



**Kiteke v Unigroup Transporters (Appeal 64 of 2021)  
[2023] KEELRC 1892 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1892 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL 64 OF 2021**

**AK NZEI, J  
JULY 31, 2023**

**BETWEEN**

**JOSEPH KINYAE KITEKE ..... APPELLANT**

**AND**

**UNIGROUP TRANSPORTERS ..... RESPONDENT**

*(Being an appeal on the whole Ruling by Hon. M. I. Nabibya at  
Mombasa delivered on 26 August 2021 in ELRC MCCC No. 458 of 2018)*

**JUDGMENT**

1. The Appellant herein was the claimant in Mombasa CM ELR Cause No 458 of 2018 whereby he pleaded that he had been employed by the Respondent as a truck driver on April 16, 2013, and that he was earning a monthly salary of Ksh 47,700 at the time of termination.
2. The Appellant further pleaded in the lower Court suit:-
  - a. that on October 2, 2015, he suffered serious injuries while working for the Respondent, leading to his hospitalization and inability to work, a fact that the Respondent was aware of as it allowed the claimant medical leave during the period of hospitalization.
  - b. that the claimant was terminated from employment on medical grounds on June 30, 2018.
  - c. that the claimant was terminated without justifiable cause and without following due process as per the law, and without payment of the claimant's terminal and contractual dues.
3. The Appellant's claim in the Lower Court was set out as follows:-
  - a. one month salary in lieu of notice.....Ksh 54,855.
  - b. house allowance from 2015 – 2018 (15% $\times$ Ksh 54,855 $\times$ 59 months).....Ksh 485,566



- c. severance pay for years worked  
(15 days X Ksh 2,109x5 years).....Ksh 158,175
  - d. compensation for unfair termination  
(12 months xKsh 54,855).....Ksh 670,260  
Less amount paid .....Ksh 27,599  
Total Ksh 1,341,257
  - e. a declaration that termination of the Claimant’s employment was unfair, unjust and wrongful.
  - f. costs of the suit and interest.
4. The Appellant further pleaded that he had been unfairly terminated from employment contrary to the provisions of Sections 35, 43, 45 and 49 of the Employment Act.
  5. According to the documents filed, the Respondent was said to have filed a Memorandum of Appearance and a Statement of Reply on December 19, 2018, which were allegedly served on the Appellant’s Counsel, but were never placed on the Lower Court’s record. Hearing of the suit is shown to have proceeded ex-parte on January 19, 2021, a date of which the Respondent was said to have been aware. The Appellant’s case was heard and was closed. The Respondent’s case was also closed.
  6. On January 21, 2021, the Respondent filed a Notice of Motion dated January 21, 2021, seeking setting aside of the ex parte proceedings taken on January 19, 2021 and an order allowing the Respondent to cross-examine the Appellant and to file all its documents and statements; and for the matter to be heard afresh. The trial Court found no merit in the application, and dismissed the same vide a Ruling dated March 18, 2021.
  7. Aggrieved by the said Ruling, the Respondent filed Mombasa ELRC Appeal No 21 of 2021, which it subsequently withdrew vide a Notice of Withdrawal of Appeal dated June 3, 2021. Subsequent to, and/or upon the said withdrawal, the Respondent filed a Notice of Change of Advocates herein and an Application dated June 3, 2021, seeking review, variation or setting aside of the trial Court’s said Ruling dated March 18, 2021. It is to be noted that the trial Court’s Ruling dated March 18, 2021 was the subject of the withdrawn appeal referred to hereinabove.
  8. The Respondent sought the following substantive orders in the said Notice of Motion dated June 3, 2021:-
    - a. that the Court be pleased to arrest writing and delivery of judgment in the matter, which judgment is slated for delivery on June 10, 2021, pending hearing and determination of the application.
    - b. that the Court be pleased to review, vary or set aside its findings in its Ruling of March 18, 2021, more specifically the findings that:-
      - i. there was no response or proper appearance on the part of the Respondent.
      - ii. the prayer by the Respondent to file documents lacks basis; and
      - iii. that there was unexplained inordinate delay regarding the prayer to file documents.
  9. The application was premised on a supporting affidavit of one Teddy Onyango, the Respondent’s Legal Officer, sworn on June 3, 2021, and to which documents filed in the lower Court suit and in the withdrawn appeal were annexed. The Appellant is shown to have responded to the said application



vide a replying affidavit sworn by himself on July 15, 2021, filed in Court on the same date, and served on the Respondent's Advocates on record herein on July 16, 2021 at 12:06 hrs.

