Middle East Bank Kenya Limited v Waseka (Civil Appeal 36 of 2019 & E236 of 2020 (Consolidated)) [2025] KECA 2113 (KLR) (5 December 2025) (Judgment)

Neutral citation: [2025] KECA 2113 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 36 OF 2019 & E236 OF 2020 (CONSOLIDATED)

DK MUSINGA, M NGUGI & F TUIYOTT, JJA

DECEMBER 5, 2025

BETWEEN

MIDDLE EAST BANK KENYA LIMITED .... APPELLANT

AND

HELLEN WASEKA .... RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL E236 OF 2020

BETWEEN

MIDDLE EAST BANK KENYA LIMITED .... APPELLANT

AND

HELLEN WASEKA .... RESPONDENT

(Being an appeal from the Judgment of the Employment and Labour Relations Court of Kenya at Nairobi (Wasilwa, J.) dated 20th December 2018 in ELRC Cause No. 454 OF 2012)

JUDGMENT

1. Before this Court are two appeals arising from two separate decisions of the Employment and Labour Relations Court at Nairobi (Wasilwa, J.). The first in time, Civil Appeal No. 36 of 2019, challenges the trial court's finding that the appellant, Middle East Bank Kenya Limited, unfairly terminated the respondent's employment. The second, Civil Appeal No. E236 of 2020, contests the trial court's determination that the Deputy Registrar of the Employment and Labour Relations Court has jurisdiction to tax a bill of costs.

2. Although the two appeals were not formally consolidated, it is evident that they share a common factual background. On that basis, therefore, it was only prudent for us to deliver the decision in the two appeals back-to-back. For clarity and logical sequence, we shall first address Civil Appeal No. 36 of 2019 before turning to Civil Appeal No. E236 of 2020.

3. The common background to these appeals is that the respondent, vide a Memorandum of Claim dated 19th March 2012, contended that she was employed by the appellant on a four-year contract as Head of Operations and Information Technology from 9th November 2009 at a monthly gross salary of Kshs. 420,000/-. Her role included overseeing operations, managing IT systems, and ensuring the bank's records and procedures were accurate and compliant.

4. On 24th February 2012, she was verbally informed by the respondent's Managing Director that her contract had been terminated due to her alleged failure to disclose cheque clearing differences to the bank's external auditors, an act which, according to the appellant, amounted to gross misconduct.

5. She contended that the termination was procedurally and substantively unfair. She asserted that the duty to communicate with external auditors did not fall within her job description, and that she was denied an opportunity to defend herself, contrary to section 41 of the *Employment Act* (the Act). According to the respondent, the appellant later issued her a termination notice on 28th February 2012, and summarily dismissed her on 9th March 2012 primarily on the ground that she had absconded duty. Another ground cited in the dismissal letter was that she had accessed the appellant's premises on Saturday 3rd March 2012 from 12.50pm to 3.45pm alone and in disregard to the bank's procedures of entry after working hours, and shredded voluminous records/documents, allegations which the respondent denied.

6. Among the prayers by the respondent was payment for the over 20 months of her remaining period of her four-year contract of service, unpaid leave days and compensation for wrongful termination.

7. The appellant, Middle East Bank Kenya Limited, in its defence to the claim asserted that the respondent's termination was justified, based on misconduct and poor performance. The appellant contended that during her tenure, the respondent became increasingly isolated from both her team and senior management due to poor attitude and lack of communication, and that she frequently disregarded deadlines and failed to provide adequate leadership.

8. It was further contended that she had failed to inform the management, internal audit, and external auditors in a timely manner about discrepancies in cheque clearing operations, which the appellant characterized as gross misconduct. The alleged conduct of the respondent led to a meeting on 23rd February 2012 where the Managing Director informed her of the potential termination and sought an explanation, which she allegedly failed to provide. The appellant maintained that a formal notice of termination dated 28th February 2012 was issued, providing the respondent with three months' notice in accordance with the terms of her contract.

9. However, from 5th March 2012, the respondent absented herself from duty without explanation, which the appellant construed as absconding duty, prompting a letter dated 7th March 2012 to that effect. The appellant further contended that the respondent had gained unauthorized entry into the bank's premises on 3rd March 2012 and shredded a large volume of documents, violating bank protocols. Additionally, she allegedly handed over sensitive keys to a third party, rather than returning them directly to the appellant, and based on these actions, the respondent was summarily dismissed on 9th March 2012 in accordance with the provisions of section 44 of the *Employment Act*. The appellant asserted that her termination was justified.

10. The appellant denied that the respondent was entitled to terminal dues, pointing out that she was a member of the staff provident fund managed by Kenindia Asset Management from which she could claim her benefits. They further contended that her claim for salary covering the remaining 20 months of the contract was unjustified as the contract allowed either party to terminate it by three months' notice. The appellant further asserted that the respondent's performance had been declining, as shown by internal performance appraisals, and thus rejected the respondent's assertion of constructive dismissal. In sum, the appellant's position was that the termination followed contractual provisions and the applicable law, and that the respondent had not proved her claim of unfair dismissal.

11. The matter proceeded for hearing, where the respondent denied all allegations of misconduct. She testified that she had performed diligently throughout her tenure and had never received any warning. She also stated that she had been awarded performance bonuses in 2010 and 2011 of Kshs. 238,000/= and Kshs. 154,000/= respectively, which, according to her, contradicted claims of poor performance. She also denied absconding duty, asserting that she had been constructively dismissed on 24th February 2012.

