



**Modern Coast Builders & Contractors Ltd v Wanyama (Appeal
E003 of 2021) [2023] KEELRC 1487 (KLR) (9 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1487 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E003 OF 2021**

**AK NZEI, J
JUNE 9, 2023**

**BETWEEN
MODERN COAST BUILDERS & CONTRACTORS LTD APPELLANT
AND
MARTIN WANGILA WANYAMA RESPONDENT**

*(Being an Appeal from the Ruling of the Principal Magistrate Hon. Lessotia Saitabau
in the Chief Magistrate Court ELRC No. 507 of 2018 delivered on 25th January 2021)*

JUDGMENT

1. The Appellant was the Respondent in Mombasa CM ELR Case No. 507 of 2018 whereby he had been sued by the Respondent herein claiming:-
 - a. Compensation for unfair termination of employment ...ksh. 461,268
 - b. One month salary in lieu of notice.....ksh. 38,439
 - c. Unpaid leave applied for but not taken (5 years).....ksh. 198,159
 - d. Unpaid salary for November 2018.....ksh. 16,262
 - e. Unlawful deductions on fuel and excess insurance
 - i. May 2016.....ksh. 670
 - ii. June 2016.....ksh. 1,406
 - iii. August 2016.....ksh. 2,433
 - iv. June 2017.....ksh. 2,758
 - v. July 2017.....ksh. 2,354



- vi. January 2018.....ksh 4,740
 - vii. May 2018.....ksh. 10,101
 - viii. August 2018.....ksh. 18,791
 - ix. September 2018.....ksh. 18,791
 - f. Costs of the suit and interest.
2. The respondent had pleaded in the said suit:-
- a. That he was employed by the appellant as a long distance truck driver from October 8, 2013 upto 11/11/2018 when he was clandestinely terminated from employment.
 - b. That at the time of termination, the Respondent was earning a gross monthly salary of ksh. 38,439, together with other benefits.
 - c. That on 11/11/2018, the Respondent was instructed by his superior to sign some warning letters before he could be cleared and given mileage to begin a journey to Kigali, which instructions the Respondent refused to comply with as he had not been involved in any disciplinary issue.
 - d. That on the said date (11/11/2018), the Respondent was informed by the Appellant's General Manager that his services were no longer required.
 - e. That prior to 11/11/2018, the Appellant had been deducting the Respondent's salary starting May 2016 upto September 2018, and that the deductions, which the Appellant stated were (for) fuel and excess insurance, were arbitrary and punitive.
 - f. That the Respondent was not given any reasons for his termination, and that the termination was arbitrary and unjustified, was effected without statutory notice to the Respondent, contravened the principles of natural justice and , the Constitution was ill conceived and malicious; and was wrongful, unfair and illegal.
 - g. that upon termination, the appellant did not compute or pay the Respondent's benefits; and only paid October salary upon receipt of a demand letter.
3. The Respondent also filed his written witness statement dated 17/4/2018 and an evenly dated list of documents listing some four documents. The listed documents included Driver Instruction Notes, the Respondent's Payslips, the Respondent's NSSF Statement and a demand letter dated 14/11/2018.
4. The Appellant entered appearance and filed a statement of Response on 15/2/2019, denying the Respondent's claim. The Appellant further pleaded negligent performance of duty, lack of competence, misconduct and unexplained fuel consumption on the part of the Respondent. The Appellant further pleaded that the Respondent had, prior to his termination, received written and verbal warnings which he never heeded, and was summarily dismissed.
5. It was the Appellant's pleading that the dismissal was compliance with section 41 of the Employment Act, principles of natural justice and fundamental rights enshrined in the Constitution ; and that the Respondent was not entitled to notice by virtue of Clause 6(1) of the terms of his contract of employment. That the Respondent is not entitled to any further payment over and above his dues for the month of October 2018.
6. The Appellant also filed a written witness statement of Fatuma Ruwange.



