Brandlife Kenya Limited v Koskei (Civil Appeal 112 of 2024)
[2025] KECA 100 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KECA 100 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 112 OF 2024

DK MUSINGA, SG KAIRU & LA ACHODE, JJA

JANUARY 24, 2025

BETWEEN

BRANDLIFE KENYA LIMITED ..... APPELLANT

AND

ANNE KOSKEI ..... RESPONDENT

(Being an appeal against the Judgment and Decree of the Employment and Labour Relations Court at Nairobi (Nduma. J.), dated 19th October 2023 in ELRC No. 315 of 2020)

JUDGMENT

1. BrandLife Kenya Limited, the appellant, has appealed against a judgment of the Employment and Labour Relations Court (ELRC), delivered by Nduma, J. on 19th October 2023, where he found for Anne Koskei, the respondent.

2. The appeal springs from a statement of claim dated 7th May 2020 that the respondent filed in the ELRC, against the appellant. Her case was that she was employed by the appellant effective from 15th October 2018 as a County Manager. Her contract of employment provided for a monthly salary of Kshs. 400,000/=, a 10% payment of the net profit from any new business she brought into the company and upon payment. She was also entitled to 21 working days annual leave. She completed her six months of probation on 23rd May 2019 and received a letter of confirmation.

3. It was her testimony that before she joined the appellant's company, she had successful work experience spanning 15 years at Resolution Insurance (E.A. Limited); Kenya Airways Limited and Ebony Brands and Marketing Limited. Further, that upon employment by the appellant, she performed very well as shown by her appraisal records up to 30th April 2019.

4. The foregoing notwithstanding, on 24th March 2020 she was issued with a notice to show cause why her employment should not be terminated, and was charged with three offences being, dishonesty and

gross negligence leading to loss of income, poor staff management, and insubordination. She was then sent on a seven (7) days compulsory leave and a hearing scheduled for 31st March 2020.

5. Consequently, she requested to be supplied with documents in possession of the appellant in support of the charges, together with further and better particulars, which the appellant declined to provide. The hearing was held as scheduled and thereafter, she received a letter on 8th April 2020 terminating her employment on grounds of dishonesty for misrepresenting to the Group Managing Director the total billing approved by the respondent for the profit and margin thereof, failure to give a satisfactory account of the expenditures incurred and profits realized, as well as timely financial updates to allow smooth operations, and insubordination by disobeying the lawful instructions of the Managing Director leading to break down of work.

6. The respondent disputed the validity and fairness of the reasons given for termination. She stated that the respondent did not objectively consider her comprehensive report and that she was therefore, unfairly treated and no valid reason given for her suspension. Further, that failure to provide particulars when requested negated the entire disciplinary process and was therefore unfair.

7. It was her testimony that the appellant unfairly placed extra demands on her to also attend to the business of a sister company, Imaginative Expression Limited, not based in Kenya. She objected, as this was not provided for in her contract of service and this was the real reason for her victimization.

8. She stated that the disciplinary process was unlawful and unfair as it was conducted by one Mr. Ikechukwu Anoke, who was introduced as a director of the appellant, yet he was not a director as per the certificate of incorporation in terms of the *Companies Act*. That she was subjected to unfair treatment on account of having pregnancy complications and taking time off, work which the appellant was aware of.

9. The respondent averred that she proceeded on maternity leave to run from 15th August, 2019 to 15th November, 2019 and on the same 15th August, 2019 she received a letter reducing her salary to Kshs. 240,000 with effect from 1st September, 2019, without her agreement or consent. The reason given was that she did not bring in new business yet, that was an incentive offered in the contract of employment apart from and unrelated to her fixed salary of Kshs, 400,000.

10. The appellant filed a statement of response dated 27th August, 2020 in opposition to the claim and called two witnesses for the defence.

11. Julius Agenmonmen (RW1), the Managing Director of the appellant, testified that the respondent's performance was consistently unsatisfactory since inception. That she failed to grow the business in three months as she had promised upon employment. He visited the office in May, 2019 and sent her an email expressing his disappointment, but things did not change. On 6th August 2019, he wrote an email querying the loss of USD 60,000 between the months of January and July 2019 and reminding the respondent that she had not met her deliverables as promised, and she had failed to bring new business or maintain the old ones.