12. Three witnesses namely, Joseph Gitau Kinuthia, then Senior Human Resource and Administration Manager, Solomon Okach Odiero, Head of Internal Audit, and Philip Ilako, the appellant's Managing Director, testified on behalf of the appellant. The gist of their testimony was that the respondent was ineffective in her role, and that she lacked interpersonal skills; that she was uncooperative with the audit department; frequently delayed in responding to audit queries; and hindered risk assessments. Philip Ilako said that he had informed the respondent of the termination due to her poor performance and failure to disclose clearing anomalies.

13. In its judgment delivered on 20th December 2018, the trial court held that the respondent had been condemned unheard in violation of section 41 of the *Employment Act*, and that the reasons for termination were neither substantiated nor valid under section 43. The trial court also questioned the credibility of the gross misconduct allegations related to the entry into the bank after working hours and the shredding of documents, especially given the absence of a human resource manual from the appellant defining the cited infractions as such. The trial court found the appellant's claim of absconding duty unconvincing, particularly in view of the timeline showing that the respondent had already been verbally dismissed before her alleged absence from work.

14. In the end, the trial court awarded the respondent salary for the unexpired term of the contract (20 months x Kshs. 420,000), Kshs. 8,400,000; compensation for unfair termination (6 months' salary) Kshs. 2,520,000; and three months' salary in lieu of notice, Kshs. 1,260,000; Total: Kshs. 12,180,000, less statutory deductions.

15. Dissatisfied with the decision of the trial court, the appellant preferred this appeal, contending that the learned judge erred in law and in fact by, inter alia: awarding the respondent excessive, unlawful, and unjustified sums as salary for the unexpired term of her contract; making no assessment or evaluation of the evidence tendered at the trial; failing to grant the appellant a fair trial guaranteed by Article 50 of *the Constitution*; making awards without considering the principles on assessment and without assigning reasons and thus went against judicial precedent; failing to consider the factors outlined under section 49 (4) and 50 of the Act in deciding the appropriate remedies; failing to consider decisions of this Court to the effect that where a contract of employment is terminable by notice, the maximum compensation should be equal to the salary for the notice period; and awarding damages for payment in lieu of notice which had not been pleaded.

16. At the hearing hereof, learned counsel Mr. Esmail appeared with Mr. Karanja for the appellant, while the respondent was represented by learned counsel Mr. Odongo. Both counsel indicated that they

would be relying entirely on their respective client's written submissions without making any oral highlights.

17. In its written submissions, the appellant contends that the trial court lacked jurisdiction under section 49(1) of the *Employment Act* to award separate sums of damages and/or compensation amounting to 29 months' salary, particularly in the absence of any stated reasons for such an award. According to the appellant, the learned judge failed to properly apply sections 49(1) and 49(4) of the Act, resulting in an erroneous award. To illustrate this error, the appellant points out that the respondent did not plead any claim for three months' salary in lieu of notice, yet the trial court nonetheless granted such an award. The appellant relies on Samsung Electronics v. KM [2017] eKLR for the principle that a court's determination must be confined to the issues raised in the parties' pleadings, and that pronouncing itself on unpleaded issues amounts to acting beyond the court's mandate. Additional reliance is placed on CMC Aviation v. Mohamed [2015] 2 EA 92 and United States International University v. Eric Rading Outa [2016] eKLR for the argument that in awarding damages, courts must be guided by section 49(4) of the Act and must provide reasons when exercising discretion in assessing damages.

18. The appellant also places reliance on Ol Pejeta Ranching v. David Wanjau Muhoro [2017] eKLR and Postal Corporation of Kenya v. Andrew Tanui [2019] eKLR in support of the argument that judicial discretion in the award of damages must be exercised in accordance with legal principles and must be supported by clear reasoning.

19. It is also asserted that the learned judge failed to consider the respondent's contribution to the termination of her employment. It is submitted that the respondent had a duty to mitigate her losses by continuing to work through to the end of the notice period, viz, 31st May 2012, as was outlined in the termination letter dated 28th February 2012. However, through her advocates' letter dated 5th March 2012, the respondent indicated that she would not continue working and failed to report to work from 6th March 2012, thereby refusing to mitigate her alleged losses. In support of this position, the appellant refers to Halsbury's Laws of England, 4th Edition, Vol. 12, paras. 1193 and 1194, which stipulates that a plaintiff must take all reasonable steps to mitigate losses resulting from a defendant's wrongdoing and may not recover damages for losses that could reasonably have been avoided. According to the appellant, the applicable standard is one of reasonableness, assessed on the particular facts of the case. In addition, it is contended that section 49(4)(l) of the Act obliges the court to consider whether the employee failed to mitigate losses arising from an unjustified termination. However, despite these clear legal standards, the learned judge awarded the respondent damages equivalent to 21 months' salary, far exceeding the statutory maximum of 12 months, thereby rendering the award unjustified by law, and thus warranting setting aside.

