

**IN THE COURT OF APPEAL
AT NYERI**

**(CORAM: JAMILA MOHAMMED, KIMARU & MUCHELULE,
JJ.A)**

CIVIL APPEAL NO. 85 OF 2019

BETWEEN

MARTIN MUTWIRI NJERU.....APPELLANT

AND

EQUITY BANK OF KENYA LIMITED.....RESPONDENT

*(An appeal arising from the judgment and decree of the
Employment and Labour Relations Court of Kenya at Meru
(Nzioka wa Makau, J.) dated 10th December, 2018,*

in

***ELRC Cause No. 40 of 2018
(Formerly Nyeri ELRC Cause No. 275 of
2011)***

JUDGMENT OF THE COURT

1. This appeal challenges the decision of the Employment and Labour Relations Court(ELRC) at Meru (Nzioka wa Makau, J.) delivered on 10th December, 2018, in ELRC Cause No. 40 of 2018. The proceedings were instituted by the appellant, who was a former employee of the respondent, seeking, *inter alia*, a declaration that his termination from employment was unlawful. He further

prayed orders for payment of terminal

dues and general damages for distress resulting from his said termination.

2. The appellant's case before the ELRC was that he was employed by the respondent in 2011, as a clerical staff, stationed at the respondent's Meru branch, and earning a salary of Kshs. 30,000. The appellant averred that he rose through the ranks and was earning a salary of Kshs. 51,865, at the time of termination. He stated that on 13th October 2015, at about 4.30 p.m., while at work, a car veered off the road, breaking through the respondent's office glass wall, and crashed into his desk. The appellant contended that he suffered severe chest and spinal injuries, for which he has been receiving medical treatment.

3. According to the appellant, the respondent, *vide* a letter dated 24th February, 2017, arbitrarily and without lawful cause, terminated his contract of employment on medical grounds. He complained that the respondent removed him from its payroll, converted his staff-friendly loan into an ordinary loan, thereby attracting interest at market rate, stopped his medical insurance cover and listed his name with a Credit Reference Bureau. The appellant contended

that the

termination was illegal and contravened labour laws, and that the respondent failed to give him three-month notice, prior to terminating his contract. He averred that due to his incapacity as a result of the accident, he is unable to secure employment elsewhere.

4. The appellant sought for: a declaration that his termination was discriminatory and unlawful; payment of gross biennial salary; three months' pay in lieu of notice; service pay for six calendar years served; general damages for distress and agony; and interest on the claimed amounts at court rates.
5. In response, the respondent filed a further amended statement of response dated 9th May, 2018, denying the appellant's claim that he was unfairly dismissed from employment. The respondent admitted that the appellant was its former employee. The respondent further admitted that the accident stated by the appellant did occur, although at no fault of the respondent, as it was caused by a third party's vehicle. The respondent averred that following the accident, the appellant's request to proceed on sick leave was allowed, at full pay. The respondent contended that when the

appellant resumed duties, he was assigned light duties as a relationship officer.

6. According to the respondent, the appellant, under the bank's group cover, was insured for personal accidents. The respondent asserted that it reported the appellant's accident to its insurer, Britam General Insurance Company Kenya Limited, and the appellant's claim, which was assessed at a sum of Kshs. 276,311, was paid to the appellant, through the respondent. Further, the respondent stated that it followed up on the appellant's work injury benefits through the Meru County Occupational Safety and Health Office, and that the appellant received a sum of Kshs. 1,839,821, on 17th November 2016.

7. It was the respondent's case that in an effort to determine the appellant's medical fitness to discharge his duties, the respondent, on 12th January, 2017, wrote to the appellant, requesting him to avail himself for a medical examination of 18th January, 2017. The appellant, however, did not show up. The respondent averred that it consequently decided to retire the appellant on medical grounds, which decision was communicated to him *vide* a letter dated 24th

February, 2017.

The respondent contended that this decision was made on the recommendation of the respondent's doctor as well as the appellant's personal doctor. The respondent urged that upon his retirement, the appellant's medical cover ceased to be in operation, and his staff loans were converted to ordinary loans, as per the lending terms and conditions of the contract.

