

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT MOMBASA**

**APPEAL NO. E107 OF 2024**

*(Before Hon. Justice Ocharo Kebira)*

**DHANJAL INVESTMENTS LIMITED**

**T/A TRAVELERS BEACH HOTEL.....APPELLANT**

*VERSUS*

**ELIZABETH PHOEBE ATIENO.....RESPONDENT**

(Being an appeal from the judgment and decree of Hon. Maureen Nabibya (SPM) delivered in Mombasa MCELRC 401 of 2019 on 16<sup>th</sup> May 2024)

**JUDGMENT**

**Background**

1. By the Statement of Claim dated 2<sup>nd</sup> May 2019, the Respondent sued the Appellant in the claim

mentioned above and sought the following reliefs against them.

- i. A declaration that the termination of her employment is and was done in gross violation of the law, in a discriminatory manner, and in violation of her fundamental rights, and hence unfair, wrongful, and unlawful.
- ii. A declaration that she is entitled to reinstatement and, alternatively, to payment of all salaries, allowances, and benefits that would have accrued to her until the mandatory retirement age of 55 years.
- iii. Terminal dues amounting to Kshs.2,515,837.60 as specified in paragraph 15 of the Statement of Claim.

- iv. Aggravated and exemplary damages for breach and violation of fundamental rights of the Respondent.
  - v. Cost of the suit.
  - vi. Costs and interest on (iii), (iv) & (v) above as the court deems fit.
  - vii. Certificate of Service.
  - viii. Any other relief the court may deem fit and just to grant.
2. The Appellant contested the Respondent's claim through a Memorandum of Response dated 5th July 2019. They asserted that the Respondent's employment was terminated through early retirement on the grounds of her health, which had adversely affected her performance. The termination on the grounds was agreed upon between the Appellant and the Respondent's trade union, with her

knowledge. The termination of her employment was both procedurally and substantively fair. At the time of termination, all dues owed to the Respondent were duly paid. Although the Appellant filed the Memorandum of Response, they did not present any witnesses to testify at trial.

3. On the material before her, the learned trial Magistrate entered judgment for the Respondent, partially allowing the Respondent's claim. The judgment is the subject of the instant appeal.
4. The Appeal was canvassed by way of written submissions per this Court's directions.

### **The Respondent's Case before the Trial Court**

5. It was the Respondent's case that she was employed by the Appellant on 5th December 1991 as a house steward, earning a gross salary of Kshs.15,462 per month.

6. She contended that her employment was governed by the terms and conditions of the Collective Bargaining Agreement that was between her Union [ The Union of Kenya Hotels & Caterers Association and The Kenya Union of Hotels Education Institutions, Hospitals and Allied Workers [KUDHEIHA]] and the Appellant.
7. She asserted that throughout her employment, she diligently and faithfully performed her duties in accordance with her letter of appointment, the CBA, and the Appellant's employment regulations.
8. On or around 4th May 2018, while carrying out her usual duties, she was suddenly summoned and rudely informed that her services were no longer required by the Appellant, who then ordered her to resign under the pretence of early retirement. She states that she refused to resign, after which the

Appellant, through a letter dated 7<sup>th</sup> May 2018, unilaterally and abruptly terminated her employment by allegedly subjecting her to early retirement without any lawful cause, justification, or explanation.

9. She further stated that although she wrote on 16<sup>th</sup> May 2018 seeking time to respond to the purported early retirement, the Appellant ignored her request and instead purported to hold a meeting with a union representative on 1<sup>st</sup> October 2018 without her knowledge, notice, involvement, or consultation.
10. According to the Respondent, the tabulation of terminal benefits resulting from that meeting was incorrect. It failed to include statutory and contractual entitlements owed to her under the law and the Collective Bargaining Agreement (CBA). She lodged a formal complaint with the union, which instructed the Appellant to retract its position and

reinstate her until she reaches the retirement age. However, the Appellant did not comply with this directive.