7. The trial Court's record shows that hearing proceeded *ex-parte* on 19/9/2019 after the Court disallowed an application for adjournment on the part of the appellant. The trial court delivered its judgment on 6/3/2020, awarding the respondent ksh. 622,416, costs of the suit and interest.
8. Subsequently, the Appellant filed a notice of motion dated 19/6/2020 seeking orders:-
 - a. That the Court be pleased to set aside, review and/or vary the *ex-parte* judgment entered on 6th March 2020 as against the applicant and allow the matter to proceed to full trial on merits.
 - b. That the Court be pleased to order the Claimant to recall its witness and allow the Respondent to call its witnesses for the matter to be heard and determined on merit.
 - c. That the Court issues such further orders and/or directions as it deems fit.
 - d. That costs be provided for.
9. The trial Court heard the foregoing application and dismissed it with costs vide a Ruling shown to have been delivered on January 25, 2021.
10. Aggrieved by the said Ruling, the Appellant filed the appeal herein vide a memorandum of appeal dated 28/2/2021 and filed in this Court's Registry on February 19, 2021.
11. The Appellant set out the following grounds of appeal:-
 - a. The learned principal magistrate erred in law and in fact and misconstrued the law in failing to exercise discretion and to set aside his own orders as a result of the sufficient cause illustrated by the Appellant, specifically on the account of non-participation of the Appellant in the matter.
 - b. The learned principal magistrate erred in law and in fact in failing to take cognizance of the fact that the Appellants were condemned unheard and a failure of justice was occasioned by the hearing of the matter *ex-parte*.
 - c. The learned principal magistrate erred in law and in fact by misdirecting himself and failing to find that the appellant's application raised triable issues that could prejudice the appellant if not allowed.
 - d. the learned principal magistrate failed to take cognizance of the reasons advanced by Counsel holding brief and forced him to proceed with a hearing in which he did not have instructions and thereby occasioning a miscarriage of justice.
 - e. the learned principal magistrate erred in law and in fact in failing to consider the mandatory requirements of article 50 of the Constitution which guarantees a fair hearing before any Court.
 - f. the learned principal magistrate erred in law and fact in failing to consider the public interest in the matter which requires Courts not to encourage abuse of its process through non compliance with provisions of the law.
 - g. the learned principal magistrate misdirected himself and erred in fact and in law in failing to take cognizance of the fact that the Respondent had not discharged the burden of proof placed upon him by the Evidence Act Cap 80 Laws of Kenya.
 - h. the learned principal magistrate erred in law and in fact in arriving at the said decision, consequently occasioning miscarriage of justice.
12. I will tackle the foregoing grounds of appeal together.



13. As already stated in this judgment, the Appellant entered appearance and filed response in the lower Court suit; and filed a written witness statement in readiness for the trial. The statement of defence filed by the Appellant, which I have substantially reproduced at paragraphs 4 and 5 of this judgment, cannot be said to be frivolous. It is a defence in the merit. A reasonable defence that raises triable issues. A reasonable defence is not necessarily one that must succeed, but one that raises issues that can only be resolved in a full trial, and upon taking evidence from the disputing parties.
14. The trial Court's proceedings filed herein show that the suit first came up for hearing on 13/5/2019, on which date Counsel holding brief for the Appellant's Counsel applied for an adjournment on ground that the hearing date had been taken *ex-parte*, and that Counsel for the Appellant, a Mr. Okello, was before the High Court at Nairobi. The hearing was adjourned and the Appellant was ordered to pay the day's costs.
15. When the matter came up for hearing for the second time on 16/9/2019, Counsel holding brief for the Appellant's Counsel applied for adjournment on ground that the Appellant's Counsel was unwell. The application for adjournment was declined by the Court, and hearing proceeded whereby the Respondent testified and called one witness. The Respondent's (Claimant's) case was closed, and the Appellant's (Respondent's) case was also closed. Written submissions were subsequently filed, and the Court delivered its judgment on 6/3/2020 as stated in paragraph 7 of this judgment.
16. Written submissions have been filed in this appeal, for and against the appeal. I will however, not tackle the listed grounds of appeal or analyse the filed submissions as this will be a mere academic exercise in view of the fact that interlocutory judgment is shown to have been entered by the trial Court against the Appellant on 7/2/2019. In entering the interlocutory judgment, the trial Court stated:-

“The defendant having been duly served and having failed to enter appearance for period of time and upon application of the plaintiff's advocates, I enter interlocutory judgment as prayed.”
17. Proceedings before the Magistrates' Courts are basically governed by the [Civil Procedure Rules](#). Order 10 rule 6 provides:-

“where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages and any defendant fails to appear, the Court shall, on request in Form No. 13 of Appendix A, enter interlocutory judgment against such defendant, and the plaintiff shall set down the suit for assessment by the Court of the damages or the value of the goods and damages as the case may be.”
18. Order 10 rule 11 of the [Civil procedure Rules](#) on the other hand provides as follows:-

“Where judgment has been entered under this order, the Court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.”
19. The interlocutory judgment entered on 7/2/2019 is not shown to have been set aside, and the same was in place when the Appellant entered appearance and purported to file a statement of defence on 27/2/2019. The statement of defence/response purportedly filed without first setting aside the interlocutory judgment was never a valid pleading, and the Appellant did not have a right to testify and/or to call witnesses and to present evidence at the hearing/formal proof on 6/9/2019. The issue of setting aside of the interlocutory judgment is not before me. Setting aside the *ex-parte* judgment delivered on 6/3/2020 when the interlocutory Judgment is in place will be a judicial act in futility.



20. In view of the foregoing, the appeal herein must fail, and is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9TH JUNE 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

..... for Appellant

..... for Respondent