8. The respondent pleaded that the appellant is yet to be paid his leave pay, and one month's salary in lieu of notice, due to his refusal to visit the bank and clear with relevant departments. The respondent contended that the procedure it undertook to retire the appellant was lawful, and that the appellant is not entitled to the damages sought. The respondent averred that the appellant was also not entitled to service pay, having received his pension, and further, by virtue of being a contributing member of the National Social Security Fund, he would be paid the Fund.

9. The appellant filed a reply to the respondent's further amended statement of response dated 7th June, 2018. The appellant maintained that his purported retirement was unlawful, as he was not accorded a hearing. He averred

that

on 18th May, 2017, he wrote to the respondent, requesting that his loan be written off, in the absence of a retirement package. He asserted that he cleared with all the departments at his place of employment, and that the loans department, in July 2017, informed him that his loan had been absolved, and that he should await communication from the bank through the mail. He reiterated that he filled and signed his clearance forms, and submitted the same to the respondent, through the payroll officer, one **Elizabeth Gicharu**. He however complained that his terminal dues had not been processed at the time he lodged the claim before the ELRC.

10. After hearing the parties, the learned Judge, at the conclusion of the trial, held that the appellant's dismissal from employment, on grounds of physical incapacity, was unfair, as he was not accorded a hearing, as per the provisions of **Section 41 (1)** of the **Employment Act**. The learned Judge determined that the appellant was not entitled to damages for distress, as the accident involved a third party, and not the respondent. He further found that the appellant's employment contract provided for one month's notice, and therefore his claim for three months'

salary in lieu

of notice did not lie. His claim for service pay was also dismissed. The learned Judge awarded the appellant one month's salary in lieu of notice, amounting to Kshs. 51,865; damages for unlawful dismissal, capped at four months' salary, totaling to Kshs. 207,460; costs of the suit and interest on sums awarded.

11. Aggrieved by this decision, the appellant lodged the instant appeal. He proffered seven grounds of appeal in his memorandum of appeal dated 25th April, 2019. The appellant contended that the award of compensation for unfair dismissal granted by the learned Judge was inordinately low, considering the circumstances of the case. He faulted the learned Judge for failing to consider the fact that the accident had disabled him, leaving him with little prospects of being gainfully employed elsewhere. He was aggrieved that the learned Judge dismissed his claim of general damages for distress and agony, thereby excusing the respondent from any liability. He took issue with the fact that the learned Judge failed to address himself on the allegation of discrimination as against the respondent, after finding that his dismissal was unlawful. He faulted the learned Judge for

making a determination, with respect to the recovery of his loan owed to the respondent, yet the respondent had not filed any counter-claim. Finally, the appellant was aggrieved that the learned Judge failed to address the fact that the hearing and determination of the matter was delayed at the instance of the respondent. In the end, the appellant urged us to allow his appeal as prayed.

12. The appeal was canvassed by way of written submissions. The appellant was represented by the firm of Peter M. Muthoni & Co. Advocates. Gathara Mahinda & Co. Advocates were on record for the respondent.
13. It was **Mr. Muthoni's** submission that the compensation awarded by the trial court was inordinately low. He maintained that the appellant furnished the court with sufficient evidence to prove that the respondent discriminated against him on account of his disability, despite the fact that the accident occurred at the respondent's premises while the appellant was discharging his duties. Counsel for the appellant contended that the respondent failed to avail a conducive working environment for the appellant following the accident, and instead,

unceremoniously, hounded him out of employment. He faulted the trial court for finding that the appellant owed a loan facility to the respondent, yet the respondent did not file a counter-claim. He pointed out that the loan facility was insured under credit life insurance, and thus the respondent would benefit twice, against the rule of subrogation. Counsel urged this Court to set aside the monetary award issued by the trial court, and adjust the same to an award commensurate with the life-long injury ramifying consequences, caused by the accident suffered by the appellant.