20. On the issue of the actual date of the respondent's termination, the appellant contends that the learned judge erred by failing to make a definitive finding on it before proceeding to assess damages. It is argued that the respondent's employment was terminated not on 24th February 2012, as claimed but on 28th February 2012, in accordance with the termination letter dated 28th February 2012. The appellant contends that this distinction is significant because the respondent's claim was predicated on the premise of a summary dismissal on 24th February 2012, which, according to the appellant, never occurred. To support this, the appellant outlines a series of facts and interactions that occurred after 24th February 2012 that contradict the claim of immediate dismissal. The appellant asserts that the respondent continued reporting to work until 5th March 2012; she retained access to the premises using bank keys as late as 3rd March 2012; and actively corresponded with colleagues and external auditors, all of which indicate that she was still performing her duties. Additionally, she received her full February 2012 salary and, in an email dated 5th March 2012, acknowledged receipt of the termination letter and inquired about hand over procedures. According to the appellant, this conduct is inconsistent with a

summary dismissal, and instead supports the conclusion that the respondent abandoned her position from 6th March 2012.

21. Finally, on the question of whether there were valid grounds for termination, the appellant contends that this issue was not raised by the respondent and was therefore improperly considered suo moto by the learned judge. It is asserted that the respondent's refusal to report to work, failure to respond to recall communications, and prior acknowledgment of termination terms amounted to misconduct justifying dismissal under section 44(4) of the *Employment Act*.

22. On her part, the respondent, through her written submissions, reiterates that she was unlawfully and unfairly terminated in violation of the Act. She asserts that the reason cited for her termination was poor performance, yet she was neither subjected to any formal hearing, nor was she given a performance appraisal. She contends that this rendered her dismissal both procedurally and substantively unfair, contrary to section 45(2) of the Act.

23. On the issue of the learned judge's jurisdiction to grant the awards in the impugned judgment, she contends that the awards were lawful and justifiable. She asserts that the trial court had jurisdiction to make the award, particularly under the "any other appropriate relief" clause in her pleadings. While she acknowledges that notice pay was not specifically pleaded, she argues that the award was made as a consequential relief under the court's inherent powers. In support of this argument, she cites Bell & Another v I L Matterello Ltd (Civil Appeal 72 of 2019) [2022] KECA 168, where the court held that consequential reliefs can be granted under a general prayer for "any other relief."

24. The respondent distinguishes the authorities relied upon by the appellant namely, CMC Aviation v Mohamed, Samsung Electronics v KM, United States International University v Eric Rading Outa, and Ol Pejeta Ranching v David Wanjau Muhoro, contending that those cases involved instances where courts awarded maximum compensation without giving reasons. In contrast, she asserts that in her case, the learned judge exercised discretion judiciously by awarding only 6 months' salary as compensation despite having jurisdiction to award up to 12 months.

    She posits that this is a clear demonstration of a reasoned and proportionate approach by the trial court in awarding damages.

25. Regarding the date of termination, the respondent maintains that her employment was terminated on 24th February 2012. She refers to the appellant's own letter dated 28th February 2012 which she contends confirmed the verbal communication of her termination, which was accepted by the trial court at paragraph 47 of the judgment, thereby settling the issue of the date of termination. She says that the circumstances of her exit amounted to constructive dismissal, citing the breakdown of trust and absence of due process in her termination. In this context, she relies on the case of Coca Cola East Africa Limited v Maria Kagai Ligaga [2015] eKLR, which emphasized that in claims of constructive dismissal, it is the conduct of the employer and not the employee that is under scrutiny.

26. The respondent also refutes the appellant's claim that the learned judge introduced the issue of whether there were valid reasons for termination suo moto. She argues that her evidence clearly demonstrated that she was dismissed on grounds of poor performance, an allegation in respect of which the appellant provided no appraisal records or documentation. She asserts that the justification for her dismissal was always a central issue in the dispute, and that it was properly considered by the trial court.

27. In conclusion, the respondent asserts that the appeal is without merit. She argues that the trial court exercised its discretion appropriately, relied on credible evidence, and applied the relevant legal standards in awarding damages. Accordingly, she urges that this appeal be dismissed with costs.

28. We have considered the issues raised in this appeal, the submissions by the parties and the applicable law. This being a first appeal, this Court is under a duty to re-evaluate, re-assess, and re- analyze the evidence on record and determine whether the findings and conclusions of the learned trial judge are to be upheld, giving reasons for its decision either way. See Abok James Odera t/a A. J. Odera & Associates vs. John Patrick Machira t/a Machira &__ Co Advocates [2013] eKLR, Kiruga__ vs.__ Kiruga__ &__ Another__ [1988] KLR 348 and Peters vs. Sunday Post Ltd [1958] EA 424.

29. Having re-evaluated the record of appeal as well as submissions by the parties, we believe that this appeal turns on the following four issues:

    I. Whether the trial court erred in finding that the respondent's employment was terminated on 24th February 2012, as opposed 28th February 2012;

    II. Whether the trial court erred by finding that the respondent's termination was substantively and procedurally unfair;

    III. Whether the trial court was justified in awarding compensation for the unexpired term of the contract and for unfair termination; and

    IV. Whether the trial court had a valid basis for awarding three months' pay in lieu of notice.

30. It is undisputed that the respondent was employed under a renewable four-year contract. The respondent contended that her contract was unfairly terminated by the appellant, acting through its managing director, at a meeting held on 24th February 2012. While the law recognises that a contract of employment may be terminated, such termination must conform to the requirements of *the Constitution* and the Act. The law does not countenance either unfair termination or wrongful dismissal.

