memorandum of Appeal dated the 21st of June 2024 seeking the following orders: -

- a) **This Appeal be allowed and the Judgement delivered on 24th May 2024 by the Learned Senior Principal Magistrate Honourable L. B. Koech in Milimani Commercial Court MCELRC 362 of 2019 be set aside.**

b) The Claim filed vide the Statement of Claim dated 19th March 2019 be dismissed with costs.

c) The costs of the suit before the Magistrate Court be awarded to the Appellant.

d) The costs of this appeal be awarded to the Appellant.

GROUND OF THE APPEAL

2. The Honourable Magistrate erred in both law and fact by failing to accord the Appellant a fair hearing and or opportunity to be heard as provided for by law.
3. The Honourable Magistrate erred in both law and fact by failing to consider and or ignoring and or adhere to the ruling and orders of this court issued on 20th December 2021.
4. The Honourable Magistrate erred in both law and fact by reviewing and or sitting on appeal on orders issued by this Superior Court.
5. The Honourable Magistrate erred in both law and fact by basing her judgement on matters that were not before her for determination.
6. The Honourable Magistrate erred in both law and fact by making a determination on issues that had not been pleaded and or canvassed by the parties before her.

7. The Honourable Magistrate erred in both law and fact in entertaining extraneous matters that were not relevant to the case.
8. The Learned Trial Magistrate erred in both law and in fact in disregarding and or failing to accord the necessary consideration to the evidence tendered by the Appellant.

BACKGROUND TO THE APPEAL

9. The Respondent filed a suit against the Appellant vide a statement of claim dated 19th March 2019 seeking the following orders: -
 - a. A declaration that the Respondent unlawfully and unfairly dismissed/ terminated the Claimant's services.
 - b. Judgment be entered against the Respondent for terminal benefits as particularized in paragraph 14 at Kshs. 554, 497 /-.
 - c. Interest on (b) above at commercial rate from the day of filing the claim herein until payment in full.
 - d) Compensation for unlawful and unfair termination of employment at (7,500/- x 12 months) at KES 90,000 /-
 - e) Costs of the suit.

f) Any other and/or further relief that this court may deem just and fit to grant in the circumstances.

(pages 3-7 of Appellant's ROA dated 21st July 2025).

1. The Respondent filed his Verifying Affidavit, sworn on 19th March 2019, as well as his list of witnesses, witness statement, and list of documents, together with the bundle of documents attached, all of even date (pages 8-19 of ROA).
2. The claim was opposed by the Appellant who entered appearance and filed a memorandum of defence dated 17th December 2019 (pages 20-22 of ROA). They also filed a list of witnesses of even date, and a list of documents with the bundle of documents attached also of even date (pages 23-64 of ROA).
3. The Respondent's case was heard on the 28th of February, 2020, with the Respondent testifying in the case. He relied on his filed witness statement as his evidence in chief, produced the documents attached to his list of documents, and was cross-examined by counsel for the Appellant, Mr. Ibrahim (pages 208-209 of ROA).
4. The Appellant did not call any witnesses (pages 208-209 of ROA).
5. The parties took directions on filing of written submissions after the hearing. The Respondent complied.

6. Vide a Notice of Motion dated 6th August 2020, the Appellant made an application before the trial court to re-open it's case in order to produce its filed documents (pages 115-125 of ROA). In a ruling delivered on 5th February 2021, the Honourable Magistrate allowed the Appellant's application, and directed them to pay thrown away costs of Kshs. 20,000/-. The defence case was set down for hearing on 24th March 2021. The Respondent appealed to the Employment and Labour Relations Court vide a Memorandum of Appeal dated 2nd March 2021, and by a Ruling and order dated 20th December 2021, the Honourable Court dismissed the appeal and directed that the defence hearing proceeds before the trial court. The Court further ordered that the Claimant be allowed to cross-examine the Respondent's witnesses and respond to any issues raised by the Respondent (pages 145-148 and 149-152 of the ROA).
7. When the matter came up for mention to fix a hearing date before the trial court on 26th February 2024, counsel for the Appellant/Respondent was absent, hence the court gave a date for delivery of judgment (page 215 of ROA).
8. The Trial Magistrate Court delivered its judgment on the 24th of May 2024 partially allowing the Claimant/Respondent's claim to the tune of Kshs. 83,760/- comprising of one month's salary in lieu of notice, and 5 months' salary as compensation for unfair termination. It also ordered that the Claimant/Respondent be issued with a Certificate of Service (judgment at pages 217-222 of ROA).

DETERMINATION

9. The appeal was canvassed by way of written submissions. Both parties complied.

Issues for determination

10. In their submissions dated 3rd September 2025, the Appellant submitted generally on the grounds of appeal.

11. On his part, the Respondent identified the following issues for determination in his submissions dated 22nd September 2025.

- i. Whether the appeal is merited;
- ii. What reliefs/orders should the court grant;
- iii. Who should bear the costs of the Appeal.

12. The court will address the grounds of appeal to determine whether the appeal is merited.

13. **The grounds of appeal are -**

- A. The Honourable Magistrate erred in both law and fact by failing to accord the Appellant a fair hearing and or opportunity to be heard as provided for by law.
- B. The Honourable Magistrate erred in both law and fact by failing to consider and or ignoring and or adhere to the ruling and orders of this court issued on 20th December 2021.
- C. The Honourable Magistrate erred in both law and fact by reviewing and or sitting on appeal on orders issued by this Superior Court.