11. The Respondent claimed that at the time of the alleged early retirement, she was 51 years old, while the mandatory retirement age under the CBA was 55 years. She had a legitimate expectation that she would remain employed until age 55.
12. She claimed that despite repeated demands, the Appellant refused to reinstate her or pay her terminal benefits, and did not issue proper communication regarding her retirement benefits. She therefore argues that the Appellant's actions amounted to a constructive, wrongful, unfair, and unlawful termination of employment, carried out without notice, a valid reason, or fair procedure, and in

breach of her contractual, statutory, and constitutional rights.

## **Judgement**

13. After hearing the Claimant's case, the trial Court concluded that the Respondent was unfairly compelled into early retirement at the age of 51, without her involvement, justification, or a fair hearing.

14. On the premise, she awarded the Respondent the following reliefs: unpaid salary arrears of Kshs.10,794 as acknowledged by the Appellant, gratuity calculated at Kshs.311,532 according to the Appellant's computation of 15 days' pay per year for 26 years of service, and salary for 20 days worked in September 2018, amounting to Kshs.22,009.40. She further awarded the Respondent Kshs:1,584,627, the salary she would have earned until retirement.

## **The Appeal**

15. Dissatisfied with the Judgment of the lower Court, the Appellant filed the instant appeal, setting forth the following grounds;

- (i) THAT the Learned Magistrate erred in fact and in law in admitting matters not pleaded, therefore occasioning grave injustice to the Appellants.*
- (ii) THAT the Learned Magistrate erred in fact and in law in failing to appreciate the evidence and facts on record adduced by the Appellants herein.*
- (iii) THAT the Learned Magistrate erred in fact and in law in disregarding vital legal and factual issues while making her ruling, thus arriving at the wrong decision.*

- (iv) *THAT the learned magistrate erred in fact and in law in her finding that the Respondent was unfairly terminated in her employment.*
- (v) *THAT the Learned Magistrate erred in fact and in law by failing to consider the pleadings before her and matters that were relevant, which she was seized of, and instead considered irrelevant matters, therefore arriving at the wrong decision.*
- (vi) *THAT the ruling of the Learned Magistrate was against the weight of the evidence and facts adduced.*
- (vii) *THAT the trial magistrate misdirected herself, misapprehended and misconstrued the legal principles in the case before her, therefore arriving at a wrong decision of awarding the Respondent compensation of Kshs.1,584,627/- equivalent to 4 years' salary.*

- (viii) *THAT the Learned Magistrate was biased by all circumstances.*
- (ix) *THAT the Learned Magistrate erred in fact and in law by failing to consider the evidence on record and the analysis of the pleadings by the Appellants.*
- (x) *THAT the Learned Magistrate erred in fact and in law in her ruling and in the circumstances of the case.*

### **Appellant Submissions**

16. The Appellant argues that the Respondent was a unionisable employee and a member of KUDHEIHA, and that she was issued with a four-month notice with full pay following a meeting held on 4<sup>th</sup> May 2018. Additionally, the Respondent admitted receipt of the early retirement letter dated 7<sup>th</sup> May 2018 and continued working until 14<sup>th</sup> September 2018. No

doubt, the early retirement was based on the Respondent's health challenges, which constituted a valid reason for termination.

17. It is further submitted that in terminating the Respondent's

employment, the appellant adhered to the procedural fairness requirements outlined under Section 41 of the Employment Act. To support this point, reliance has been placed on the case of **Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR.**

18. The Appellant further submits that upon lapse of the notice period, terminal dues were tabulated in accordance with the Collective Bargaining Agreement between itself and KUDHEIHA, and that the only payable dues were unpaid salary arrears of Kshs.10,794/-, gratuity of Kshs.311,532/-, and salary

for 14 days worked in September 2018, amounting to Kshs.11,183/-.