31. The distinction between unfair termination and wrongful dismissal was provided by this Court in CMC Aviation Limited v Mohammed Noor [2015] KECA 775 (KLR) thus:

    > "Unfair termination involves breach of statutory law. Where there is a fair reason for terminating an employee's service but the employer does it in a procedure that does not conform with the provisions of a statute, that still amounts to unfair termination. On the other hand, wrongful dismissal involves breach of employment contract, like where an employer dismisses an employee without notice or without the right amount of notice contrary to the employment contract. Section 49 of the Act sets out the remedies for both wrongful dismissal and unfair termination."

32. With the above context in mind, we now turn to the issue of when the employment relationship between the parties was severed. The respondent contends that she was verbally terminated at a meeting held on 24th February 2012, without being afforded an opportunity to make any representations. The appellant denies this allegation, asserting that during the said meeting, the respondent was merely informed of the intention to terminate her employment in accordance with the terms of her contract. The appellant further states that formal notice of termination was communicated to the respondent vide a letter dated 28th February 2012, which provided three months' notice, with her last working day being 28th May 2012. However, she was subsequently summarily dismissed vide a letter dated 9th

March 2012 on grounds, inter alia, of absconding from duty. In addressing this issue, the trial court held as follows:

> "The decision to terminate had already been made and communicated to the Claimant on 24.2.2012. The 3 months' notice coming on 28/2/2012 was therefore an afterthought."

33. We respectfully do not agree with the learned judge's findings on this issue. In our view, the respondent's claim that her employment was verbally terminated on 24th February 2012 is contradicted by a series of events that took place thereafter. First, there is evidence that the respondent continued to access the appellant's premises until 5th March 2012. Second, she retained possession of sensitive office keys to the appellant's premises beyond 24th February 2012 and maintained official email correspondence, including with external auditors, as demonstrated by her email dated 2nd March 2012. Additionally, in her email to the managing director dated 5th March 2012, she acknowledged receipt of the termination letter dated 28th February 2012 and sought clarification on handover procedures. In our view, this undermines her assertion of a verbal termination.

34. From the totality of the foregoing, it is our view that during the meeting on 24th February 2012, the appellant merely communicated an intention to terminate the respondent's employment in accordance with her contract. The said intention was actualized vide the letter dated 28th February 2012, which provided the respondent with three months' notice. We have reviewed the respondent's employment contract dated 6th October 2009, and in particular the clause titled "Notice Period," which provides as follows:

> "The employment contract may be terminated by either yourself or the Bank giving to the other three months' written notice of its intention to do so."

35. By issuing the termination notice dated 28th February 2012, specifying the last working day as 28th May 2012, the appellant, in our view, was in compliance with the Notice Period clause in the respondent's employment contract. In addition, save for the respondent's allegation concerning the meeting of 24th February 2012, there is no evidence indicating that her employment was terminated on that date. In any event, had her employment been terminated on 24th February 2012, it is unlikely that the appellant would have allowed her to retain access to sensitive office keys, documents and/records, or even the continued engagement with the appellant's external stakeholders. The trial court therefore erred in concluding that her employment was verbally terminated on 24th February 2012.

36. The above findings bring us to the question of whether the respondent's termination was justified and lawful. In addressing this issue, we note that at the time of termination of her employment, the respondent had approximately 20 months remaining in her four-year contract. The legal principles governing termination of employment by an employer are now well established.

    A termination is deemed unfair and unlawful if it is not based on a valid reason and is not carried out in accordance with fair procedure. Section 45(1) and (2) of the *Employment Act* sets out the requirements for determining whether a termination is unfair.

37. The termination letter issued by the appellant did not specify any grounds for termination. It simply provided the respondent with three months' notice in accordance with the terms of her employment contract. The reasons for the termination were only set out in the appellant's defence, and not in the termination letter dated 28th February 2012. In our view, since the termination was not by mutual agreement but was instead based on the respondent's alleged poor performance as alluded to by the Managing Director in the meeting of 24th March 2012, it was incumbent upon the appellant to clearly

state the reasons for the termination, notwithstanding the existence of a termination clause. In the circumstances of this case it was not enough for the employer to simply invoke the termination clause as an easy way out.

38. With respect to the actual reasons for termination, the trial court made the following observation at paragraph 35 of the impugned judgment:

> "The Respondent's Managing Director testified that the Claimant was terminated for poor leadership, lack of team work, tardiness in resolving audit issues and failure to communicate to management of clearing differences in a timely basis and to disclose the same to the external auditor."

39. Were these reasons sufficient to justify termination? In addressing this question, we note that the respondent denied the appellant's allegations of poor performance and relied on evidence of consistent and satisfactory performance throughout her tenure. She pointed out that her contract expressly provided for annual performance appraisals based on agreed targets, with eligibility for a performance-based bonus calculated as a percentage of her monthly salary. In line with this provision, the respondent received substantial bonus payments of Kshs. 238,000/- in 2010 and Kshs. 154,000/- in 2011 which she contended were indicative of performance that met or exceeded expectations during those years. This Court in National Bank of Kenya vs. Samuel Nguru Mutonya [2019] eKLR adopted the decision of the court in Jane Samba Mukala vs. Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK) (September, 2013) where it was observed:

> " a. Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act*, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.
>
> b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.
>
> c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.
>
> d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee."

40. The appellant has not shown that it complied in any way with the foregoing mandatory statutory procedural requirements. In addition, and as correctly found by the trial court, the issuance of performance-based bonuses undermines the appellant's claim of the respondent's poor performance. If the respondent had indeed been underperforming, it is unlikely that she would have received such financial rewards for the two preceding years.