12. The appellant cited the respondent for disciplinary action on the foregoing failure and for absenting herself from the office without authority. The respondent was given enough time to respond to the charges made against her in the notice to show cause and she was given a fair disciplinary hearing on 31st March 2020 as per the minutes produced in court. Further, that the respondent was aware that Imaginative Expressions Limited was a sister company belonging to the appellant as demonstrated in the company's Memorandum and Articles of Association. She was the custodian of those documents and knew that Imaginative Expressions Limited projects were her responsibility.

13. RW1 testified that Mr. Anoke became a director of the appellant on 27th January 2020, and was introduced to the respondent on 31st January 2020 via an email. He was therefore, the appropriate person to hear the disciplinary case against the respondent and the venue chosen was a neutral one. That the respondent did not follow the right company policy in notifying the appellant of her pregnancy on time and that the pregnancy had nothing to do with the disciplinary case.

14. RW1 stated that to mitigate the loss in the company the respondent proposed a salary cut in an email dated 10th August 2019 which the appellant accepted in an email dated 12th August 2019. The appellant reduced the respondent's salary by 40% to Kshs. 240,000 and increased commission from 10% to 30% in good faith.

15. Ikechukwu Arthur Anoke (RW2), told the court that he became a director of the appellant on 31st January 2020 and the respondent was duly notified by email. He visited the appellant's office regularly and engaged the respondent officially on operation matters before the disciplinary process began. He confirmed that he conducted the disciplinary hearing alone but allowed the respondent to bring her attorney, and gave her seven days to prepare for the hearing. The respondent had all relevant documents before the hearing, which was conducted in a fair manner. In the end, he found the respondent guilty of the charges preferred against her and recommended dismissal. The termination was communicated via email and the respondent was paid her terminal benefits and issued with a certificate of service.

16. The learned judge considered the matter before him and found in favour of the respondent. He awarded her Kshs. 400,000 in lieu of one month's notice, Kshs. 279,993 in lieu of 21 days annual leave, Kshs. 1,280,000 being arrears of salary not paid from 2nd September 2018 to 8th April 2019 and Kshs. 2,000,000 compensation for the unlawful and unfair dismissal.

17. Aggrieved by the judgment and decree, the appellant filed this appeal. The grounds of appeal as enumerated in the memorandum of appeal dated 14th February 2024 fault the court on several fronts. The Appellant states that the learned judge erred:

    a. In failing to hold that there were fair and valid reasons to terminate the respondent's employment.

    b. In disregarding material evidence that clearly showed that the appellant had valid grounds to terminate the respondent's employment, and it adhered to procedures as stipulated under section 41 of the *Employment Act*.

    c. In finding that there was no proper and fair disciplinary process for failure by the respondent to constitute a proper committee of the Board to hear the disciplinary case against the respondent.

    d. In failing to appreciate that the appellant's director had interacted with the respondent and was well versed in dealing with the issues raised in the Notice to Show Cause.

    e. In making an award for compensation for unlawful termination. That without prejudice to the foregoing, the award of 5 months' pay as compensation for unlawful termination is in any event inordinately high and excessive in the circumstances of this case.

    f. In making a finding that the respondent was entitled to a full refund of the salary deducted from 2nd September 2019 until the date of separation with the appellant.

    g. In failing to take into consideration that the reduction was recommended by the respondent and was effected by the appellant with her consent.

    h. In awarding the respondent payment in lieu of Leave and Notice."

1. This appeal was disposed of by way of written and oral submissions. The firm of M/s Andrew and Steve Advocates filed submissions dated 2nd April 2024 on behalf of the appellant, while the firm of M/s Ogembo and Associates Advocates filed submissions dated 16th April 2024 on behalf of the respondent. Learned counsel Miss Mabango held brief for Mr. Kimathi for the appellant, while Mr. Ogembo, learned counsel, appeared for the respondent. Both counsel orally highlighted the written submissions.

19. In the submissions the appellant condensed its grounds into four headings. These are: validity of the reasons for termination; the disciplinary process initiated against the respondent; deduction of the respondent's salary; and, payment in lieu of leave and notice.