10. The trial Court delivered a brief Ruling on August 26, 2021 and rendered itself as follows:-

“...That the Court to review, vary or set aside orders dismissing the application on March 18, 2021. This application on arresting the judgment was granted ex-parte. The Respondent/claimant failed to file a response to the application and/or place them on record. But submissions were filed.

I have noted from record/submissions that the Respondent was aware of the case but is blaming its advocates then on record for laxity.

Since the application is not opposed, I proceed to allow it.

Right of appeal 30 days.”

11. Aggrieved by the said Ruling, the Appellant appealed to this Court vide the appeal herein, and set forth the following grounds of appeal:-

- a. the Learned Magistrate erred in law and fact in allowing the Respondent's application dated June 30, 2021 (sic).
- b. the Learned Magistrate erred in law and fact in not considering the fact that the application was for review of orders that the Respondent had earlier sought in the High Court through an appeal and were denied.
- c. the Learned Magistrate erred in failing to consider the documentary evidence and submissions presented by the Appellant in considering the application in question.
- d. the Learned Magistrate erred in law and fact in ruling that the Appellant had failed to file response to the application after setting the same (down) for ruling on August 26, 2021 on being satisfied with compliance by both parties.
- e. the Ruling was against the weight of the need to dispense justice with fairness, and thus bad in law.

12. The Appellant sought the following orders:-

- a. that the appeal be allowed.
- b. that the Ruling in ELRC CMCC No458 of 2018 delivered on August 26, 2021 by Honourable M. L. Nabibya, Principal Magistrate, be set aside.
- c. that the arrested judgment that was to be delivered on June 10, 2021 be delivered forthwith.
- d. that an award be entered in favour of the Appellant herein.
- e. that the Appellant be awarded costs of the appeal.

13. Both parties filed written submissions for and against the appeal pursuant to this Court's directions in that regard. In my view, the single issue for determination in this appeal is whether the trial Court's order/ruling dated August 26, 2021 allowing the Respondent's Notice of Motion dated June 3, 2021 was merited, and whether it ought to be set aside.

14. Addressing this Court in his submissions on the duty of a first appellate Court, the Appellant referred to the case of *Easy Coach Bus Services & Another v Henry Charles Tsuma & Another (suing as the*



*Administrators and Personal Representatives of Josephine Weyanga Tsuma* [2019] eKLR where the Court, (W Musyoka J) stated:-

“7. Firstly, as a first appellate Court, this Court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, drawing a conclusion from that analysis bearing in mind that the appellate Court did not have an opportunity to hear the witnesses first hand and to test the veracity of their evidence and demeanor...”

15. It is to be noted that this is an interlocutory appeal arising from an interlocutory application seeking review of the trial Court’s earlier Ruling refusing to set aside ex parte proceedings taken before it. Whatever evidence was taken by and/or presented to the trial Court in the ex parte proceedings in issue is not subject to re-evaluation and scrutiny by this Court in this interlocutory appeal. This Court must, however, look at the entire record before it, including the application from which the impugned ruling flows, and make an informed and fair decision.
16. It is clear from the impugned ruling that the trial Court was satisfied that the Respondent herein was aware of the hearing date on which hearing of the Appellant’s suit/case proceeded. The Court, however, allowed the Respondent’s application before it “since the Respondent/claimant failed to file response to the application and/or place them on record.”
17. The foregoing scenario is rather disturbing in that, as already stated in paragraph 9 of this judgment, the Appellant filed a replying affidavit in Court on July 15, 2021 and served it on the Respondent’s Counsel on July 16, 2021 at 12:06 hrs. The impugned ruling was delivered ten days after the Appellant had filed his replying affidavit.
18. Since the sole basis of allowing the Respondent’s Notice of Motion dated June 3, 2021 was an alleged failure by the Appellant to respond to the said application, and since the record before me is quite clear that the Appellant duly filed a replying affidavit on July 15, 2021, the appeal herein is merited, and must succeed.
19. Consequently, and having considered written submissions filed by both parties herein, I allow the appeal and make the following orders.
  - a. the trial Court’s ruling in Mombasa CM ELR Cause No 458 of 2018 delivered on August 26, 2021 is hereby set aside.
  - b. the lower Court’s judgment that was scheduled for delivery on June 10, 2021 shall be rescheduled for delivery forthwith, and shall be delivered.
20. Costs of the appeal are awarded to the Appellant.
21. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 31<sup>ST</sup> JULY 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:

Ms. Munene for Appellant

Mr. Mureithi for Respondent