41. Regarding the appellant's reliance on an internal audit report to justify the respondent's termination which purported to highlight deficiencies in the respondent's performance, the respondent pointed to positive feedback she had received from the Managing Director, including a letter dated 3rd January 2012 commending her for improvements in the cheque-clearing process. Taken together with the bonuses, this feedback suggests that although there may have been areas requiring improvement, the respondent's overall performance did not warrant termination. We therefore concur with the learned judge's finding that the appellant failed to demonstrate valid grounds for terminating the respondent's employment.

42. With respect to whether the respondent's termination met the requirements of procedural fairness, we note the respondent's allegation that during the meeting held on 24th February 2012 when the intention to terminate her services was conveyed, she was not given an opportunity to make any representations. Moreover, there is no evidence to suggest that, prior to the issuance of the termination letter dated 28th February 2012, the respondent was afforded a hearing in accordance with section 41(2) of the Act. The burden lay with the appellant to demonstrate that the termination process was procedurally fair, a burden it failed to discharge. We therefore concur with the trial court's finding that the respondent was condemned unheard, thereby rendering her termination both unfair and unjustified within the meaning of section 45(2) of the Act.

43. We decline to make any comments regarding the respondent's summary dismissal vide the letter dated 9th March 2012, as the respondent's claim was specifically anchored on unfair termination and not summary dismissal. Further, and in view of our finding that the respondent was unfairly terminated on 28th February 2012, any claim of constructive dismissal would, in the circumstances, be misplaced and without basis.

44. Turning to the issue of damages awarded to the respondent comprising 20 months' salary for the unexpired term of the contract, 6 months' salary as compensation, and 3 months' salary in lieu of notice, the appellant contends that the learned judge lacked jurisdiction to grant these awards. It is further argued that the awards were excessive and that the learned judge failed to provide adequate reasons in support of them. In Cooperative Bank of Kenya Limited v Yator [2021] KECA 95 (KLR), this Court observed as follows:

> " ...one of the guiding principles for the remedies under section 49 is that damages are awarded to compensate the claimant, not as punishment to the employer but to make good the employee's loss. In Hema Hospital vs Wilson Makongo Marwa [2015] eKLR this Court adopted with approval the holding of the Labour Court of South Africa in Le Monde Luggage cc t/a Pakwells Petze vs Commissioner G Dun & Others, Appeal Case No JA 65/205 which when applying provisions of the Labor Relations Act of South Africa which is similar to ours held that:
>
> "The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This Court has been careful to ensure that the purpose of the compensation is to make good the employee's loss and not to punish the employer."

45. The remedies for both wrongful dismissal and unfair termination are outlined under section 49 of the Act. Section 50 of the Act together with section 12(3)(vi) and (vii) of the *Employment and Labour Relations Court Act* empowers the Employment and Labour Relations Court to grant remedies in

accordance with section 49 of the Act. The authority to grant such remedies is discretionary. However, judicial discretion must be exercised judiciously. The mode of assessment of those remedies was set out by this Court in Co-operative Bank of Kenya Ltd v Banking Insurance & Finance Union [2016] KECA 97 (KLR) thus:

> "Our understanding of the Act is that the prescribed remedies…are discretionary rather than mandatory remedies, to be granted on the basis of the peculiar facts of each case. This is made absolutely clear by the use of the word "may", which in the context of the provision imports a discretionary rather than a mandatory meaning. That the remedies….are not a mandatory remedies, is made even clearer by section 49(4) which sets out some 13 considerations which the court must take into account before determining what remedy is appropriate in each case. Those considerations include the wishes of the employee, the circumstances of the termination and the extent to which the employee caused or contributed to it, the practicability of reinstatement or re-engagement, the common law principle that an order for specific performance of a contract for service should not be made save in exceptional cases, the employee's length of service with the employer, the employee's reasonable expectation of the length of time the employment was to last but for the termination, the employee's opportunities for securing comparable or suitable employment, any conduct of the employee that may have caused or contributed to the termination, any action on the part of the employee to mitigate his loses, etc. What all the above means, is that before exercising the discretion to determine which remedy to award, the court must be guided by the above comprehensive list of considerations."

46. Regarding our latitude to interfere with the exercise of discretion by the trial court, this Court, in Kenya Revenue Authority & 2 others v Darasa Investments Limited [2018] KECA 358 (KLR) stated:

> "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."

47. In the circumstances of this case, it is evident that the learned judge did not provide any reasons to support the awards granted save for the following brief statement: "I find that the Claimant was serving the Respondent on a 4-year contract. The Respondent decided to terminate this contract prematurely on 24.2.2012. In the circumstances, I find for the Claimant and I award her full salary for the remainder of the contract period."

48. In United States International University vs Eric Rading Outa (supra), this Court stated thus:

> "…We have noticed a trend by the Employment and Labour Relations Court where maximum awards are made without assigning any reasons for doing so and without carrying out any evaluation of the effect such awards have on employers and to the economy in general. Awards such as the one made by the trial judge in the judgment appealed from are made without any consideration of principles on assessment of damages and without assigning any reasons why a particular award is made.
>
> Although we have found, like the learned judge, that the appellants' termination of the respondent's employment was wrongful, we find, on our own consideration of the matter, that the learned judge erred in making a maximum award. He did not assign any reason for doing so and in the event he fell into error by not considering any or any relevant factor that

should have guided him to make an award of compensation for wrongful termination of employment."