20. The appellant urged that section 43 of the *Employment Act* requires the employer to have a reasonable basis for genuinely believing that the grounds for termination exist even if it later turns out that they in fact, did not. It was posited that the standard of proof is on a balance of probability, as stated by this Court in Kenya Revenue Authority vs Reuwel Waithaka Gitahi & 2 Others (2019) eKLR. That the appellant complied with all the substantive and procedural aspects of termination of employment as required by sections 43 and 41 of the *Employment Act*.

21. It was argued that the appellant furnished the court with the procedure for approving budgets which the respondent was aware of. The procedure involved the respondent drawing up an estimated budget and negotiating with the client. Once the budget was agreed upon with the client, she would draw a "job bag" stating the operation costs against the budget agreed and submit it to the appellant for review and approval before commencement of the project. The key consideration in approving the budget was the profit margin that would be realised on the project.

22. The respondent did not make full disclosure of the costs of the project. She misrepresented the initial budget and the profit margin, and the appellant acted on this misrepresentation and released the funds. It is this failure to follow procedure that led to the loss in the company and the charges against her.

23. The appellant contended that it adhered to the procedure stipulated under section 41 of the *Employment Act*. It referred us to the case of Kenya Revenue Authority supra which was cited in Postal Corporation of Kenya vs Andrew K. Tanui (2019) eKLR, where the court discussed what amounts to a fair hearing or procedure in disciplinary proceedings. It was asserted that the respondent in the present case was issued with a show cause letter requiring her to state why disciplinary action could not be taken against her. The appellant explained to her in detail the reasons it considered for terminating her employment and accorded her the opportunity to respond. Her advocate accompanied her during the hearing conducted by the representative of the appellant, who is a director and qualified by his rank to act as a supervisor to the respondent.

24. The appellant asserted that the trial court was wrong in holding that the deduction of salary was unlawful and a blatant breach of the contract of employment, since the appointment letter was clear that other terms of the contract would be made available to the respondent. This was done via an email on 20th May 2019. In the email, the company's Group Managing Director referred to the discussion held and communicated to the respondent on the need to acquire new clients and grow the business with the existing ones as the company was focused on becoming profitable within a period of three months. Instead, the company incurred losses to the tune of USD 60,000 between January and June 2019.

25. It was further submitted that the loss was communicated to the respondent, and she recommended reducing the salary of all employees. The appellant acted on her recommendation and gave two weeks' notice of change of salary by a letter dated 15th August 2019. The appellant urged that the respondent

did not challenge the said salary review until the filing of this claim and therefore the Court should set aside the award of Kshs. 1,280,000 being arrears of salary not paid.

26. The appellant argued that there was no clause in the contract of employment for them to pay salary in lieu of notice. However, it still made payment to the respondent of one month's salary in lieu of notice. Additionally, that the respondent did not demonstrate to the court the claim for 21 days accrued leave. Under the company policy, employees were not allowed to carry over annual leave days. In any case, the respondent was away from duty for a total of 7 days and absent without any authority for 14 days in the year 2019, which days were ultimately deducted from the respondent.

27. In rebuttal, the respondent urged that there was no communication from her to the appellant on 24th February 2020, as alleged in the charge. As such, there was no evidence that a sum of USD 68,886.10 with a profit margin of 33% was at any time submitted by the respondent. The charge further alleged that on 2nd March 2020 the respondent allegedly informed the appellant that the actual budget approved by the client was USD 59,598.70 bringing the profit margin down to 17%. It was urged that the respondent availed evidence in court and the communication of RW1, evincing that the respondent notified the appellant of the agreed budget of USD 59,598 on 30th January 2020 way before the commencement of the project.

28. The respondent argued that no communication was exhibited by the appellant in the entire life of the project commencing January 2020, where the respondent was accused of delaying the submission of any information or declined to avail any demanded information. It was posited that the disciplinary hearing was done merely as a matter of course and not to achieve fairness for the respondent, and that RW2 was incapable of proffering any explanation as required by the mandatory provisions of section 41 of the *Employment Act*.

29. The respondent submitted that compensation of five months' salary for unfair termination was fair in the circumstances of this case, and that all the issues that the court considered squarely fall within the parameters allowed by the provisions of section 49 (4) of the *Employment Act*. She urged that the pay cut on her salary was based on non-existent deliverables not borne out of the express terms of the employment contract between the parties. That there were no agreed targets to be achieved within a specific period, failure of which a pay cut would be effected on her salary in the employment contract, therefore, the trial court found correctly that there did not exist a consent between the parties to reduce the respondent's salary by 40%.

