

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT NAKURU

ELRC APPEAL NO. E026 OF 2024
(Before Hon. Lady Justice Anna Ngibuini Mwaure)

ANISIA MERCY MARIGU

NJERI NJERU.....

....APPELLANT

VERSUS

**BOARD OF MANAGEMENT ST.
LWANGA CATHOLIC PRIMARY
SCHOOL**

.....RESPONDENT

***(Being an Appeal from the Judgment and Decree of
the Honourable Emmanuel S. Soita, Senior
Resident Magistrate, delivered on 26th March 2024
in Nakuru CM ELRC No. E041 of 2020)***

JUDGMENT

1. The Appellant, being dissatisfied with the judgment and decree of the Honourable Emmanuel S. Soita, Senior Resident Magistrate, filed this appeal vide a Memorandum of Appeal dated 24th April 2024 and subsequently filed an amended memorandum of appeal dated 16th April 2025 on the following grounds: -

***1. The trial magistrate erred in law and in fact by
failing to appreciate the proper effect and purport***

of the evidence and in arriving at a decision which is not supported by or is against the weight of the evidence.

- 2. The trial magistrate erred in law and in fact in failing to consider or adequately consider the Appellant's testimony that the Appellant had been in the Employment of the Respondent for a continuous period of 13 years without a break, and service gratuity was due and payable to the Appellant.*
- 3. The trial magistrate erred in law and in fact by not appreciating the evidence of the Appellant that the Appellant had attended remedial classes for a period of one week before schools were closed down due to the COVID-19 outbreak on 15th March 2020, and was entitled to payment for the remedial and responsibility allowance as senior teacher.*
- 4. The learned trial magistrate erred in law and in fact in not appreciating the evidence on record and submissions of the counsel for the Appellant by not awarding reasonable compensation for unfair termination of the Appellant's employment.*

5. In all the circumstances of the case, the findings of the learned trial magistrate are at variant with the weight of the evidence adduced and therefore, failing to make reasonable and/or adequate award in favour of the Appellant.

2. The Appellant prays that:

- i. The Appellant's appeal be allowed.*
- ii. The Judgment delivered virtually by Honourable E. Soita on 26th March 2024 in the Chief Magistrate's Court at Nakuru, MCELRC No. E041 of 2020 be set aside in terms of prayers 1,3,5,6, and 7 of the Statement of Claim and be substituted with judgment in favour of the Appellant in terms of the prayers cited herein.*
- iii. The Appellant be awarded costs of this appeal and in the trial court*
- iv. Such other or further relief orders and/or remedies as the Honourable Court may deem just and expedient.*

3. The appeal was disposed of by way of written submissions.

Appellant's submissions

4. The Appellant submitted that the trial magistrate erred in law and fact by failing to properly evaluate the evidence presented, resulting in an inadequate award of Kshs.73,530/= for notice pay, unlawful termination compensation, and June 2020 salary. The Appellant argued that the trial magistrate overlooked her 13 years of continuous and exemplary service, including her role as a senior teacher and representative at an international forum, and failed to consider her entitlement to service gratuity, which the Respondent did not adequately rebut or prove payment for.
5. Additionally, the Appellant submitted that the trial magistrate neglected to award compensation for remedial classes conducted before the COVID-19 outbreak and the responsibility allowance tied to her senior position.
6. The Appellant maintains that the one-month compensation for unfair termination was insufficient given the circumstances and urges the court to allow the appeal and grant judgment in line with the amended memorandum of appeal dated 16th April 2025 with costs.

Respondent's submissions

7. The Respondent submitted that the 1st ground of appeal is vague, as it fails to identify specific evidence allegedly overlooked or misinterpreted by the trial court. The Respondent emphasize that the Trial Magistrate thoroughly examined the pleadings, testimonies, and documents from both parties, with the judgment (pages 171-177 of the Record of Appeal) clearly showing reasoned analysis and proper application of legal principles. The Respondent submitted that ***Jabane V Olenja [1968] KLR 661, Ephantus Mwangi V Duncan Mwangi Wambugu (1982-88) 1 KAR 278, and Mwanasokoni V Kenya Bus Service (1982-88) 1 KAR 870***, the Respondent underscores that appellate courts should not interfere with factual findings unless they are unsupported or based on wrong principles. In this case, no such error has been demonstrated, and the trial court's decision was consistent with the weight of the evidence.
8. The Respondent argued that the Appellant, having worked for 13 years, was paid a gratuity of Kshs.318,630/= as per her employment contract, which entitled her to 15 days' pay per completed year of service. Since she was also a member of the National Social Security Fund (NSSF), ***Section 35(6)***

of the Employment Act excluded her from additional service pay under section 35(5). Evidence showed the gratuity was deposited into her account, which she did not dispute. In **Jeremiah Mbithi Ngewa V Intex Construction Limited [2014] KEELRC 545 (KLR)**, the court held that receiving both NSSF and gratuity constitutes double compensation, amounting to unjust enrichment.