49. Similarly, in CMC Aviation Limited v Mohammed Noor (supra), this Court stated thus:

> "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."

50. The above decisions clearly underscore the obligation of the learned judge to provide reasons justifying the manner in which the awards were determined.

51. With regards to the awards made in respect of the unexpired portion of the respondent's contract and the six months' salary awarded as compensation for unfair termination, we are not satisfied that the learned judge exercised judicial discretion in accordance with established legal principles. Firstly, there is no indication that the learned judge took into account the considerations set out under section 49(4) of the Act which guide the court in determining appropriate remedies for wrongful or unfair termination. In addition, it is not in dispute that the respondent was employed under a fixed-term contract of four years, which was expressly terminable by the issuance of three months' notice. In view of this contractual provision, it is our view that the respondent was not entitled to damages equivalent to the unexpired term of the contract or to six months' gross salary as compensation. On the contrary, given that the contract was lawfully terminable upon the provision of three months' notice, an award equivalent to three months' salary would have, in the circumstances, constituted reasonable and sufficient compensation for the unfair termination.

52. This Court while considering the issue of compensation for an unserved period of a contract of service in Chairman Board of Directors (National Water Conservation and Pipeline Corporation) v Meshack M. Saboke & 2 others [2019] eKLR stated thus:

> "... we adopt fully, what was stated by the court in the case of Directline Assurance Co. Limited versus Jeremiah Wachira Kihara (supra), that compensation for an unserved period of a contract of service is only available where there is no termination clause in the contract permitting either party to bring the contract prematurely to an end. In light of the above guiding principle, the only legitimate compensation that the 1st respondent was entitled to was limited to three months' notice or payment of salary in lieu of notice."

53. In CMC Aviation Limited v Mohammed Noor (supra), this Court while setting aside an award made by the trial court for unfair termination stated thus:

> "The respondent was serving a two-year contract of employment which was terminable by one month's notice or one month's salary in lieu of notice. Had the appellant complied with the requirements of sections 41 and 45 of the *Employment Act*, the summary dismissal would have been a fair one. But to the extent that the appellant did not follow the statutory procedure the dismissal was found to be unfair, which we agree. Taking all this into consideration, we think that the respondent was not entitled to twelve months gross pay as compensation for wrongful dismissal. In our view, since the contract of employment was terminable by one month's notice, we believe that an award of one month's salary in lieu of notice would have been reasonable compensation."

54. In light of the foregoing, it is our view that the learned judge misdirected herself by awarding damages that exceeded the permissible scope of judicial discretion under section 49 of the *Employment Act* and for failing to provide adequate reasons for such awards.

55. With respect to the award for payment in lieu of notice, we concur with the appellant's position that this claim was not specifically pleaded by the respondent in her memorandum of claim. It is well established that parties are bound by their pleadings, and a court cannot adjudicate upon issues that were neither pleaded nor properly placed before it for determination. See Independent Electoral and Boundaries Commission & Leonard Okemwa (Returning Officer) v Stephen Mutinda Mule & Others, Civil Appeal No. 219 of 2013. In the absence of a specific plea, the learned judge, in our view, had no basis for making a finding on this issue. We also reject the respondent's contention that the award was made pursuant to the trial court's inherent jurisdiction. There was neither an invitation for the court to invoke such powers nor any indication in the impugned judgment that the learned judge exercised her inherent discretion in granting the award.

56. Accordingly, we set aside the awards made in respect of the remainder of the contract term and payment in lieu of notice. The award of six months' salary as compensation for unfair termination is hereby set aside and substituted with an award equivalent to three months' salary as fair compensation for the unfair termination.

57. In the end, this appeal succeeds to the extent outlined hereinabove.

    We direct that each party shall bear their own costs of the appeal.

Civil Appeal No. E236 Of 2020

58. Turning to Civil Appeal No. E236 of 2020, the brief background is that after judgment was delivered by the trial court in the main suit wherein several awards were made in favour of the respondent together with costs of the suit, the respondent commenced taxation of the Party & Party Bill of Costs dated 15th January 2019. The appellant subsequently filed a Preliminary Objection dated 20th June 2019, opposing the taxation of the Bill of Costs. The basis of the objection was that Schedule VI A of the Advocates Remuneration Order which formed the basis for the Bill of Costs was not applicable to the taxation of costs in the Employment and Labour Relations Court.

59. In addition to the preliminary objection, the appellant filed a Notice of Motion dated 14th November 2019 where it was contended that the Deputy Registrar of the Employment and Labour Relations Court lacked jurisdiction to conduct the taxation of a Bill of Costs based on the Advocates Remuneration Order. The appellant asserted that the Advocates Remuneration Order which governs the process of taxation of costs applied exclusively to the High Court and subordinate courts and not to the Employment and Labour Relations Court.

60. It was further contended that since the Employment and Labour Relations Court is a distinct court established under Article 162(2)(a) of *the Constitution*, its Deputy Registrar could not lawfully undertake taxation, and therefore, any such attempt was a nullity. Among the orders sought in the motion were the setting aside of the orders issued by the Deputy Registrar on 5th November 2019 regarding the Bill of Costs; the setting aside of the Deputy Registrar's decision declining to place the appellant's Preliminary Objection before a judge of the Employment and Labour Relations Court; and an order directing that the Preliminary Objection be determined by a judge of that court.