30. On the pay in lieu of notice, the respondent contended that sections 10 (3) (b) of the *Employment Act* stipulates that the contract of service drawn by the employer ought to contain, inter alia, the length of notice the employer is obligated to give and is entitled to receive, to terminate an employment contract. She urged the court to find that the appellant was required to provide notice of the same period as was required of the respondent in the contract.

31. On the issue of absenteeism or being away from duty, the respondent submitted that it was not raised in the trial court, nor was the appellant's policy which allegedly provides for forfeiture of leave availed in the trial court. That section 28 (4) of the *Employment Act* entitles an employee to utilize any remainder of leave days not taken within a period of 18 months from the leave earning period.

32. This being a first appeal, the mandate of this Court is ensconced in rule 31 (1) (a) of the Court of Appeal Rules, 2022 as follows:

> " On appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power to re-appraise the evidence and to draw inferences of fact."

33. This Court addressed that duty in Gitobu Imanyara and 2 others v Attorney General [2016] eKLR as follows:

> "[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect."

34. Upon considering the grounds of appeal, the rival arguments advanced and the law, we collapsed the grounds into the following issues for our consideration:

a. Whether the appellant followed the proper disciplinary process before terminating the respondent's employment,

b. Whether the reasons advanced by the appellant for termination of the respondent's employment were reasonable,

c. Whether the respondent was entitled to a full refund of the salary deducted from 2nd September 2019 until the date of separation with the appellant,

d. Whether the respondent was entitled to Kshs. 278,993 in lieu of 21 days' annual leave and kshs.400,000 in lieu of one month's notice, and

e. Whether the compensation awarded to the respondent by the trial court is proper in law.

35. We are guided by this Court's decision of Pius Machafu Isindu vs Lavington Security Guards Limited [2017] eKLR where it had the following to say on the burden of proof:

> "There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed thus obviating reliance on the *Evidence Act* and the *Civil Procedure Act*/Rules. Finally, the remedies for breach set out under section 49 are also fairly onerous to the employer and generous to the employee. But all that accords with the main object of the Act as appears in the preamble:
>
> "..to declare and define the fundamental rights of employees, to provide basic conditions of employment of employees.."
>
> Those provisions are a mirror image of their constitutional underpinning in Article 41 which governs rights and fairness in labour relations.
>
> 14. Section 47 (5) of the Act provides for the procedure to be followed in matters of complaints of unfair termination as follows:
>
> > '(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the

grounds of the termination of employment or wrongful dismissal shall rest on the employer."

36. The relationship between the parties in the appeal before us was governed by the *Employment Act*. Section 41 of the *Employment Act* provides for fair procedure before termination of employment as follows:

    1. Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

    2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

37. This Court in interpreting the above provision in Barclays Bank of Kenya Ltd v Banking, Insurance & Finance Union (Kenya) [2019] KECA 408 (KLR) relied on the decision of David Gichana Omuya vs Mombasa Maize Millers Limited [2014] eKLR where it was pronounced that:

> "Section 41 of the *Employment Act* requires an employer to notify and explain to an employee in a language the employee understands of the reasons it is considering for terminating the services of the employee. The employer is also under an obligation to hear and consider any representation which the employee may make before taking the decision to terminate an employee. During the process the employee is entitled to have a fellow employee present and if a union member, a shop floor union representative. The requirements of section 41 of the Act have long pedigree in administrative/public law and are usually referred to as the rule of natural justice. In employment law and practice, it is called procedural fairness."

38. In the case before us, the appellant contended that the respondent was given notice to show cause and ample time to defend herself. Further, that RW2 was competent to hear the matter as he qualified as a supervisor to the respondent. On her part, the respondent posited that the hearing was done as a matter of course but not to achieve fairness, and that RW2 was incapable of proffering any explanation as required by the mandatory provisions of section 41 of the *Employment Act*.

39. The trial court had this to say on fair procedure:

    60. Furthermore, the respondent failed to constitute a proper committee of the Board to hear the disciplinary case against the claimant. The claimant being a County Manager of the respondent could not be subjected to a hearing by a single person who admitted before court that he was removed from the day-to-day operations of the respondent, was a new director of the company and not well versed with the matters raised by RW1 against the claimant.

