Bins (Nairobi) Services Limited v Hardard Macharia Kariamburi (Civil Appeal E670 of 2024) [2025] KECA 1726 (KLR) (24 October 2025) (Judgment)

Neutral citation: [2025] KECA 1726 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E670 OF 2024

W KARANJA, F TUIYOTT & LA ACHODE, JJA

OCTOBER 24, 2025

BETWEEN

BINS (NAIROBI) SERVICES LIMITED ..... APPELLANT

AND

HARDARD MACHARIA KARIAMBURI ..... RESPONDENT

(An appeal against the judgment of the Employment and Labour Relations Court at Nairobi, (Manami J), dated 22nd July 2024 in Nairobi ELRC Cause No. E433 OF 2021)

JUDGMENT

1. This is a first appeal arising from a statement of claim dated 27th May 2021 filed by Hardard Macharia Kariamburi the respondent, against Bins (Nairobi) Services Limited, the appellant. On 22nd July 2024, the Employment and Labour Relations Court (ELRC), at Nairobi, Manani J. entered judgment therein in favour of the respondent provoking this appeal. The respondent was also not contented with the award and he filed a cross-appeal against the judgment.

2. In the claim the respondent averred that he was the General Manager of the appellant, from 1st December 2011, on a 3-year renewable contract with a gross salary of Kshs.290,250.00 per month. His net monthly pay worked out to Kshs. 224,337.00. After his initial contract lapsed, it was not expressly renewed. However, he continued to serve the appellant until he resigned in October 2020.

3. Sometime in April 2020, the appellant unilaterally reduced the respondent's net salary from Kshs. 224,337.00 to Kshs.157,848.00. Later, by a letter dated 30th April 2020, the appellant's director sent him on unpaid leave allegedly due to the Covid-19 pandemic. Thereafter, he was not contacted regarding resumption of duty, and he received no communication regarding his employment. This situation persisted until 12th October 2020 when he resigned from employment.

4. The respondent asserted that his resignation was involuntary since the appellant had left him in a state of limbo, regarding the status of his employment and without pay. That the appellant terminated his medical insurance cover in July 2020, and stopped remitting his statutory dues in respect of Pay As You Earn, National Social Security and National Hospital Insurance. The appellant then appointed one Mr. Aloo Muga in May 2020, to take over his position in a substantive capacity. As such, the respondent pleaded constructive dismissal from employment.

5. The respondent further averred that during his term of service, he could not utilize his leave days in full, due to the nature of his engagement.

6. The respondent prayed for:

   i. A declaration that the respondent was constructively dismissed by the appellant and the constructive dismissal was wrongful, unfair, and unlawful.

   ii. A declaration that the respondent was unlawfully discriminated against and was subjected to unfair labour practices by the appellant.

   iii. 2 months' pay in lieu of notice Kshs 580,500

   iv. Annual leave not taken for 8 years 10 months Kshs.1,267,052.88

   v. Paid holiday at 21 days per year for 8 years 10 months Kshs. 2,070,822.11

   vi. Salary balance for April 2020 Kshs. 66,389.00

   vii. Salary for May, June, July, August, and September 2020 Kshs 1,451,250.00

   viii. Salary for 12 days in October 2020 Kshs.133,962.00

   ix. Service pay kshs.1,281,937.50

   x. 12 months' pay in compensation kshs.3,483,000.00

   xi. General damages for discrimination and unfair labour practices Kshs. 5,000,000 =

   xii. Aggravated damages Kshs. 5,000,000

   xiii. Exemplary damages kshs.5,000,000

   xiv. Cost of suit

   xv. Certificate of service

7. In rebuttal, the appellant filed an Amended Memorandum of Response dated 4th July 2022 and averred that the parties had a three-year fixed term contract, which was not renewable. Therefore, the respondent's continuity in its service was on a month-to-month contract and he is not entitled to service pay. The appellant denied that it terminated the respondent's employment, and averred that he resigned voluntarily from employment on 12th October 2020.

8. The appellant averred that during the Covid-19 pandemic, its business was adversely affected and it could not meet some of its financial obligations, including payment of staff salaries. As a result, the management which included the respondent reduced staff salaries starting from April 2020, in a bid to remain afloat. Therefore, the respondent was deemed to have consented to the salary cut.