61. Opposing the application, the respondent contended that although the Employment and Labour Relations Court is distinct in its constitutional foundation, it holds a status equal to that of the High Court and should therefore be treated similarly for purposes of taxation. Relying on rule 29

of the Employment and Labour Relations Court (Procedure) Rules, 2016 and Section 12(4) of the *Employment and Labour Relations Court Act*, the respondent argued that the Court is duly empowered to award and tax costs using the Advocates Remuneration Order as a guiding framework. The respondent further accused the appellant of raising technical objections merely to delay the conclusion of the matter, particularly after failing to comply with an order issued by the court on 30th April 2019, which required the deposit of the decretal sum in a joint interest-earning account in the names of counsel for both parties.

62. Vide a ruling delivered on 21st May 2020, the trial court (Wasilwa, J.) held that the Employment and Labour Relations Court, by virtue of its constitutional status, shared equal footing with the High Court and could properly adopt the same taxation framework. The learned judge held that the Deputy Registrar of the Employment and Labour Relations Court, as a judicial officer, had jurisdiction to handle the taxation of costs under the Advocates Remuneration Order. The application was accordingly dismissed with costs for lacking in merit, and the Deputy Registrar was directed to proceed with the taxation as scheduled.

63. Dissatisfied with the trial court's decision, Middle East Bank Kenya Limited filed the present appeal, primarily challenging the finding that the Deputy Registrar of the Employment and Labour Relations Court had jurisdiction to tax the Bill of Costs. The appellant contends that the learned judge erred in both law and fact by, inter alia: failing to appreciate that jurisdiction cannot arise by implication, nor can a court through judicial innovation or craft assume jurisdiction that has not been expressly conferred by *the Constitution* or statute; misinterpreting section 12(4) of the *Employment and Labour Relations Court Act*, which, according to the appellant, only permits the Court itself and not its Deputy Registrar to assess and fix costs without any provision for taxation; disregarding the fact that neither the Act nor rule 29 of the Employment and Labour Relations Court (Procedure) Rules, 2016 contemplate taxation akin to that conducted in the High Court; and for relying on what it terms an irrelevant authority, namely, United States International University (USIU) v Attorney General [2012] eKLR in arriving at the impugned decision.

64. As noted earlier in this decision, counsel for the appellant at the hearing hereof elected to rely entirely on his client's written submissions. On his part, counsel for the respondent did not file any written submissions in respect of this appeal and offered no oral arguments, instead leaving the matter entirely to the Court for determination.

65. In the written submissions, the appellant contends that jurisdiction should not be conflated with status. Relying on the Supreme Court decision in Karisa Chengo v. Republic [2017] eKLR, the appellant contends that courts may be of equal status but possess distinct jurisdictions. Citing Samuel Kamau Macharia & Another v. Kenya Commercial Bank & 2 Others, Supreme Court Civil Application No. 2 of 2011, and In the Matter of the Interim Independent Electoral Commission [2011] eKLR, the appellant asserts that jurisdiction derives from *the Constitution* and/or statute.

66. The appellant further submits that jurisdiction cannot be implied, nor can a court assume jurisdiction based on alleged "use and custom." In support of this position, the appellant cites Konosi v. Flamco Limited [2017] eKLR, asserting that the powers of the Registrar of the High Court in matters of taxation are conferred strictly by the *Advocates Act* and the Advocates Remuneration Order. It is contended that such jurisdiction cannot arise by implication, nor can it be conferred by consent of the parties.

67. The appellant reiterates that the award and assessment of costs in the Employment and Labour Relations Court is governed not by the *Advocates Act* or the Advocates Remuneration Order, but specifically by section 12(4) of the *Employment and Labour Relations Court Act* and rule 29

of the Employment and Labour Relations Court (Procedure) Rules. According to the appellant, these provisions, which guide the court in determining the quantum of costs, do not authorize or contemplate the taxation of costs by a Registrar. It is therefore contended that costs may only be assessed by the court itself at the time of awarding them.

68. In addition, it is contended that the Registrar of the High Court when taxing a bill of costs acts as a judicial officer and also performs important judicial functions under Order 49 rules 6 and 7 of the Civil Procedure Rules. In contrast, the Registrar of the Employment and Labour Relations Court (ELRC) is not empowered to perform any judicial functions, and under section 9 of the *Employment and Labour Relations Court Act*, the Registrar's power is limited to administrative duties. Additionally, that section 11 of the same Act which outlines the functions of the Registrar does not confer the authority to tax bills of costs.

69. In light of the foregoing, the appellant contends that the learned judge erred in holding that the Registrar has authority to tax a bill of costs. The appellant therefore seeks to have the ruling and order delivered on 21st May 2020 set aside.

70. We have considered the issues raised in this appeal, the submissions made and the applicable law. In our view, this appeal turns on a singular issue of whether the learned judge erred in finding that the Registrar, and by extension the Deputy Registrar of the Employment and Labour Relations Court, has jurisdiction to tax a bill of costs.