9. The Respondent submitted that the Appellant's claim for remedial and responsibility allowances for March 2020 was dismissed as unsubstantiated. Under **Section 60(1)(o) of the Evidence Act**, the court took judicial notice of the nationwide school closures on 16th March 2020 due to Covid-19, which halted all teaching activities. The Appellant was on leave from 9th to 16th March and returned after schools had closed, providing no evidence of conducting remedial classes. Additionally, a letter dated 9th March 2020 relieved her of senior teacher duties, and she failed to show proof of reinstatement or payment, rendering her claim for responsibility allowance invalid.
10. The Respondent submitted that the Appellant's challenge to the trial magistrate's award of one

month's salary for unfair termination was found to be without merit. Under **section 49(1)(c) of the Employment Act**, compensation of up to 12 months' salary is discretionary and guided by **section 49(4) of the Employment Act**. The Court of Appeal in **CMC Aviation Limited v Mohammed Noor [2015] KECA 775 (KLR)** upheld a similar award, noting that one month's salary was reasonable where the contract allowed termination by notice. Additionally, the Respondent also submitted that the Appellant's claim that the trial magistrate failed to evaluate evidence was dismissed, as the court had carefully considered all claims and applied the law correctly. In **Gitobu Imanyara & 2 Others v Attorney General [2016] KECA 557 (KLR)**, the Court of Appeal cited the case of **Peters V Sunday Post Ltd [1958] EA 424**, the appellate court emphasized that it will not interfere with factual findings unless they are plainly wrong or based on no evidence.

11. Consequently, the Respondent urged this Honourable Court to dismiss the appeal with costs.

Analysis and determination

12. Being the first appellate court, this court's duty is to re-evaluate, and analyze the evidence tendered before the trial court and subject it to an independent analysis so as to arrive at its own conclusion as to whether or not to uphold the decision of the trial court as set out in ***Selle Associates V Associated Motor Boat Company Ltd (1968) E.A. 123.***
13. Having considered the records of appeal, the memorandum of appeal, and the submission by both parties, the issue for determination is whether the appeal is merited.
14. The court has perused the record of appeal, and there is no doubt that the trial magistrate held that the Appellant was unfairly terminated from her employment for failing to avail her documents according to the letter dated 24th June 2020. The Appellant avers that she served the Respondent for 13 years, and she is entitled to gratuity since the school was not paying her NSSF. ***Section 35(5) and 35(6) of the Employment Act*** provides as follows:
“ An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every

year worked, the terms of which shall be fixed.

This section shall not apply 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.”

15. ***Sections 107, 108, and 109 of the Evidence Act*** provide that whoever alleges must prove. ***Section 74 of the Employment Act*** provides that the employer is required to keep records of its employees. In this instance case, among the Appellant’s list of documents, there was a gratuity and annual increment form amounting to Kshs.27,800/= thus the

trial magistrate erred in failing to award gratuity on that period.

16. For compensation for unfair termination, the trial magistrate awarded the Appellant Kshs.24,510/=. In ***CMC Aviation Limited V Mohammed Noor [2015] KECA 775 (KLR)***, the Court of Appeal stated as follows:

“The trial court did not state why it opted to give the remedy provided under section 49 (1) (c), that is, twelve months' gross salary, and not the other remedies under section 49 (1) (a) or (b). The court should have been guided by the provisions of section 49 (4), but the trial judge said nothing about the reasons that led him to exercise his discretion in the manner he did.”

17. In ***Kenfreight (E.A) Limited V Benson K. Nguti [2016] KECA 409 (KLR)***, the Court of Appeal held as follows:

“The award of 12 months gross salary as per Section 49 (c) as opposed to either Section 49 (a) or (b) of the Act by the trial

Judge was upheld since it was awarded in the exercise of the trial Judge's discretion, which this Court agreed was exercised judiciously. The trial Judge had considered the respondent's rank and the difficulty he was likely to face before he could be employed, as well as the applicant's conduct. That was the basis upon which the court upheld the trial court's exercise of discretion. As correctly observed by Mr. Mogaka, the issue in dispute is catered for under the Employment Act and the relief thereunder is discretionary."

18. In ***OI Pejeta Ranching Limited V David Wanjau Muhoro [2017] KECA 329 (KLR)***, the Court of Appeal stated as follows:

"The trial judge did not at all attempt to justify or explain why the respondent was entitled to the maximum award. Yes, the trial Judge may have been exercising discretion in making the award. However, such exercise should not be capricious or whimsical. It should be exercised on some sound judicial principles. We would have

expected the Judge to exercise such discretion based on the aforesaid parameters. In the absence of any reasons justifying the maximum award, we are inclined to believe that the trial Judge in considering the award took into account irrelevant considerations and or failed to take into account relevant considerations, which act then invites our intervention”.

19. The trial Magistrate awarded the Appellant equivalent of one month for compensation. The record show the Appellant worked for the Respondent from 5th May 2008 until May 2020. That was a long period of time she worked for the Respondent and without good reasons the trial magistrate did not justify the award the Appellant deserved better compensation. The trial magistrate gave no reasons why he awarded her only 1 month salary as compensation and yet had worked for the Respondent for about sixteen (16) years.

20. Several case laws provide that in awarding compensation under Section 49(1)(c) and 49(4) the trial court should give reasons why it opted to give

the compensation awarded. The Appellant having worked for so many years for the Respondent and there being no major issues on misconduct the Appellant deserved better compensation. In the already cited case of **CMC Aviation Limited -VS- Mohamed Noor (2015)** the court of Appeal stated that the trial court ought to have stated why it opted to give the remedy provided under Section 49(1)(c).

21. In conclusion, the court allows part of the appeal and replaces the one month equivalent for award of general damages with 10 months equivalent;

**(a) Totalling - Kshs.24,510 x 10 =
Kshs.245,100/=**

**(b) One month payment in lieu of notice
Kshs.24,510/=**

(c) June 2020 salary - Kshs.24,510/=

(d) Gratuity - Kshs.27,800/=

(e) Costs of the lower court trial and this appeal are granted in to the Appellant.

(f) Interest is granted at 14% per annum from date of this judgment.

Orders accordingly.

**Dated, Signed and Delivered virtually at Nakuru
this 11th Day of November, 2025.**

**ANNA NGIBUINI MWAURE
JUDGE**

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate

just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

ORIGINAL