9. Owing to the respondent's high salary, it became impractical to keep him at work after April 2020, and it was decided that he should proceed on unpaid leave pending the easing of the effects of the pandemic.

Meanwhile, they found it necessary to engage Mr. Aloo Muga to replace the respondent in an acting capacity, on a significantly lower salary. The appellant denied that it discontinued the respondent's medical insurance and remittance of his statutory dues on account of his contract of service having been terminated. The benefits were temporarily withdrawn in response to the aftershocks of the pandemic.

10. During the hearing, the respondent testified as PW1 and reiterated the contents of his statement of claim. On cross examination, he stated that the decision to reduce his salary by 25% and to place him on unpaid leave was made unilaterally and without a time frame within which he was to be recalled after he was sent on leave. Further that he was sent on compulsory leave on 30th April 2020, and DW2 took over from 1st May 2020, showing that he was pushed out for DW2 to come into his position. He confirmed that DW2 was earning a lower salary than what he earned and that he resigned out of frustration.

11. In addition, he testified that due to the workload he was not allowed to go on leave as the Human Resource office did not approve his leave. He, however, had no proof that he had applied for leave and it was denied and he had leave carried forward.

12. Sophia Too (DWI), one of the directors of the appellant and Aloo Muga (DW2) testified for the appellant. DW1 stated that the respondent consented to the reduction of his salary from April 2020. The salary reduction was communicated in a memo signed by the respondent himself as the General Manager, addressed to all staff. According to DW1 the respondent's signature on the memo indicates that he agreed with it. She stated that they sent the respondent on unpaid leave and informed him that he would receive further advice, depending on the situation. After the lapse of the unpaid leave of 3 months, they extended it for another 3 months. Thereafter, payment for NHIF, NSSF and PAYE was suspended as the cash flow was poor.

13. DW1 testified that although the appellant did not contact the respondent on his job status, they did not terminate his employment and they appointed DW2 as Acting Manager after the respondent resigned. She stated that the respondent would inform them whenever he wished to go on leave. Moreover, the appellant used to close business from 15th December every year, and resume in the first week of January in the New Year, to enable the management take a break. She confirmed that the respondent was entitled to service pay once he returns company property and is cleared.

14. DW2 testified that he was only appointed as a General Manager when the claimant resigned, and that before that, he was General Manager in acting capacity. He too confirmed that the respondent was entitled to service pay.

15. Upon considering the matter before him, the learned Judge held that the parties to the suit had an indefinite term contract of service, from 1st December 2014 until 12th October 2020 when the respondent resigned from employment. Further that the appellant unfairly terminated the contract of service through constructive dismissal. The learned Judge awarded the respondent as follows:

    i. Salary for the period between 1st May 2020 and 12th October – Kshs. 1,567,350.00

    ii. Underpayment of salary for the month of April 2020 –

        Kshs. 66,389.00

    iii. Compensation for unfair termination of his contract, equivalent to his gross salary for ten months – kshs.2,902,500

    iv. Pay in lieu of notice to terminate his contract – Kshs. 580,500

16. Aggrieved by the judgment the appellant filed this appeal. In the Memorandum of Appeal dated 13th August 2024, he assailed the judgment on grounds that the learned Judge erred in law and fact:

    i. By finding that the respondent was constructively dismissed by the appellant.

    ii. By holding that the appellant used the COVID – 19 pandemic as an excuse to dismiss the respondent.

    iii. By holding that the respondent's leave without pay was indefinite when there was contrary evidence that it was not.

    iv. By failing to observe that the appellant had not declared the respondent redundant as he was still in employment save for the pandemic that made the employment relationship frustrated

    v. By holding that the salary reduction occasioned by COVID-19 was unilateral when there was plenty of evidence to the contrary.

    vi. By holding that the termination of the respondent's medical insurance cover in July 2020 amounted to frustration and discrimination against the respondent.

    vii. By ordering the appellant to pay the respondent a month's salary of Kshs. 290,250 when the salary had been reduced through the consent of the respondent as a result of the COVID-19 pandemic.

    viii. By narrowly applying section 49 of the *akn ke act 2007 11 Employment Act* in issuing exorbitant awards.