    61. The conclusion in the letter of termination that the director of the respondent had found the claimant guilty upon granting her a fair hearing is without basis. There was no proper and fair disciplinary process initiated against the claimant. The claimant was simply subjected to a one on one session with a director who did not have relevant information to deal with the allegations made, unfairly against the claimant."

40. We note that the appellant gave the respondent a notice to show cause and the respondent filed a defence stating as follows at paragraph *11*:

> "I have not been informed before hand what aspects of my report the organization deems as unsatisfactory. I made attempts to seek particulars including all the relevant documents that would be relied upon to enable me understand the charge much better but none was availed."

41. It is also not disputed that the hearing was conducted by RW2 as the sole panelist. We have looked at the proceedings of the hearing carried out by RW2 and it is evident that the respondent was not supplied with the relevant documents before the hearing, neither did RW2 have all the documents that the respondent was relying on. In the premises, we agree with the trial court that in those circumstances, the disciplinary process initiated against the claimant was not proper and fair.

42. Turning to the reasons advanced for terminating the respondent's employment, the applicable provision is found in section 43 of the *Employment Act* which provides that:

> "1. In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
>
> 2. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee."

43. The appellant believed that the respondent did not follow the required procedure before presenting a budget to them for approval. This led the appellant to incur losses and hence, the reasons for terminating her contract were genuine. The respondent on the other hand contended that there was no communication from her to the appellant on 24th February 2020 indicating a profit margin of 33% as alleged in the charge letter, and therefore the charges were not substantiated.

44. On this, the trial court held that:

> 57. The court finds that the claimant did not misrepresent the expected profit margin but only gave reasonable projections based on the expenditure incurred during the execution of the project. RW1 confirmed that at the end, the respondent got 18% profit margin on the capital expenditure on the project.
>
> 58. RW1 was unable to prove that any loss was incurred by the claimant in respect of this project, except lamenting that a profit margin of 18% was not good enough and was unacceptable. Clearly the claimant was maliciously blamed for matters beyond her control and was wrongly, without any proof accused of having caused the company a loss of USD 60,000.
>
> 59. Accordingly, the court finds that the respondent had no valid reason to terminate the employment of the claimant. No reasonable employer would have terminated the employment of its County Manager on such flimsy and unproven grounds."

45. From a glance at the notice to show cause dated 24th March 2024, the first charge is that on 24th February 2020 the respondent misrepresented to the appellant Group Managing Director the budget approved by the client for the project, and the profit margins thereof. In her defence to the claims, the respondent categorically stated that she did not make such a misrepresentation. Indeed, there is no such communication in the record of appeal or the supplementary record of appeal. We find that

the court below correctly held that the appellant did not prove the existence of a genuine reason to terminate the respondent's employment.

46. On whether the respondent was entitled to a full refund of the salary deducted from 2nd September 2019 until the date of termination, the appellant asserted that the appointment letter was clear that other terms of the contract would be made available to the respondent. That the priority to acquire new clients and grow the business with the existing ones as the company was focused on becoming profitable within a period of three months was communicated to the respondent. Instead, the company incurred a loss of USD 60,000 between January and June 2019. The appellant acted on the respondent's recommendation to reduce the salary of all employees and the respondent did not challenge the said salary review.

47. The respondent on the other hand urged that the pay cut on her salary was based on non-existent deliverables not borne out of the express terms of the employment contract between the parties. That there were no agreed targets to be achieved within a specific period, failure of which a pay cut would be effected on her salary in the employment contract therefore, the trial court found correctly that there did not exist a consent between the parties to reduce the respondent's salary by 40%.

48. We have evaluated the record and are of the view that the respondent, as the County Manager, merely gave a suggestion on how to cut costs in the company by reducing employees' salaries. She did not consent to her salary being reduced by 40%. We are therefore satisfied that the learned Judge was correct in his finding, since there was no consent between the parties to deduct the respondent's salary, neither was it captured in the employment contract.