14. On perusal of the record, the court found that vide ruling in ELRC NAIROBI NO. E022 OF 2021, Lady Justice Mbaru issued a ruling and Order in the appeal by the Respondent against the ruling delivered by Hon. Mburu in Milimani CMELRC NO. 363 OF 2019 on the 20th December 2021 as follows- *‘...On 28th January, 2020 the appellant avers at his paragraph 14 that the respondent's advocate submitted that he would not be calling any witness and a witness statement had not been filed and that hearing closed on such date. On 21st February, 2020 the appellant filed his written submissions; On 11th and 13th March, 2020 the respondent paid throwaway costs; On 6th August, 2020 the respondent filed application seeking to re-open the case; And By ruling delivered on 5th February, 2021 the trial court allowed his application and the subject of this appeal.*
- As noted above, the outline above cannot be verified as this is one-sided and from the appellant's affidavit in support of his application and without the benefit of the record of the trial court of the impugned ruling. Such omission is fatal.*
- On this basis, the background to the ruling taken into account, the same relating to directions of the trial court in directing for the re-opening of the case to allow the respondent to be given a hearing vide application dated 6th August, 2020 and which application was allowed in the trial court ruling on 5th March, 2021 such orders are commensurate to the provisions of Rule 14 of the Employment and Labour Relations Court (Procedure) Rules, 2016 which allow a party to file application and seek leave to be allowed to amend, file and exchange witness statements before judgement is issued.*
- Judgement of the trial court has not issued. Each party has the fair opportunity to urge its case on the merits.*

On the material before this court, the hearing before the trial court shall proceed as directed on 5th February, 2021 save the appellant shall be equally allowed sufficient time and opportunity to cross-examine the respondent and its witnesses and to recall the appellant to respond to any matter that has now been introduced by the respondent.

Each party shall have the right to a fair bearing before the trial court.

Each party shall bear own costs.

Orders accordingly.

Delivered in court at Nairobi this 20th day of December, 2021. “(Emphasis given on the Order of the by Lady Justice Mbaru)

15. The next trial court date post the Order by Lady Justice Mbaru was before Hon. Njora on the 20th June 2022, but she was indicated as disposed. On 30th June 2023, Hon. Koech returned the file to the registry with an order for the parties to move court when ready. On 26th February 2024, the record indicates it was a mention date. The record is as follows-

“20/6/2022

Before: Hon L.M Njora SPM

Court assistant: Hannah

Court indisposed

File taken back to the registry

30/6/2023

Before: Hon L.B Koech (Mrs) SPM

Court assistant: Dorcas

Court: File back to registry. Matter last before Hon Njora. Parties to move that court once ready.

HON L.B KOECH

SENIOR PRINCIPAL MAGISTRATE

30/6/20/23

28/08/2023-At the registry

Court assistant: Dorcas

Parties absent

Mention on 26/02/2024

26/2/2024

Before: Hon L.B Koech (Mrs) SPM

Court assistant: Dorcas

Mr Njuguna for claimant: Mwangi is for respondent. We have an affidavit of service.

This matter was heard and we had filed submissions. An application was filed by the respondent and ruling delivered. They have not complied with orders of ruling. I pray for judgment.

Court: Judgment on the 16/5/2024. Notice To Issue.”

There was no entry for 16th May 2024. On the 24th May 2024, before Hon Koech, the record was as follows- ‘24/5/2024

Before: Hon L.B Koech (Mrs) SPM

Court assistant: Dorcas

Mr Njuguna for claimant

Mr Ibrahim for respondent

Ibrahim: Matte is coming up for mention for directions. There was an application. We pray for judgment.

Njuguna: We had sought to be heard. We paid throw away costs

Court: Application does not seek to arrest judgment. It is overtaken by events. Judgment to be read.

HON L.B KOECH

SENIOR PRINCIPAL MAGISTRATE

24/5/2024''

16. The court finds that the trial subordinate court never issued a fresh hearing date in compliance with the Order of Justice Mbaru of 20th December 2021(see above). The only dates mentioned were for directions. On 24th May 2024, the counsel for the appellant told the trial court of the Judge's court order and compliance with the throw away cost. There was no rebuttal on the compliance. The Court holds that the trial court acted in contempt of the superior court order in failing to comply with order of 21st December 2021 to hear the case afresh. The condition of fair hearing is met when a party is granted opportunity to be heard. This was not done as the matter the lower court never fixed it for hearing after the Order of Justice Mbaru of 21st December 2021. The judgment of Hon. Koech delivered on the 24th May 2024 was issued in contempt of the Order of a superior court thus null and void and is set aside.

CONCLUSION

17. The appeal is held as merited. This Appeal is allowed and the Judgement delivered on 24th May 2024 by the Learned Senior Principal Magistrate Honourable L. B. Koech in Milimani Commercial Court MCELRC 362 of 2019 is set aside. The security of decretal sum deposited in court be released to the appellant forthwith.
18. It is ordered that this Matter be placed before the magistrate court other than Hon. Koech for compliance with the Order of Justice Mbaru of 21st December 2021.
19. Costs of the appeal to the appellant.
20. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 13TH DAY OF NOVEMBER 2025.

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant – Ibrahim

Respondent – Njuguna