17. The respondent filed a Notice of Cross Appeal dated 4th October 2024 and raised ten grounds that we have condensed. He alleged that the learned Judge erred:

    i. By misinterpreting section 28(4) of the *akn ke act 2007 11 Employment Act* by holding that where annual leave days are taken or split into portions or blocks to be taken separately, an employee who takes the remainder of the annual leave within 18 months from the date of the end of the leave earning period to which the leave relates and that if the employee does not take the remaining portion within 18 months, then it is lost.

    ii. By relying on section 35 (6) of the *akn ke act 2007 11 Employment Act* to hold that the respondent was not entitled to Service Pay on account of him being registered with the National Social Security Fund which holding disregarded the respondent's contention that the Service Pay he was claiming was not based on the *akn ke act 2007 11 Employment Act* or contract of employment but on an established practice at the appellant coupled with an express admissions by the appellant in its pleadings and testimony at trial to the effect that it was willing to pay the respondent Service Pay.

    iii. In law and fact in failing to hold that the appellant discriminated against the respondent by giving preferential treatment to Aloo Muga without legal justification.

    iv. In failing to hold that the respondent had established a case for the grant of General, Exemplary and Aggravated damages.

    v. In failing to award the respondent the maximum award for unlawful termination being 12 months' salary in compensation given the circumstances of the respondent's exit from the

appellant, his age and his lengthy period of employment in addition to the other factors as contended by the respondent in the trial court.

vi. In failing to award interest from the date of filing suit for the awards of pay in lieu of notice and salary arrears, yet these claims constitute special damages.

18. The firm of M s Prof. Tom Ojienda & Associates filed written submissions dated 7th March 2025 on behalf of the appellant and urged that the appellant's action of sending the respondent on unpaid leave was justified when contextualized against the backdrop of the pandemic. It was posited that the appellant's action cannot be construed as being aimed at dismissing the respondent. It was that of a business struggling to stay afloat in a period of unprecedented uncertainty.

19. It was contended that the respondent, as the General Manager, was aware of the challenges that the appellant faced during the Pandemic period. He was at the forefront of managing the crisis. He made the decision to send several employees on unpaid leave to ensure the company's survival, and when the situation worsened in April 2020, the appellant had no choice but to extend the same measure to him.

20. The appellant argued that sending the respondent on unpaid leave was neither punitive nor indicative of any intention to terminate his employment. It was a temporary and necessary measure to manage the financial strain caused by the Pandemic. The appellant submitted that the respondent's resignation was premature and inconsiderate and that the lack of communication by the appellant was not an act of negligence or bad faith, but a reflection of the harsh realities of the time.

21. The appellant asserted that they were in constant communication with Kenya National Union of Service Employees regarding the employees that were on unpaid leave and who included the respondent. During the 5-month leave the respondent never communicated with the appellant or informed the appellant of any complaint he had. The appellant relied on the superior court decision in Exotica Penina Fields Group Limited v Makau (Appeal E013 of 2022) (2023) KEELRC 1919 (KLR), where the Employment and Labour Relations Court held that the claimant had not been declared redundant by being sent on unpaid leave which lasted for 2 years. By refusing to return to work when he was summoned, the court ruled that the claimant had voluntarily resigned.

22. The appellant argued that the trial court erred in awarding the respondent salary for the time he was on unpaid leave. In their view, once the court recognized that their operations had been frustrated by the pandemic, it should not have ordered the appellant to fulfill its obligations under the employment contract. It was also posited that the respondent acquiesced to the instruction to proceed on unpaid leave and did not raise any objection to being placed on unpaid leave.

23. The appellant faulted the learned Judge for awarding the respondent the balance on the salary for the month of April 2020, on the ground that the reduction was unilateral since the respondent was part of the decision-making process as the General Manager. The learned Judge's decision was assailed for failure to take into consideration that the appellant's actions were necessitated by the Pandemic, in awarding compensation for unfair termination. Further that the respondent's omission or silence also contributed to the issue.