49. Next, we consider the issue whether the respondent was entitled to Kshs. 278,993 in lieu of 21 days' annual leave and kshs.400,000 in lieu of one month's notice. The appointment letter dated 3rd October 2018 by the appellant to the respondent stated as follows:

> "3. You will be entitled to 21 working days annual leave. For the first year vacation, this will be pro-rated. Annual leave may not normally be carried forward to the next year.
>
> 8. If you desire to leave the company upon confirmation, you will be required to give the company two (2) months' notice period prior to your exit or pay two (2) months' basic salary in lieu of notice."

50. The appointment letter indicates that the annual leave may not normally be carried forward to the following year. The provision on leave carried to the next year is found in Section 28 of the *Employment Act* which provides as follows:

> " The uninterrupted part of the annual leave with pay referred to in subsection (3) shall be granted and taken during the twelve consecutive months of service referred to in subsection (1) (a) and the remainder of the annual leave with pay shall be taken not later than eighteen months from the end of the leave earning period referred to in subsection (1)(a) being the period in respect of which the leave entitlement arose."
>
> The use of the word 'may not' in the appointment letter connotes that it is not mandatory. Therefore, in some instances the leave days may be carried forward to the next year. However, the instances where this may happen were not stipulated in the appointment letter. As such, guided by the above proviso, we find that the court below was correct in awarding the respondent 21 days' salary in lieu of leave not taken.

51. Additionally, the letter of appointment is silent on the length of notice the appellant should give the respondent before terminating her contract. However, it was expressive that the respondent should give the appellant two months' notice or two months' salary in lieu of termination of her contract. Section 10 of the *Employment Act* provides for what should be in the contract of employment. In sub Section (3) (b) it provides that the contract ought to have:

> ...the length of notice which the employee is obliged to give and entitled to receive to terminate his contract of employment.

52. The foregoing is mandatory and the only implication is that the appellant was supposed to give the respondent the same length of notice as it required of her before termination of her employment. This is where the saying, "What is good for the goose is good for the gander" applies. We therefore find no reason to fault the court below for awarding the respondent one additional months' salary in lieu of the notice.

53. As we have indicated above, the appellant did not follow the proper disciplinary procedure, and it did not have valid grounds to terminate the respondent's employment. Therefore, the respondent's employment was terminated unlawfully. The appellant urged that the award of 5 months' pay as compensation for the unlawful termination was inordinately high and excessive in the circumstances of this case, while the respondent held that it was fair in the circumstances.

54. This Court in Cooperative Bank of Kenya Limited v Yator (Civil Appeal 87 of 2018) [2021] KECA 95 (KLR) (22 October 2021) (Judgment) pronounced itself in regard to the remedies available for unfair termination as follows:

> " The remedies for wrongful dismissal and unfair termination are provided for in section 49 as read with section 50 of the Act. Among them is an award of the equivalent of a number of month's wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal."

55. Further, in Co-operative Bank of Kenya Ltd v Banking Insurance & Finance Union [2016] KECA 97 (KLR), this Court outlined the issues that must be considered in view of section 49 of the Act as follows:

> " 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."

56. In the present case, the judge in awarding the respondent compensation of 5 months' salary had this to say:

> "The claimant is entitled to compensation in terms of section 49 (1) (c) and (4) of the Act. In this respect, the claimant lost a very senior job with good career prospects unlawfully and unfairly, the claimant was subjected to unfair disciplinary process whilst she was pregnant and about to give birth. The claimant was admonished even for taking 7 days sick off to

attend to emergency complications. The attitude displayed by RW1 towards the claimant was inhuman and wanting and failed to give due consideration to the claimant's condition at the time. The fact that the notice to show cause was given to her the same date she took maternity leave is an aggravating circumstance in the matter. The respondent failed to honour the contract of employment by reducing the salary of the claimant by 40% while she was expectant and due to go on maternity leave. The respondent also did not honour the two months' termination notice provided in the contract of employment. The claimant suffered anguish and psychological torture by being subjected to this unlawful process culminating in unlawful termination during her immediate postnatal care period."

We find that the court, in exercising its discretion to compensate the respondent, was correctly guided by sections 49 and 50 of the *Employment Act*. The appellant has not established any basis for this Court to interfere with the exercise of discretion by the learned Judge in making the award of 5 months' pay as compensation for the unlawful termination.

In the end, we find that the appeal has no merit and is accordingly, dismissed with costs to the respondent.

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

D. K. MUSINGA, (PRESIDENT)

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.