14. On their part, counsel for the respondent, **Mr. Gathara**, submitted that the award made by the trial court was discretionary, and that the trial court's discretion was exercised judicially. He urged that the appellant is seeking for mercy and sympathy from this Court, which cannot be grounds for assessing damages. Counsel asserted that the appellant's claims for three months' salary in lieu of notice, as well as service pay, were unfounded. He explained that the appellant admitted that he had filed a compensatory suit against the third party responsible for the accident, and that

he had also received various compensatory insurance sums, as enumerated in the respondent's pleadings. He submitted that contrary to the appellant's allegation, the respondent, as an employer, assigned the appellant light duties after he resumed work, paid all his costs for treatment, and ensured that the appellant was compensated by the County Occupational and Safety Health Office. He pointed out that because the appellant unjustifiably refused to attend the medical examination scheduled by the respondent, the respondent had no choice but to retire him on medical grounds. In the premises, he urged this Court to uphold the decision of the trial court.

15. This being a first appeal, the role of the first appellate court was well settled in the case of **Gitobu Imanyara & 2 Others v. Attorney General [2016] eKLR**, where this Court observed thus:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has

neither seen nor heard the

witnesses and should make due allowances in this respect.”

16. Having evaluated the record of appeal, the parties’ written submissions and authorities cited, we find that the issues arising for our determination are as follows:

a) Whether the appellant was entitled to three months pay’ in lieu of notice;

b) Whether the appellant was entitled to service pay;

c) Whether the award of compensation for unfair dismissal, granted by the trial court, was inordinately low;

d) Whether the appellant was entitled to an award of general damages for distress and agony;

e) Whether the learned judge erred, in making a finding, with respect to the appellant’s loan facility.

17. The trial court noted that the termination of the appellant’s employment was indeed unfair. This finding is not contested. The gist of this appeal lies on the quantum of damages assessed by the learned Judge, after determining that the appellant’s termination was unfair. It is the appellant’s case that the amounts awarded by the trial court were inordinately low.

18. It is not contested that the respondent failed to issue the appellant with a notice prior to terminating his employment contract. The appellant submitted that the respondent owed him three months' pay in lieu of notice, as opposed to the one month's pay in lieu of notice awarded by the trial court. It is our finding that the learned Judge properly observed that the appellant's appointment letter dated 1st August, 2011, stipulated that the appellant was entitled to one month's notice, in the event the respondent decided to terminate his contract of employment. His claim for three months' salary in lieu of notice is unfounded.
19. The appellant faulted the learned Judge for dismissing his claim for service pay for the six years he worked for the respondent. **Section 35 (5)** of the **Employment Act** provides that an employee, whose contract of service has been terminated, and the terms of the contract stipulated payment of wages or salary periodically at intervals of or exceeding one month, shall be entitled to service pay for every year worked, the terms of which shall be fixed.

20. **Section 35 (6)** of the Act goes further to state that **Section 35 (5)** of the Act is not applicable where an employee is a member of:

a) a registered pension or provident fund scheme under the Retirement Benefits Act;

b) a gratuity or service pay scheme established under a collective agreement;

c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and,

d) the National Social Security Fund.

21. From the appellant's pay slips adduced before the trial court, it is evident that the appellant was a member of the National Social Security Fund. Further, he was also a member of the respondent's Group Pension Scheme, and upon retirement, he was paid his pension contributions by the respondent. The appellant admitted to these facts in his testimony before the trial court. We see no misdirection on the part of the learned Judge in dismissing the appellant's claim for service pay. He was not entitled to the same as observed above.

22. The appellant was further aggrieved by the award for compensation for unfair termination, amounting to four

months' wages awarded by the trial court. **Section 49** of the **Employment Act** outlines the remedies for unfair termination. **Section 49 (1) (c)** directs that an employer may be required to pay an employee:

“the equivalent of a number of months’ wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.”