24. The appellant opposed the cross appeal. It affirmed the trial court's reasoning, that when an employee has utilized a portion of his leave during a leave earning period where the leave period has been split into blocks, Section 28 (4) of the *akn ke act 2007 11 Employment Act* (the Act), obligates that the balance of the leave days remaining must be utilized within 18 months of the leave earning period, failure to which it stands forfeited.

25. On service pay, the appellant invoked Section 35 (6) of the Act which states that an employee will not be entitled to service pay if, during the pendency of employment, that employee was a member

of the National Social Security Fund. The section does not give parties the leeway to decide otherwise regarding service pay and therefore, the respondent cannot claim it.

26. On discrimination, it was posited that the respondent failed to discharge the onus upon him to demonstrate that the appellant's action was a prohibited ground under Section 5(3) of the Act. On general damages the appellant agreed with the trial court that Section 49 of the Act sufficiently prescribes remedies for wrongful dismissal and unfair termination and this Court has, on many occasions, affirmed that general damages cannot be awarded for breach of contract.

27. On exemplary or punitive damages, it was urged that the trial court had already made a finding that the conduct of the appellant was not so egregious as to attract punitive damages.

28. The firm of M s Macharia, Burugu & Company Advocates filed submissions dated 7th March 2025 on behalf of the respondent, opposing the appeal and urging that the trial Judge considered the effect of the pandemic, and concluded that the appellant used it in bad faith as a cover to hound the respondent out of employment. That the trial court fully appreciated the evidence and it is not true that it relied on conjecture.

29. The respondent urged that the evidence on record shows that there was no communication whatsoever to the respondent at the end of his unpaid leave and he resigned with a plethora of accusations against the appellant, which were not challenged. Additionally, the appellant through a letter dated 14th August 2020 advised their client, United States Embassy that the respondent had left its employment on 30th April 2020 and that Mr. Aloo Charles Muga was being confirmed as General Manager. Further, the appellant wrote to the respondent on 17th June 2020, through Mr. Aloo asking him to hand over company items and the trial court correctly observed that the leave was indefinite.

30. The respondent posited that the trial court was right in holding that there was nothing on record to prove either consent or consultation with the respondent concerning salary reduction. His salary was unilaterally reduced. He invoked the decision in Aketch v Rusinga Schools Nairobi (Cause E522 OF 2021) (2022) KEELRC 13320 (KLR) where it was held that reduction of salaries during COVID-19 was not meant to be permanent and it needed the consent and consultation with employees.

31. It was urged that the termination of the respondent's medical cover in July 2020 amounted to frustration of the respondent as was held by the superior court. The appellant removed the respondent from its medical cover on 27th July 2020, while the cover for all other staff was still active as at 21st August 2020 and what can be deduced from this is that the respondent was no longer considered by the appellant as its employee.

32. The respondent urged, in support of the cross appeal, that the learned Judge erred in denying him annual leave pay. In his view, this went against the holding by the courts that annual leave cannot be forfeited. It can only be monetized en-cashed. To support this argument he relied on the decisions in Fancy Jeruto Cherop & Another v Hotel Cathay Limited [2018] eKLR, Rumba Mnyika Kaya v Southern Hills Development Agency Limited T A Radio Kaya [2020] eKLR and Joaqim Mbithi Mulinge v Transoceanic Projects & Development (K) Limited [2017] eKLR.

33. It was posited that the trial Judge's interpretation of Section 28 (4) of the Act leads to absurd results when the reasoning is extrapolated. That the section directs the employer to ensure that its employee first takes an uninterrupted annual leave of two weeks in the leave earning year, and secondly, forbids employers from keeping employees for a period longer than 18 months without exhausting the other portion of their annual leave. It was his submission that the appellant did not produce any annual leave records to rebut the respondent's contention that he only took part of his annual leave as specifically pleaded. It was his prayer to be awarded annual leave pay.

34. The respondent asserted that he was entitled to service pay as the appellant expressly admitted that it was willing to pay him. Further, that it was the established practice of the appellant.

35. The respondent submitted that he had established a prima facie case on discrimination, which was not rebutted by the appellant. He thus deserves damages over and above the compensation provided under Section 49 of the Act. He contended that the appellant crafted a scheme to replace him with Mr. Aloo Muga and there being no legally justifiable reason given by the appellant, it must be taken that the motivation was discriminatory.