71. It is said that jurisdiction is everything and without it, a court cannot move any step further. The locus classicus on jurisdiction is the celebrated case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 where Nyarangi, JA. stated that:

> " Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

72. In Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others (supra), the Supreme Court held that:

> "A court's jurisdiction flows from either constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

73. The appellant maintains that the Advocates (Remuneration) Order does not apply to the Employment and Labour Relations Court, contending that rule 2 of the Order limits its applicability to the High Court. Rule 2, which sets out the scope of the Order provides as follows:

> " This Order shall apply to the remuneration of an advocate of the High Court by his client in contentious and non-contentious matters, the taxation thereof and the taxation of costs as between party and party in contentious matters in the High Court, in subordinate courts (other than Muslim courts), in a Tribunal appointed under the *Landlord and Tenant (Shops, Hotels and Catering Establishments) Act* (Cap. 301) and in a Tribunal established under the *Rent Restriction Act* (Cap. 296)."

74. In addressing the central question posed by the appellant, it is our view that the proper starting point lies in examining the constitutional status of the Employment and Labour Relations Court as well as the applicable statutory and procedural framework governing its operations. Article 162(2)

(a) of *the Constitution* establishes the Employment and Labour Relations Court as a court with status equal to that of the High Court. The jurisdiction of the court is provided under section 12 of the *Employment and Labour Relations Court Act*. Further, section 7(1) of the Sixth Schedule to *the Constitution* provides that all law in force immediately before the effective date shall continue in force and shall be construed with such alterations, adaptations, qualifications, and exceptions as are necessary to bring it into conformity with *the Constitution*. This transitional provision, in our view, expressly permits the continued application of pre-2010 legislation, including the Advocates (Remuneration) Order, subject to its interpretation in accordance with the values, principles, and context of the 2010 constitutional framework.

75. Within this constitutional and statutory framework, the Employment and Labour Relations Court, though a distinct and specialized court, enjoys the same judicial status as the High Court. As such, statutory and procedural provisions applicable to the High Court may, in our view, be applied to the Employment and Labour Relations Court mutatis mutandis, provided they are not inconsistent with the court's distinct jurisdictional mandate as set out in *the Constitution* and in section 12 of the Employment and Labour Relations Court Act. In saying this, we make reference to the preamble to the *Employment and Labour Relations Court Act* which reads as follows:

> "An Act of Parliament to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and for connected purposes" [Emphasis added]

76. The phrase "for connected purposes" as used in the preamble, in our view, is a general legislative drafting device intended to permit the Act to encompass matters beyond its core mandate of adjudicating employment and labour disputes. It captures incidental, ancillary, or supportive functions that facilitate or arise from the effective execution of the court's jurisdiction. In this context, we are of the view that taxation of bills of costs by the Registrar properly falls within the scope of "connected purposes," as it stems from the court's judgments and is necessary for the procedural finality of cases before the court.

77. In addition, rule 29 of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides that in awarding costs, the court shall be guided by section 12(4) of the *Employment and Labour Relations Court Act* and the Advocates (Remuneration) Order. In our view, this express provision effectively incorporates the Advocates (Remuneration) Order into the procedural framework of the court, thereby authorizing its application in the assessment and taxation of costs.

78. With regard to the Registrar's mandate to tax costs, the taxation of a bill of costs is inherently a judicial function ordinarily performed by a taxing officer, who is either the Registrar or the Deputy Registrar of the respective court. As correctly observed by the appellant, the Registrar exercises important judicial functions pursuant to Order 49 rules 6 and 7 of the Civil Procedure Rules. These functions have, through established judicial practice and interpretation, been extended to all superior courts of equal status, including the Employment and Labour Relations Court. In our view, to deny the Registrar of the Employment and Labour Relations Court authority to tax costs would not only hinder the effective functioning of the court but would also contradict the principle of equal status under Article 162(2) of *the Constitution*.

79. While we appreciate that the *Employment and Labour Relations Court Act* does not expressly confer upon the Registrar the power to tax bills of costs, it is our considered view that where legislation is silent, established judicial custom and practice that align with constitutional norms may validly inform and guide court procedures. In the circumstances herein, the longstanding practice of Registrars of the

Employment and Labour Relations Court taxing bills of costs under the Advocates (Remuneration) Order reflects a constitutionally sound and pragmatic adaptation.

80. In conclusion, a purposive and harmonious interpretation of Article 162(2)(a) of *the Constitution*, section 7(1) of the Sixth Schedule of *the Constitution*, section 12(4) of the *Employment and Labour Relations Court Act*, and rule 29 of the Employment and Labour Relations Court (Procedure) Rules, 2016, leads to the conclusion that the Registrar, and by extension the Deputy Registrar of the Employment and Labour Relations Court, has jurisdiction to tax a bill of costs in respect of matters heard and determined by that court. We reiterate that withholding this authority from the Registrar would not only hinder the effective functioning of the court but would also conflict with the constitutional principle of equal status as enshrined in Article 162(2), as well as Article 259(1) which requires *the Constitution* to be interpreted in a manner that promotes its purposes, values, and principles.

81. We believe that we have said enough to demonstrate that this appeal has no merit. Accordingly, it is hereby dismissed. We make no orders as to costs.

82. In the end, we allow Civil Appeal No. 36 of 2019 to the extent stated therein, and dismiss Civil Appeal No. E236 of 2020.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF DECEMBER 2025.

D. K. MUSINGA, (PRESIDENT)

…………………………………………

JUDGE OF APPEAL MUMBI NGUGI

…………………………………………

JUDGE OF APPEAL

F. TUIYOTT

…………………………………………

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.