



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CIVIL APPEAL NO 27 OF 2019

KRIDHA LIMITED.....APPELLANT

VS

PETER SALAI KITURI....RESPONDENT

(Appeal from the judgment of Hon G. Kiage, SRM delivered on 28th November 2019 in Mombasa CMELRC No 121 of 2018

JUDGMENT

Introduction

1. 'To whom much is given, much is required.' One of the latitudes given to judges and judicial officers in the course of their work, is judicial discretion.
2. Black's Law Dictionary (Tenth Edition) defines judicial discretion as:

“The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court’s power to act or not act when a litigant is not entitled to demand the act as a matter of right.”
3. This appeal addresses the exercise of judicial discretion by the trial court.
4. The appeal arises from the judgment of **Hon Kiage, SRM** delivered in **Mombasa CMELRC No 121 of 2018**.
5. The Appellant filed a Memorandum of Appeal dated 17th December 2019 and amended on 5th October 2020.
6. The stated grounds of appeal are as follows:
 - a. That the learned trial Magistrate erred in law and fact in making a finding that the Respondent’s termination was unprocedural and substantively unfair;
 - b. That the learned trial Magistrate erred in law and fact by holding the Appellant liable without any evidence to that effect and contrary to the evidence on record;
 - c. That the learned trial Magistrate erred in fact and law by failing to dismiss the Respondent’s claim;
 - d. That the learned trial Magistrate erred in fact and law by failing to take into account the principles set out under Sections 49 and 50 of the Employment Act in awarding compensation which was in any event, excessive in the circumstances;
 - e. That the learned trial Magistrate erred in law and fact in arriving at a decision against the weight of the evidence on record.
7. There are five (5) grounds in this appeal which may be compressed into the two conventional strands of liability and level of compensatory award.
8. This being a first appeal, I am required to reconsider and re-evaluate the evidence on record and draw my own conclusions, bearing in mind that I have had no opportunity to see and hear the witnesses for myself (see **Kenya Ports Authority v Kuston Kenya Limited [2009]**

9. In his judgment delivered on 28th November 2019, the learned trial Magistrate awarded the Appellant Kshs. 384,000 being 12 months' salary in compensation for unlawful termination of employment plus Kshs. 32,000 being one month's salary in lieu of notice.

10. The Appellant's employment was terminated by letter dated 8th February 2016, on allegations of gross misconduct, particulars being absconding duty and turning up for work while drunk.

11. The Appellant's Director, Patel Ashok Kumar testified before the lower court that the Respondent's conduct was discussed at a monthly meeting. Kumar however admitted that the Respondent was not called to a personal disciplinary hearing.

12. In his judgment, the learned trial Magistrate stated thus:

“It is clear from the respondent's testimony that no hearing was held prior to the claimant (sic) termination. No letter of warning was ever given to the claimant it is clear that the process of termination was irregular and unprocedural. “

13. An employer who terminates the employment of an employee on account of gross misconduct is required to do two things; first, is to establish a valid reason for the termination and second, is to allow the employee an opportunity to defend themselves.

14. With regard to the reason for termination, Section 43 of the Employment Act provides as follows:

43.(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

15. And how does an employer establish a valid reason for termination of employment? To my mind, this can only be achieved by the employer putting specific charges to the employee while allowing adequate opportunity to the employee to respond at the shop floor. This then is the requirement of Section 41 of the Employment Act, which provides for procedural fairness.

16. In its decision in *Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR* the Court of Appeal stated the following:

“Section 41 provides the minimum standards of fair procedure that an employer ought to comply with. The section provides for “Notification before termination on grounds of misconduct.”

17. The Court of Appeal went further to set out the four elements contained in Section 41 of the Employment Act as:

a. An explanation of the grounds of termination in a language understood by the employee;

b. The reason for which the employer is considering termination;

c. Entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;

d. Hearing and considering any representations made by the employee and the person chosen by the employee.

18. It was evident to the learned trial Magistrate as it is to this Court that the Respondent was not given an opportunity to respond to the charges levelled against him, prior to the termination of his employment.

19. For this reason, the finding by the trial court that the termination of the Respondent's employment was unlawful and unfair is confirmed. That settles the issue of liability.

20. Having found the Appellant liable for unlawful and unfair termination, the learned trial Magistrate went ahead to award the Respondent twelve (12) months' salary in compensation. And the Appellant complains that this award was excessive.

21. It is now settled at the highest level in the hierarchy of Kenyan courts, that in granting an award under Section 49 of the Employment Act, the court exercises judicial discretion. This was affirmed by the Supreme Court in its decision in *Kenfreight (E.A) Limited v Benson K Nguti [2019] eKLR*.

22. I am also aware of the age old legal principle that an appellate court should not idly interfere with a discretionary award handed by a trial court.

23. I am reminded of the following rendition by **Madan JA** (as he then was) in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd [1985] E.A.*:

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

24. But a judge or magistrate exercising judicial discretion bears the burden of accounting for their decision and in order to discharge this burden, the judge or magistrate ought to explain the basis of their decision. I say so because an unexplained award is a fertile ground for judicial *utado*.

25. With regard to awards under Section 49 of the Employment Act, the Legislature found it necessary to catalogue the factors to be taken into account in making an award. These are contained in Section 49(4) of the Act and they range from the wishes of the employee, his contribution to the termination, length of service to alternative employment opportunities.

26. Without going into the philosophical foundation of this mode of drafting, it would appear that the intention of the Legislature was to guide the exercise of discretionary awards under Section 49 of the Employment Act.

27. This was confirmed by the Supreme Court in *Kenfreight (E.A) Limited v Benson K Nguti* (supra) in the following terms:

“On an award of damages, the Act limits the award a court can make to a maximum of 12 months’ salary. In as much as the trial Court therefore does have discretion in the quantum of damages to award for unfair or wrongful termination of employment, it must be guided by the principles and parameters set under sub-section 4 of the Employment Act.”

28. The corollary of this is that an award under Section 49 of the Employment Act which is not subjected to the beams of sub-section (4) is susceptible to review by a higher court.

29. In the case which is the subject of this appeal, the learned trial Magistrate did not record any analysis of the factors considered in arriving at the maximum award of 12 months’ salary. A good starting point would have been the Respondent’s length of service; followed by the conduct of the parties.

30. By his own pleadings and testimony, the Respondent worked for the Appellant from 8th December 2014 until 8th February 2016, a period of just over one year. Barring any other compelling factors, such an employee could not, in my view, qualify for a maximum award.

31. That said and also taking into account the Appellant’s failure to afford the Respondent an opportunity to be heard, I will replace the 12 months’ salary award with an award for 6 months’ salary.

32. Regarding the award for one (1) month’s salary in lieu of notice, this Court noted that the Respondent was required to utilise his annual leave during the notice period. In its decision in *Fulgence Msangachi Mgholo v Hakika Transport Services Limited [2018] eKLR* this Court held that leave and notice are two mutually exclusive rights and one cannot be traded for the other.

33. It follows therefore that because the Respondent was on leave during the notice period, he was entitled to notice pay.

34. In the end, the award by the trial court is varied as follows:

a. 6 months’ salary in compensation.....	Kshs. 192,000
b. 1 month’s salary in lieu of notice.....	<u>32,000</u>
Total.....	224,000

35. Each party will bear their own costs.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 17TH DAY DECEMBER 2020

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Miss Ithondeka Appellant

Miss Kitoo for the Respondent