36. The respondent argued that the trial court failed to be guided by the case of Standard Group Limited v Jenny Luesby [2018] eKLR, where it was held that an employee can be awarded damages over and above the ones in the *akn ke act 2007 11 Employment Act*, if the unlawful termination is intertwined with other breaches. He urged this Court to award general, exemplary and aggravated damages, the quantum of which will be deemed adequate based on guidance from the authorities cited in the trial court.

37. On compensation he submitted that the trial court should have awarded him maximum compensation and not the 10 months' salary that it did. He faulted the court for not distinguishing this case from other cases, where persons with less grounds received maximum compensation.

38. Lastly, it was urged that the court did not exercise its discretion judiciously when it awarded interest from the date of judgment. He contended that the awards and in particular pay in lieu of notice, and salary arrears constitute special damages for which interest should be awarded from the date of filing. He placed reliance on Francis Joseph Kamau Ichatha v Housing Finance Company of Kenya Limited [2015] eKLR where it was held that interest on special damages is from the date of filing, because the successful party has been deprived of the use of money by a wrongful act of the defendant.

39. During the hearing via the virtual platform on 11th March 2025, Mr. Ogada learned counsel, held brief for Professor Ojienda, learned counsel for the appellant. He adopted the submissions as filed and relied on them entirely. Mr. Mburugu, learned counsel was present for the respondent and briefly restated the submissions they had filed.

40. This being the first appeal, our duty was well stated in Kenya Ports Authority v Kuston (Kenya) Limited [2009] 2 EA 212 thus:

> " On a first appeal from the High Court, the Court of Appeal should 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 allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

41. We have anxiously considered the record of appeal, the notice of cross appeal and the parties' rival submissions. The issues that arise for our consideration are:

    i. Whether the respondent was constructively dismissed?

    ii. If so, what are the reliefs that the respondent is entitled to?

42. Lord Denning in Western Excavating ECC Ltd v Sharp [1978] 2 WLR 344 pronounced himself on constructive dismissal as follows:

> "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound

by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer's conduct.

He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.

43. This Court pronounced itself succinctly in Leena Apparels (EPZ) Limited v Nyevu Juma Ndokolani [2018] KECA 308 (KLR) where it held that the conduct of the employer is at the center of constructive dismissal. This is what the Court said:

> " However, it is worth remembering that in constructive dismissal, the issue is primarily the conduct of the employer and not the conduct of the employee – unless waiver, estoppel or acquiescence is in issue. In other words, an employer is required not to behave in a way that amounts to a repudiatory breach of contract. (See Coca Cola East & Central Africa Limited vs. Maria Kagai Ligaga [2015] eKL). The appellant's conduct in this case supported the respondent's assertion that the appellant had repudiated the employment contract. This is because, though the respondent turned up for work on 4th January, 2016 she was directed to go back home on account of her coworkers' failure to report which (according to the appellant) forced it to either re deploy the respondent's calibre of workers or send them home. These were issues beyond the respondent's control, but which materially affected her employment contract.

44. We quote in extenso what the learned Judge said in finding that the respondent had proved his case on constructive termination as follows :

> " 46. The fact that the respondent had made up its mind to sever the employment relation with the Claimant is also self-evident from other pieces of evidence on record. For instance, on 17th June 2020, it (the Respondent) wrote to the Claimant asking him to return work equipment which were in his possession despite the fact that he was still in its employment. On 14th August 2020, the Respondent wrote to the US Embassy introducing Mr. Aloo Muga as its General Manager after he had been installed in the position in acting capacity from 1st May 2020. The Respondent stated that Mr. Muga had henceforth replaced the Claimant who had allegedly left the company on 30th April 2020. On 12th October 2020, moments after the Claimant tendered his resignation, Mr. Aloo Muga isCquoted as describing himself as the Respondent's General Manager. Never mind that he had begun describing himself as such much earlier without any reprimand from the Respondent's management.
>
> 49. The picture which emerged from the evidence on record is one of an employer who was uncaring about the plight of its employee. Despite the reality of the Covid-19 pandemic, it was quite insensitive for the Respondent to have kept the Claimant in the dark regarding the status of his employment for close to

five months notwithstanding that it was aware that all this while, he was not at work and was without a salary.