19. The award made by the learned trial Magistrate for salary for the remainder of the Respondent's working life was unsound and unjustified under Section 49 of the Employment Act. They rely on **Osoti v Trees for the Future INC [2024] KEELRC 962 (KLR)** to argue that anticipatory or future earnings are not a remedy contemplated in law.
20. The Appellant also maintains that the Employment and Labour Relations Court lacks jurisdiction to award anticipatory reliefs and that compensation under Section 49(1)(c) of the Employment Act is capped at a maximum of twelve months' salary. Reliance is placed on **Engineon Engineer Francis N. Gachuri -vs- Energy Regulatory Commission, Industrial Cause No. 203 of 2011**, to the effect that there is

no provision for payment of damages up to the date of retirement and that no employment is permanent.

21. It is further argued that awarding salary for the remainder of the employment period amounts to unjust enrichment and payment for services not rendered. In support of this position, the Appellant cites **D.K. Niagi Marete -vs- Teachers Service Commission Industrial Cause No. 379 of 2009, David Mwangi Gioko & 51 Others -vs- Nairobi City Water & Sewerage Company Limited Industrial Court Cause No. 1722 of 2011, and Maria Kagai Ligaga -vs- Coca Cola East Africa Limited Industrial Court Cause No. 611/N/ of 2009.**

22. In conclusion, the Appellant urges the Court to set aside the award of Kshs.1,584,627/- being salary for

the remainder of the employment period as unjust, injudicious and unsupported by statute or precedent.

### **Respondent's Submissions**

23. The Respondent contends that the trial court properly evaluated the evidence before it and correctly found that the Appellant failed to give any valid or justifiable reason for the termination. She submits that the Appellant unlawfully forced her into early retirement at the age of 51 after pressuring her to resign during a meeting held on 4<sup>th</sup> May 2018, and later issued an early retirement letter dated 7<sup>th</sup> May 2018 without disclosing any lawful reasons. She relies on Section **43 of the Employment Act** and the decisions in **Anthony Yamo Ihito v Basco**

**Products (Kenya) Limited [2022] eKLR and Kenfreight (EA) Limited v Benson K. Nguti [2016] eKLR** to argue that termination without substantive justification is unfair.

24. It is further submitted that her termination was discriminatory and unconstitutional. She submits that the Appellant admitted in its pleadings that age played a role in her termination, resulting in her separation from employment before age 55, contrary to the Collective Bargaining Agreement's stipulations.
25. She relies on Article 27 of the Constitution, Section 5(2) of the Employment Act, and the decision in **Jared Juma v Kenya Broadcasting Corporation & 3 Others [2014] eKLR** to support her claim that termination on the basis of age amounts to unlawful discrimination. She further submits that the Appellant's allegations of ill health raised on appeal

were neither pleaded nor proved at trial and ought to be disregarded in line with **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR**, which applies the principle that submissions are not evidence.

26. On procedural fairness, the Respondent maintains that she was never accorded a hearing before termination. The Appellant failed to comply with Sections 41 and 45 of the Employment Act. She submits that letters allegedly evidencing meetings with the union were unsupported by any minutes or records and were therefore mere fabrications. In support of her submission that termination of an employee's employment without adherence to the dictates of procedural fairness would render the termination unfair, she relies on **CMC Aviation Limited v Mohamed Noor [2015] eKLR, Njuguna**

**v Times Sacco Limited [2024] eKLR and  
Wanyera v Central Isiolo Investment Limited  
[2024] eKLR.**

27. Concerning remedies, the Respondent endorses the trial court's grant of compensation for loss of earnings up to the retirement age. However, she further submits that should this Court find it appropriate to overturn this awarded relief, it ought to substitute it with compensation for unfair termination pursuant to Section 49 of the Employment Act.

28. The Respondent also submits that, as the termination of her employment was discriminatory and thus a violation of her constitutional rights, she is entitled to damages. To support this point, she places reliance on the cases of **Ronoh v Kenya Electricity Generating Company PLC (KENGEN) [2024]**

**eKLR, G.M.V v Bank of Africa Kenya Limited [2013] eKLR, V.M.K v C.U.E.A [2013] eKLR and Macharia v Safaricom PLC [2021] eKLR** to demonstrate that courts have awarded substantial damages for discrimination and violation of constitutional rights at the workplace.