23. Section 50 of the **Employment Act** gives the Employment and Labour Relations Court power to make an award in line with **Section 49** aforementioned. The power of the trial court to award the remedies provided for under **Section 49** of the Act is discretionary. This Court, in **Kenya Revenue Authority & 2 others v. Darasa Investments Limited**

[2018] eKLR observed as follows with respect to this Court’s jurisdiction, on appeal, to interfere with the exercise of discretion by a trial court:

“The Court ought not to interfere with the exercise of such discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the Judge was clearly wrong in the

***exercise of discretion and occasioned
injustice.”***

24. Counsel for the appellant has invited us to consider the circumstances surrounding the appellant's termination, interfere with the discretion of the trial court, and go beyond the award of four months' pay awarded by the learned Judge. The appellant was adamant that he was discriminated against, due to his disability, hence the reason why his employment contract was terminated. We are not convinced based on the materials placed before us that the appellant's retirement was due to discrimination on the basis of his disability. **Section 41** of the **Employment Act** acknowledges physical incapacity as a valid ground for termination of employment. The appellant had been on and off work from 13th October, 2015, up until his retirement on medical grounds on 24th February, 2017. The respondent contended that the decision to retire the appellant on medical grounds was founded on the recommendation of the respondent's doctor.
25. The appellant admitted that upon medical examination, his own doctor made a recommendation, in writing, that he be retired on medical grounds. He produced the said recommendation before the trial court. The recommendation

by the appellant's doctor noted that the appellant was *"completely unable to carry out his normal duties and responsibilities for now and probably in the future"*. The appellant's allegations that the respondent discriminated against him are unfounded. We also note that the appellant, prior to his retirement, failed to turn up for a medical examination which had been scheduled by the respondent, to assess his medical condition. We agree with the findings of the learned Judge that the respondent was justified in retiring the appellant on medical grounds, albeit that the procedure followed was flawed. It is our considered view that the appellant has not furnished sufficient reasons to prove misdirection on the part of the trial Judge to justify the interference with the damages awarded by this Court.

26. Was the appellant entitled to an award for general damages for distress and agony? The answer is no. It is clear to this Court that the respondent was not liable for the appellant's accident. The appellant himself admitted in his testimony before the trial court that the accident was caused by a third-party vehicle. The appellant further admitted that he sued the liable third party, for recovery

of damages, incidental to the

accident. It is also admitted that the appellant received compensation *vide* the respondent's personal accident cover from Britam General Insurance Company Kenya Limited, in the sum of Kshs. 276,311, as well as an additional sum of Kshs. 1,839,821, as work injury benefits, as assessed by Meru County Occupational Safety and Health Office. Additionally, the respondent, through its staff medical insurance, offset some of the appellant's medical bills, incidental to the accident. For these reasons, we find no special circumstances herein that would warrant additional compensation in the manner claimed for by the appellant.

27. The appellant faulted the learned Judge for making a finding on the status of his loan facility with the respondent, yet the respondent had not filed a counter-claim against him with respect to the loan. We note that the learned Judge did not make any orders regarding payment of the appellant's loan owing to the respondent. The appellant, pleaded before the trial court that the respondent, after unfairly terminating his employment, converted his staff loan into an ordinary loan, which attracted interest at market rates, and even forwarded his

name to the Credit Reference Bureau, for defaulting on

the repayment of the loan. In determining whether the appellant was treated unfairly, the learned Judge observed that the loan facility contract, which the appellant signed, provided for conversion of a staff loan to an ordinary loan, upon termination of employment. The learned Judge determined that the respondent did not act unfairly, but was well within their rights to convert the same. We see nothing wrong with the learned Judge's observation on the same.

28. The upshot of the foregoing is that we find that the appeal lacks merit and is hereby dismissed, with costs to the respondent.

Dated and delivered at Nyeri this 3rd day of October, 2025.

JAMILA MOHAMMED

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**.... JUDGE OF
APPEAL**

L. KIMARU

.....
**JUDGE OF
APPEAL**

A.O. MUCHELULE

.....
... JUDGE OF

APPEAL

*I certify that this is
a true copy of the
original*

Signed
DEPUTY REGISTRAR