52. The Respondent's conduct was a clear demonstration of its intention not to be bound by the terms of the contract between the parties. The conduct was clear evidence of the Respondent's intention to repudiate the employment relation between them.

53. In my view, the Respondent took advantage of the Covid 19 narrative to justify its scheme to get rid of the Claimant. I hold this view because despite the difficulties which the pandemic visited on businesses forcing some of them to temporarily release their members of staff, reasonable employers still found it within themselves to periodically updated affected employees regarding the efforts that were being made to resume normalcy. And where resumption of normalcy was not foreseeable, the employers took prompt decisive action to release affected employees from the workplace through declarations of redundancies.

45. Guided by Western Excavating ECC Ltd and Leena Apparels (EPZ) Limited supra, we are in agreement with the analysis and conclusion of the learned Judge on the issue of constructive dismissal. We will therefore, belabour the point no further.

46. The reliefs sought by the respondent and which are in contention in this appeal and cross-appeal include the award of under payment, pay for annual leave not taken, service pay, court award of 10 months compensation instead of 12 months, the court not awarding general, aggravated and exemplary damages, and the interest being calculated from the date of judgment instead of the date of filing suit.

47. Regarding the salary cut and unpaid leave, we can do no better than advert to the Supreme Court decision in Gatuma v Kenya Breweries Ltd & 3 others [2024] KESC 52 (KLR) which pronounced that:

> " 55. The Court of Appeal has made various pronouncements in relation to section 10 as read with section 13 of the *akn ke act 2007 11 Employment Act* and specifically on the unilateral change in employment terms. In Board of Governors, Cardinal Otunga High School, Mosocho & 2 others v Elizabeth Kwamboka Khaemba [2016] eKLR the Court of Appeal in interpreting the provisions of section 13 of the *akn ke act 2007 11 Employment Act* agreed with the trial court that the effect of the unilateral decision to change the terms of the contract of employment was tantamount to terminating the existing contract and therefore amounts to an unfair and unjustified termination. In Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR the Court of Appeal whilst setting out the principles relevant to determining constructive dismissal relied on the case of Western Excavating (ECC) Ltd v Sharp [1978] ICR 222 or [1978] QB 761, where Lord Denning held as follows:
>
> 56. The decision in Ibrahim Kamasi Amoni v Kenital Solar Limited [2018] eKLR by ELRC court specifically dealt with an instance in unilateral change of remuneration where it held that;
>
> > " ...For a reduction of salary to be valid, an employer ought to obtain the approval of an employee by communicating the reduction to an employee in a letter and causing the letter to be accepted

by the employee. This is because salary is a fundamental term of employment whose reduction has negative impact on an employee's livelihood and should not be done arbitrarily or unilaterally by an employer "

48. From the provisions of Section 10(5) and Section 13 of the Act, it is clear that any unilateral variation of the terms of an employment contract may be deemed as a repudiation of the contract and where it would lead to termination of employment it may be deemed as constructive dismissal. The provisions of Section 13 equally apply to remuneration. Any unilateral changes in remuneration and terms of employment without informing the employee will be tantamount to an unfair labour practice. (See Gatuma v Kenya Breweries Ltd supra).

49. We note that the respondent's gross salary cut of 25% was initiated through a memo dated 8th April 2020 that was sent to all staff, and he was sent on unpaid leave by an email of 20th April 2020. There is no evidence that there was consultation or approval by the respondent to proceed on unpaid leave. Accordingly, we agree with the learned Judge's award of salary for the five months that he was sent on unpaid leave.

50. Regarding under payment of salary, the salary was reduced from 1st April to 12th October 2020. We note that the respondent as the General Manager, was aware of the challenges that the appellant faced during the Pandemic period, and he was at the forefront of managing the crisis. He was part of the team that made the decision to send several employees on unpaid leave to ensure the company's survival. When the situation worsened in April 2020, the appellant extended the same treatment to the respondent. Therefore, we find that no discrimination was visited upon the respondent. He is bound by his own conduct and is not entitled to compensation for underpayment as the reduced salary had his input and applied to all employees.