29. She further argues that the Appellant's conduct justifies an award of aggravated and exemplary damages, citing **PN Mashru Ltd v Ojenge [2023] KECA 473 and Oyagi v Nairobi City Council [2024] eKLR.**

30. Finally, the Respondent asserts that she is also entitled to a housing allowance under Clause 7 of the applicable Collective Bargaining Agreement and Section 31 of the Employment Act, given that she received only a basic salary throughout her period of service.

31. In conclusion, she urges the Court to dismiss the appeal in its entirety, uphold the judgment of the lower court, and affirm all the reliefs granted to her.

### **Analysis and determination**

32. In the case of **Selle & Another vs. Associated Motor Boat**

**Co Ltd & Others [1968] EA 123**, the court setting out the scope of a first Appellate Court's authority aptly stated:-

*"...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ...is by way of retrial, and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the*

*witnesses and should make due allowance in this respect...”*

33. In determining the instant appeal, I consider the above statement.

34. I have carefully examined the grounds of appeal, the parties’ pleadings, the oral and documentary evidence presented at the trial court, and the written submissions by counsel. In my view, this appeal hinges on two main issues:

(a) whether the Respondent’s employment was unfairly terminated; and

(b) whether the Respondent was entitled to the reliefs granted by the court below.

35. Before I proceed to examine the issues identified for determination, it is imperative to highlight at this juncture that this Court has consistently held, and continues to hold, that when a Respondent enters an

appearance and submits a Response to the Statement of Claim / Memorandum of Claim and a witness statement, but does not present their evidence during the trial, the statements remain, albeit without any evidential value. Nevertheless, the default and its consequent impact do not automatically result in success for the opposing party's case.

36. As such, where the law places a burden on the Claimant to discharge, sufficient evidence must be presented, notwithstanding the Respondent's default, if the Claimant's case is to succeed.

37. The core issue in determining whether the termination was justified pertains to the involvement of the Respondent's Union in discussions with the Appellant regarding the termination and, if involved,

the extent of that involvement. The resolution of this matter is of paramount importance. The relationship between trade unions and their members is predicated upon principles of representativeness and apparent authority to bind members to decisions and related matters. Accordingly, a member cannot disclaim participation in or disassociate themselves from such deliberations, decisions, or events after their occurrence.

38. When deliberations between an employer and the Union culminate in a decision to terminate an employee, such a decision is legally binding on the employee. The employee may successfully challenge it only if the decision is plainly inconsistent with the terms and conditions of the Collective Bargaining Agreement, the employment contract, statutory obligations, or constitutional provisions.

39. The Appellant took the position in their pleadings that the Respondent's Union was duly involved in the process that led to the termination of her employment. The Union sanctioned her early retirement. However, they did not place any evidence before the trial Court to demonstrate the Union's involvement and the extent of that involvement. I have carefully considered the Respondent's letter dated 16<sup>th</sup> May 2018 and the Union's letter dated 5<sup>th</sup> September 2018. They clearly do not speak to a mutual agreement on the Respondent's early retirement. As such, I am unable to disagree with the Respondent's contention that the termination of her employment was unilateral.

40. Having stated as I have hereinabove, it is vital to note that in a dispute regarding the termination of an employee's employment, section 43 of the

Employment Act places a legal obligation on the Employer to prove the reason for the termination. Section 45[2] of the Employment Act further imposes a legal burden to demonstrate that the reason or reasons were valid and fair. See **Pius Machafu Isundu v Lavington Security Guards Limited [2017] eKLR.**

41. The burdens could be discharged only upon the Appellant placing sufficient evidence before the trial Court. This they did not do. It is my view, therefore, that the learned trial Magistrate did not err in holding that the termination was substantively unjustified.
42. This Court has not lost sight of the fact that in their pleadings, the Appellant sets out two grounds for the termination of the Respondent's employment. In paragraph 5 of the Memorandum of Response, they averred that the Respondent deserted duty without

the permission of her supervisors, while in paragraph 9 they averred that the Respondent had become elderly and could no longer discharge her duties as expected. Besides these reasons remaining unproven, in my view, the averment makes no sense, as the termination would either be on account of desertion or age. It wouldn't be both. This leaves a clear impression that the Appellant did not have a legitimate reason for terminating the Respondent's employment.