51. The respondent also faults the learned Judge for not awarding him for days he did not go on leave during his employment period. The appellant agreed with the learned Judge. In the impugned judgment it was held that:

> " 85. The respondent appears to rely on this provision to argue that the claimant forfeited any leave days that he did not utilize during the currency of his employment. The Claimant's claim for the balance of his accrued leave days appears to have been entrapped by section 28(4) of the *akn ke act 2007 11 Employment Act*.
>
> He confirmed that he used to take portions of his leave days from 23rd December to 4th January of every year. However, he contends that he did not utilize the entire of his leave during any of the eight years that he was in the service of the Respondent.
>
> 86. In effect, the Claimant implies that his annual leave days were split into portions (blocks) to be utilized separately every year. However and all the while, he only utilized the days which fell between 23rd December and 4th January thus leaving the other days unutilized.
>
> 87. If the foregoing is the case, then by virtue of section 28 of the *akn ke act 2007 11 Employment Act*, the claimant was required to have utilized the balance of his leave days within eighteen months of every leave earning period. He says that he did not. Thus, these days were, in my view, lost."

52. It is common ground that the respondent took part of his leave days between 23rd December and 4th January of every year. His annual leave entitlement was 21 days. As such Section 28(4) of the Act is applicable here. The section stipulates that:

> "(4) The uninterrupted part of the annual leave with pay referred to in subsection (3) shall be granted and taken during the twelve consecutive months of service referred to in subsection (1)(a) and the remainder of the annual leave with pay shall be taken not later than eighteen months from the end of the leave earning period referred to in subsection (1)(a) being the period in respect of which the leave entitlement arose."

53. The respondent argued that the nature of his work was such that he could not take his leave. However, he did not avail any evidence to evince that he applied for leave within the 18 months that is prescribed by the Act, and the leave was denied by the appellant. We are persuaded by the decision of the Employment and Labour Relation court in Abongo v Chemelil Sugar Co Ltd [2023] KEELRC 2591 (KLR), where it was held that:

> "25. The Appellant prayed to be awarded the equivalent of 76 months accrued leave in the sum of Kshs 132,757 -.
>
> 26. Section 28(4) of the *akn ke act 2007 11 Employment Act*, 2007 circumscribes how many leave days can be carried forward. The period is only up to 18 months.
>
> 27. The Appellant did not suggest or testify that he accumulated leave over 76 months with the approval of the Respondent or that he applied for leave and was denied.
>
> 28. The Principal Magistrate did not, therefore, err in declining to award this head of the claim."

54. From the foregoing analysis, we are satisfied that the learned Judge did not err in declining to award the respondent for the days that he did not take his annual leave.

55. On the compensation awarded for unfair termination of the contract, the appellant contended that the court did not take into consideration the fact that the respondent contributed to the termination. The respondent on the other hand argued that the court should have awarded him 12 months instead of 10 months compensation, in accordance with the authorities he relied on.

56. Remedies for wrongful dismissal and unfair termination repose in Section 49 of the Act. Section 49 (1) (c) of the Act provides that:

> "(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—
>
> (c) 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."

57. The appellant has not convinced us that the respondent contributed to his termination and we have already found that he was constructively dismissed. The above provision on compensation provides for a maximum of 12 months' gross salary. Upon considering numerous factors under Section 49

(4) of the Act, the learned Judge deemed it fit to award 10 months' salary. The respondent has not demonstrated that the learned Judge did not exercise his discretion judiciously in giving this award. Neither has it been established that the trial judge proceeded on wrong principles or misapprehended the evidence in a material aspect and thereby arrived at an award that as so inordinately low (see Butt v Khan [1978] KECA 24. (KLR). Indeed it may be inconceivable that in the circumstances of this case that an award equivalent to 10 months gross salary is manifestly lower than gross salary of 12 months. Therefore, we find no basis to interfere with the award.

58. On general, aggravated, and exemplary damages, we agree with the impugned judgment. The learned Judge held that:

> "105. The Claimant has claimed for general damages for discrimination and unfair labour practices. He has also claimed for aggravated and exemplary damages. However, the court finds that the matters which he raised point to a case of breach of the employment contract between him and the Respondent. As such, they can be adequately redressed by reference to the provisions of the *akn ke act 2007 11 Employment Act*. Section 49 of the Act provides for sufficient remedies for breach of employment contracts which do not include the above remedies.
>
> 106. In any event, the general position in law is that claims for breach of contract ought not to attract the remedy of general damages. As for aggravated and exemplary damages, this may only be awarded where it is apparent that the aggressor's acts were arbitrary and oppressive.