43. Further, **section 41** obligates the employer to prove that in terminating an employee's employment, they adhered to the mandatory procedure contemplated thereunder. Whether it was the infraction of desertion that the Respondent committed, or that she became elderly to discharge her duties as required, the Respondent deserved to be heard before being let go

by the Appellant. The Respondent maintained before the trial Court that she was not accorded an opportunity to be heard. This evidence was not rebutted. The learned trial Magistrate did not err in finding that the termination was unfair.

44. The Appellant did not testify at trial, leaving the Magistrate with only the Respondent's evidence to consider. I am not persuaded that the learned trial Magistrate did not sufficiently appraise the material placed before her, as alleged by the Appellant. Critically, considering the material before the lower Court, a safe impression can be formed that the Respondent duly discharged her legal burden under section 47[5] of the Employment Act, establishing *prima facie* that a termination occurred and it was unlawful.

45. Having concluded that the learned trial Magistrate did not err in finding that the termination of the Respondent's employment was unfair, I now turn to consider whether she erred in awarding the reliefs she did, and, more specifically, the award of Kshs.1,584,627, representing the salary she would have earned until the attainment of her retirement age. It is a trite principle, established by a line of judicial decisions, that there is no employment for life. The fact that an employee is serving under a permanent and pensionable appointment or under a contract with a specified lifespan does not in any manner deprive the employer of its managerial prerogative to terminate the employee's employment for cause before the appointed retirement age or the lapse date.

46. The Employment Act 2007 does not provide for compensation for the salary that would have been earned during the period between the date of termination and the appointed retirement age in cases of permanent employment contracts, or between the date of termination and the appointed lapse date in the case of fixed-term contracts. Looking at the architecture of the provisions of Section 49 of the Employment Act, the period remaining under an employee's contract can only be a factor to be considered in determining an award under Section 49[1][c] of the Act. It is my view that the learned trial Magistrate erred in law when she fashioned a remedy not provided by law. Consequently, the award of the sum hereinabove stated is set aside.

47. Recently, in the case of **Ngokonyo & 2 others vs Telkom Kenya Limited [2025]KESC 75 [KLR]**, the Supreme Court of Kenya held that there is no statutory basis for anticipatory salaries and allowances.

48. Having agreed with the learned trial Magistrate's finding that the termination was unfair and having set aside the award hereinabove mentioned, equity and fairness would demand that I award the Respondent, under this appeal, compensation pursuant to the provisions of Section 49[1][c]. The provision empowers the Courts to make a compensatory award for an employee who has successfully challenged their employer's decision to terminate their employment or summarily dismiss them. However, it should be emphasised that the power is

discretionary, depending on the circumstances of each case.

49. I have carefully considered the circumstances under which the Respondent's employment was terminated, the unchallenged fact that under the CBA her retirement age was 55 years, yet she was unfairly retired at age 51, her expectation that she was to serve up to that age, she in no proven manner contributed to the termination, and that the termination was without substantive justification and procedural fairness and find that she is entitled to 10 months' gross salary in the place of the award mentioned above.

50. For the reasons set out above, the Appellant's appeal succeeds only to a limited extent—the award of Kshs.1,584,627 under the head of compensation for salary for the four years that were remaining

between the date of separation and the appointed retirement age is hereby set aside. In its place, an award of Kshs.154,620 is made.

51. As the appeal succeeds partially, each party shall bear its own costs.

**READ, SIGNED AND DELIVERED THIS 29<sup>TH</sup> DAY OF  
JANUARY 2026**

**OCHARO KEBIRA  
JUDGE**

**In the presence of:**

Appellant: .....

Respondent: .....