59. In the case before us, even though we have found that the appellant's actions resulted in the constructive dismissal of the respondent, the law provides for a specific remedy of compensation for unfair termination of the contract for this kind of injury. As such, we find that the court was correct in declining to grant the prayers for general, aggravated and exemplary damages.

60. Turning to service pay, the respondent urged that he is entitled to it as it was the established practice of the appellant, and the appellant had expressly admitted that it was willing to pay it. The appellant on the other hand agreed with the learned Judge on his finding on service pay. The learned Judge declined to award service pay, guided by Section 35 (6) of the Act that disentitles employees who are registered with provident funds and the National Social Security Fund (the NSSF) from claiming it.

61. We are of the view that the respondent is entitled to service pay on the grounds that it was the practice of the appellant to pay it and further, that the appellant expressly stated that it was willing to pay. DW1 and DW2 expressly testified that the appellant was willing to pay service pay. We do not perceive the employer's willingness to pay service pay as contra statute as nothing stops the employer from being more generous than required of him her by the Act.

62. Regarding the notice on termination, it is not disputed that the respondent was on a fixed term contract of three years that expired and was not renewed. However, he continued working from the year 2014 to 2020. He likely had a legitimate expectations of renewal. However, at this point, his employment converted to a continuous relationship, thus requiring notice on termination as if it were an indefinite contract. This continued engagement with the employer's knowledge and without a new contract or

formal termination, implies a tacit renewal on the same terms but for an indefinite period, granting him the rights and protections of an on - going employee.

63. Section 35 of the *akn ke act 2007 11 Employment Act* outlines the notice periods required for terminating an employment contract based on how wages are paid. It stipulates that daily – wage contracts are terminable daily. Less than monthly periodic contracts are terminable at the end of the following period. The respondent received a monthly salary and Section 35(1)

(C) stipulates that:

> "…. where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of 28 days next following the giving of notice in writing."

64. The foregoing is equivalent to one month's notice. The respondent was therefore entitled to one month's notice, or salary in lieu of notice on termination but he prayed for, and was awarded two months' salary in lieu of notice. We find no justification for the award of two months.

65. Lastly, the respondent assailed the learned Judge for failing to award interest from the date of filing the suit, on the award of pay in lieu of notice and salary arrears, yet the claims constitute special damages. The appellant did not submit on this. The provision on interest found in Section 26 of the *akn ke act 1924 3 Civil Procedure Act* provides that:

> "(1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."

66. On this issue, we are persuaded by the decision in Later vs Mbiyu [1965] EA 392 where it was held that:

> "The award of interest on a decree for payment of money for a period from the date of the suit to the date of the decree is a matter entirely within the court's discretion, by section 26 of the *akn ke act 1924 3 Civil Procedure Act* but such discretion must, of course, be judicially exercised, and where no reasons are given for the exercise of a judicial discretion in a particular manner, it will be assumed that the discretion has been correctly exercised, unless the contrary be shown…"
>
> In the instant case, we find no reason to hold that the discretion of the learned Judge was exercised capriciously, to warrant our interference with the award of interest from the date of the judgment.

67. Consequently, this appeal and the cross appeal succeed in part. We have found that the award of under payment of salary was not warranted and therefore, the awards made to the respondent are recalculated based on the reduced salary as follows:

i. Pay for the period of 1 st May to 30 th September 2020:

Kshs. 157,848.00 x 5 months = Kshs.789, 240.00

ii. Pay for the12 days of October 2020: = Kshs.63, 139.00

iii. Compensation for unfair termination:

10 months x Kshs.157, 848.00 = Kshs. 1,578,480.00

iv. One months' pay in lieu of notice of Kshs. 157,848.00

v. Service pay of kshs.1, 281, 937. 50, as pleaded.

Each party shall bear its own costs. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24 TH DAY OF OCTOBER, 2025.

W. KARANJA

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR