County Assembly of Migori & 3 others v Ouma & 2 others (Civil Appeal 102 of 2018) [2025] KECA 6 (KLR) (10 January 2025) (Judgment)

Neutral citation: [2025] KECA 6 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 102 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JANUARY 10, 2025

BETWEEN

COUNTY ASSEMBLY OF MIGORI ..... 1ST APPELLANT

COUNTY ASSEMBLY SERVICE BOARD MIGORI COUNTY ... 2ND APPELLANT

COUNTY PUBLIC SERVICE BOARD MIGORI ..... 3RD APPELLANT

TOM OPERE ONYANGO ..... 4TH APPELLANT

AND

PETER OMONDI OUMA ..... 1ST RESPONDENT

PATRICK OYUGI WAKINE ..... 2ND RESPONDENT

MAURICE THOMAS CHACHA ..... 3RD RESPONDENT

(Being an appeal from the Judgment and Decree of the Employment and Labour Relations Court at Kisumu (Maureen A. Onyango, J.) dated 2nd May 2018 in Petition No. 10 of 2017)

JUDGMENT

1. The respondents were employees of County Assembly Service Board - Migori County, the 2nd appellant herein, in the positions of Clerk to County Assembly and Finance and Economic Planning Officer and Accountant respectively. The genesis of this appeal stems from letters dated 23rd January 2017, in which the 2nd appellant interdicted the respondents from their respective positions of employment. Aggrieved by their interdiction, the respondents filed Petition No. 10 of 2017, before the Employment and Labour Relations Court (ELRC) at Kisumu alleging that the said interdictions were in violation of the provisions of the County Government Act, the Fair Administrative Actions Act as well as *the Constitution* of Kenya. They sought a declaration that their removal and dismissal was unconstitutional; an order of certiorari to quash the decision on their dismissal; an order reinstating

them to their respective positions of employment and also permanent injunctive orders prohibiting their said positions from being filled substantively and or in an acting capacity, in addition to Compensation and costs.

2. An application for conservatory orders was also filed under certificate of urgency, and conservatory orders freezing any disciplinary action against the respondents were issued, in effect maintaining status quo obtaining as at 15th March 2017 pending hearing of the petition. Those orders remained in effect until the date of Judgement on the 19th day of January 2017 after the petition was heard and determined.

3. Opposing the petition, the respondents maintained that the interdictions were valid as they had been implicated in improprieties contained in the report by the County Public Investments and Accounts Committee; and none of their fundamental rights had been violated as they had participated in the meeting whose findings formed part of the said report.

4. The trial court (M. Onyango, J.) issued a declaration that the removal of the respondents from office was unconstitutional; that in view of the changes that had taken place since the petitioners were dismissed, and with the general elections of August 2017 ushering in a new County Government, it would not be in the public interest to reinstate the petitioners, or issue an order prohibiting the appellants from filling the positions held by the petitioners. The court thus declined to give orders of certiorari; instead, damages were awarded for breach of the respondents' constitutional rights and compensation for loss of employment, in the sum of Kshs.5,000,000/-, Kshs.3,500,000/- and Kshs.4,000,000/= to the respective respondents, against all the appellants both jointly and severally. This decision aggrieved the appellants, hence this appeal.

5. A brief background to the genesis of the dispute, will help put matters in perspective. The respondent's case was that by a letter, dated 17th February 2017 they were invited to give written responses on issues raised by the Auditor General's report on financial operations of Migori County Assembly and to appeal before the County Public Accounts and Investments Committee on 24th February 2017. However, before that date, on 23rd February 2017, the appellants were served with letters of summary dismissal backdated to 23rd January 2013. Their contention was that their right to fair administrative action was breached by the appellants who violated their statutory protection under section 41 of the *Employment Act* by failing to accord them a fair hearing, that the dismissal was punitive and vindictive and that they had been subjected to unfair and inhuman treatment, unfair labour practices and deprived of their legitimate expectation.

6. The appellants maintained that the dismissal was justifiable and due process followed. Further the appellants state that the respondents were first interdicted to pave way for investigations, issued with notices to show cause which they failed to respond to, following which they were dismissed, and letters on communication of the dismissal were sent by the 4th appellant in his capacity as secretary; further, that the 2nd appellant was equipped with statutory power to exercise disciplinary control over its employees and there was no malice in the said dismissals.

7. The 1st, 3rd and 4th appellants also maintained that the respondents did not make allegations against them and that the petition as filed did not disclose any cause of action against the appellants; and that the respondents had failed to prove their claim, as they did not question the contents of the report discussed and adopted by the county assembly.

8. The trial court in its judgment considered the question whether the dismissal of the respondents was fair and whether they were entitled to remedies sought. The court noted that the respondents were officers of the Public Service Commission; that during the pendency of Petition No. 4 of 2016, the

appellants attempted to dismiss the respondents despite the existence of orders of status quo, which allegations the appellants did not deny; that the appellants did not deny the contents of the letter dated 17th February 2017 inter alia, required the respondents to appear on 24th February 2017, yet, a day before, letters of summary dismissal were issued which were backdated to 23rd January 2013.

9. The court found that the appellants did not explain how or when the respondents were subjected to due process when they were dismissed, before the date they were to appear before the committee; that the respondents did respond to the notices to show cause, as such it was clear that the respondents were not subjected to due process; and the court also observed that the County Public Accounts and Investments Committee was not the forum to hear disciplinary process against employees, but the County Assembly Service Board.

10. The trial court then went on to hold that the appellants violated the respondents' right to fair labour practices under Article 41, right to fair administrative action under Article 47 and section 4(3) of Fair Administrative Actions Act and right to due process under Article 236 and finally failure to comply with sections 41, 43 and 45(2)(4)(b) and (5) of the *Employment Act*.

11. The trial court also held that the removal of the respondents from office was unconstitutional, but that it would not be in the best interest of the public to reinstate them, but instead awarded damages for breach of the respondents' constitutional rights and compensation for loss of employment in the sums already referred to in this judgment; plus, costs and interest were also awarded.

12. In its memorandum of appeal challenging the judgment of the Superior Court, the appellant raised the following grounds. The learned judge erred in law:

    a. in holding that the removal of respondents from office was unconstitutional, when what the 2nd appellant had done was to summarily dismiss the respondents from employment.

    b. when she failed to appreciate and recognize and place due regard to the 2nd appellant's rights as an employer to summarily dismiss its employees from service subject to sufficient and justifiable cause and due process being followed.

    c. by holding that the summary dismissal of the respondents from the County Assembly Service of Migori County was unconstitutional in the face of the clear and express statutory mandate accorded to the 2nd appellant under section 12 as read with section 13 of the *County Governments Act*, *Act No. 17 of 2012*.

    d. when she failed to give regard and or to appreciate the 2nd appellant's reasons for having summarily dismissed the three respondents from service as had been contained in the letters of dismissal which had been issued to each of the respondents.

    e. when she awarded damages for breach of constitutional rights against all the appellants when such remedy had not been prayed for and/or argued before her; and therefore, should not have been awarded to any of the respondents, in the circumstances.

    f. the damages were manifestly excessive in the circumstances and which damages in any event had not been sought before her and without assigning any reasons for such awards.

    g. failed to consider appellant's defence that there were alternative statutory remedies available under the *Employment Act* which was applicable to the circumstances of the case as was before her; and could only further err when she failed to uphold that where a statutory remedy is prescribed to address any particular grievance, such a remedy must be strictly followed.

h. when she failed to notice appreciate that the respondents did not seek award of damages in their petition and in awarding them damages beyond the maximum compensation allowed by law for unlawful termination, and absence a specific finding that the dismissal of each respondent was unlawful.

i. erred in law when in the circumstances of the case, she failed to consider and state the manner in which the appellant's liability to pay, both jointly and severally, the damages awarded when no evidence at all was led to show how such liability arose in the first instance.

j. there was no evidence led against the 1st and 3rd appellant who had no role in the respondents' dismissal; and the 4th respondent simply communicated a decision which had been made by the 2nd appellant in his capacity as the secretary;

k. when she condemned the 1st, 3rd and 4th appellants in costs of the petition as was before her when there was no evidence led to show how their liability arose in respects of the acts and omissions which the respondents had complained of in the petition.

l. when she failed to distinguish between the appellant's County Public Accounts and Investments Committee Meeting to which the respondent's had been summons on 24th February 2017 and the disciplinary process to which the respondents had been subjected to prior to the dismissal.

m. Erred in equating the 1st appellant's invitation to the vide letters dated 17th February 2017 to the disciplinary process against the respondents, thereby implying that the 2nd appellant's right to exercise disciplinary control over its employees was subject to such Auditor General's report and findings.

n. When she decided the case against the weight of evidence which was led at the trial and failing in the circumstances to dismiss the petition.

It is proposed that the Judgment and Decree of the court dated 19th October 2017 be set aside in its entirety; and the appeal be allowed.

13. The appeal against the 3rd respondent has since been compromised by a Consent Order reinstating the 3rd respondent to his employment; and the appeal against the 1st respondent having abated upon his death as confirmed by the appellants in their submissions herein. The appeal therefore remains between the appellants and the 2nd respondent alone.

14. This being a first appeal, and as has been reiterated in several decisions of this Court, it is this Court's primary duty to evaluate the evidence on record in order to come to its own independent conclusion on the evidence and the law, as per Rule 31(1)(a) of the Court of Appeal Rules. This duty has been reiterated in Abok James Odera t/a A.J. Odera & Associates vs. John Patrick Machira t/a Machira & Company Advocates [2013] eKLR. From the numerous grounds set out, we are of the view that these grounds can be condensed into three main themes, namely, whether it was open to the learned Judge to consider and make findings on the question of the legality and constitutionality of the acts complained of; whether there was any justification for the award of damages, and even if justified, then whether the award was unreasonable and manifestly excessive.

15. As to whether the removal of the respondents was unconstitutional, the appellant contends that removal from office was not the same as a summary dismissal; that in any event, there existed an employer/employee relationship between the 2nd appellant and the respondents, thus clothing the 2nd appellant with a mandate to hire and fire employees in its service; it had justifiable reason to do so; and

properly exercised this right under section 12 of the *County Governments Act*. The appellants argue that the letter of dismissal issued to each respondent had reasons why summary dismissal as a disciplinary action was necessary, thus the dismissal was proper, that in any event, the trial court failed to distinguish between the letter dated 17th February 2017 which according to the appellants related to a call to answer queries on the audit report; and that such invite continued even after the dismissal of the respondents as per letter dated 23rd February 2017. The appellants further submit that the disciplinary process began through the interdiction which was unsuccessfully challenged by the respondents in Petition No. 4 and that no appeal against the dismissal having been lodged the interdiction stood. Further, that the respondents did not respond to the issues in the show cause and neither did they dispute being engaged in actions that justified disciplinary actions taken against them.

16. Drawing from the provisions under section 49(1)(c) of the *Employment Act*, which provides that the employer may be required to pay to the employee, "the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal", the appellants contend that the Judge misdirected herself and arrived at a wrong assessment of damages, the appellant submits that the respondents never prayed for damages for violation of their rights, and that they sought other prayers which were declined, thus the petition ought to have been dismissed.

17. In this regard, reference is also made to section 50 of the *Employment Act*, as well as Section 12(3)(vi) and (vii) which gives the Employment and Labour Relations Court discretionary power to make an award as provided for under section 49 of the Act is discretionary. In raising the argument that judicial discretion must be exercised judiciously, the appellants draw from the words of this Court in Kenya Revenue Authority & 2 Others vs. Daras Investments Limited [2018] eKLR:

> "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."

18. It is on account of this that the appellants maintain that the learned Judge did not exercise her discretion judiciously, and ended up making a rather punitive decision punishing the employer; that the learned Judge ought to have considered the peculiar circumstances of this case, bearing in mind that in the absence of the respondents establishing the exact violation of right, then there was no basis for making the awards. In support of this submission, reference is made to the decision in Hema Hospital Wilson Makongo Marwa [2015] eKLR, where this Court adopted with approval the holding of the Labour Court of South Africa in Lemonde Luggage ccta Pakwells Petze vs. Commissioner G. Dun and others, Appeal Case No. J4 65/205, which when applying provisions of the *Labour Relations Act* of South Africa whose provisions at sections 193 and 194 of the South African legislation, is similar to the Kenyan provision at section 49; and held that the purpose of the compensation is to make good the employee's loss and not to punish the employer.

19. The appellant argues that the trial court made an award for loss of damages in excess of the statutory limit provided for under the *Employment Act*, and that damages awarded should not have exceeded 12 months' salary as compensation in the event summary dismissal was found to be unlawful; that none of the respondents pleaded their earnings, nor did they produce any pay slips, evidence as to when they were employed, the terms of such employment and the period within which such employment was to last, as to form a basis for exceeding the 12 months' salary equivalent.

20. The appellant submits that there existed statutory alternative remedies available to the respondents which they ought to have exhausted in the first instance, which they failed to use; that section 77 of the

County Government Act mandated the respondents, as employees of the County Assembly Service Board, to submit their employment grievances on appeal to the Public Service Commission first before proceeding to court; that the trial court in this instance usurped the jurisdiction of the Public Service Commission under Article 234(2)(i) of *the Constitution* and arrogated to itself a jurisdiction to hear and determine a matter it had no jurisdiction over in the first instance. The case of Secretary, County Public Service Board & Another vs. Hulbhai Gedi Abdille [2017] eKLR is cited to support this proposition. It is also contended that the 1st, 3rd and 4th respondents took no part in the decision resulting in the impugned dismissal, nor did they have any legal powers or lawful mandate to do so; and no evidence was led to show that they indeed did acted so. We are thus urged to find that the trial court erred in finding the 1st, 3rd and 4th appellants liable for damages for violation of the respondents constitutional rights, as the dismissal was made by the 2nd appellant in its capacity as their employer and the aforementioned appellants took no part in that decision. The appellant therefore prays that the appeal be allowed.

21. As pointed out in the earlier part of the judgment, a consent order reinstated the 3rd respondent to his employment and the appeal against the 1st respondent abated upon his demise; and the appeal herein remains between the appellants and the 2nd respondent who filed written submissions contending that the impugned decision is sound and valid in law and need not be faulted. It is argued that matters governing labour practices are not only statutory but also have a constitutional underpinning by dint of Articles 41, 47 and 236 of *the Constitution* of Kenya 2010; that the attempt by the appellants to restrict the trial Judge to consider summary dismissal as non-constitutional arena is therefore misconceived. The 2nd respondent argues that in any case, the trial Judge investigated and interrogated the question as to whether the respondents had been subjected to any fair labour Practice before the alleged summary dismissal and returned a negative answer.

22. It is the respondent's submission that Conservatory Orders issued in Kisumu Petition No. 4 of 2016 ELRC were in existence, yet appellants in utter disobedience, proceeded to summarily dismiss the respondents vide back dated letters which demonstrated unfair labour practices and unfair administrative actions; and that the awards were justified in the circumstances of this case as the learned Judge dropped the prayer for reinstatement and compensation, substituting these with an award damages instead.

23. The main issue in this appeal is whether the respondent's removal from office was constitutional. It is not disputed by both parties that conservatory orders were issued in Petition No. 4 of 2014 which barred any disciplinary action against the respondents until the petition was heard and determined. Once the same was dismissed the disciplinary process was to continue as per the laid down statutory provisions which is clear on the face of the record that the same was not followed.

24. We certainly cannot fault the respondent's argument that labor practice matters are not only statutory but also constitutional by dint of articles 41, 47 and 236 of *the Constitution*. Article 22. (1) of *the Constitution* provides:

> Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

This is fortified by the case of in Francis Atoya Ayeko vs. Kenya Police Service & Another [2017] eKLR and in Jane Angila Obando vs. Teachers Service Commission & 2 Others [2020] eKLR the Court has held that a party is at liberty to file a Memorandum of Claim and argue a claim of constitutional violations, judicial review and other rights violations.

25. Looking at the trial court's judgement, it is clear from the record that by letter dated 17th February 2017 the respondents were asked to respond to queries raised in the Auditor General's report and appear before the County Public Accounts and Investments Committee on 24th February 2017. On 23rd February 2017 the respondents were served with letters of summary dismissal dated 23rd January 2013. The question then would be, were the respondents subjected to due process when in fact they were dismissed before the dated to appear before the committee? It is also noted that the committee is not the forum for disciplinary process. The evidence on record is clear that the respondents were summarily, dismissed without being given a chance to be heard. There is proof that the respondents were dismissed even before they appeared before the committee to answer queries raised by the audit report and worse still vide a backdated letter. The burden was on the appellant to show that the employment was terminated in accordance with fair procedure. The appellant did not discharge this burden. We need not belabor the point, the writing is clearly on the wall; and this court is therefore in agreement with the trial court that due process was not followed.

26. Now that it has been established that due process was not followed, what next? The question of whether or not termination is unfair is dependent on the adherence or lack thereof by an employer of the twin requirements of procedure and substantive justification. Adhering to one and contravening the other renders the dismissal wrongful.

27. Section 41 of the *Employment Act* is instructive and states:

> 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 and the employee shall be entitled to have another employer or union representative of his choice present during this explanation.

28. Sections 43, 45 and 47(5) of the *Employment Act* also requires that an employer must prove the reasons for dismissal are valid and fair and prove that the grounds are justified. At the risk of sounding repetitive, but for the sake of emphasis, it is apparent that the respondents' employment was terminated without being accorded a fair hearing. The appellant's submissions are mere denials. The appellants have not shown that there was a hearing conducted and the respondents invited to defend the show cause notice.

29. This Court in Co-operative Bank of Kenya Limited vs. Yator (Civil Appeal 87 of 2018) [2021] KECA 95 (KLR) (22 October 2021) (Judgment) stated:

> "...that notwithstanding, even where an employee has committed gross acts of misconduct, which acts warrant summary dismissal, the law requires that before such sanction is undertaken, an employer must ensure procedural fairness to the employee by allowing the employee to give his defence. Where the employer us unable to hear the employee in defence, such must only be in exceptional circumstances which the employer must demonstrate."

30. It is clear that for a termination of employment to pass the fairness test, there must be procedural fairness. Procedural fairness in the sense that the employee must not only be accorded an opportunity to defend himself, but also that the body disciplining him must be properly constituted. We are satisfied that in the instant case, the dismissal was unfair, unprocedural and illegal and unconstitutional and as such there is no basis for the court to interfere with the judge's finding to that effect.

31. The appellant also contends that there were alternative statutory remedies available under the *Employment Act* which was applicable to the circumstances of the case as was before her; and could only further err when she failed to uphold that where a statutory remedy is prescribed to address any

particular grievance, such a remedy must be strictly followed. It is argued that courts should not micro-manage the workplace. Arguing that since there existed alternative statutory remedies available to the respondents which they ought to have first exhausted, in the first instance but failed to do so, then this matter should never have seen the light of day in the courts; that Section 77 of the County Government Act mandated the respondents, being employees of the County Assembly Service Board, to submit their employment grievances on Appeal to the Public Service Commission first before proceeding to court. The trial is thus accused of usurping the jurisdiction of the Public Service Commission under Article as provided under Article 234(2)(i) of *the Constitution*; and arrogated to itself a jurisdiction to hear and determine a matter it had no jurisdiction over. In support of this submission, reference is made to the case of Secretary, County Public Service Board & Another vs. Hlbhai Gedi Abdille [2017] eKLR.

32. Section 77 of the *County Governments Act* provides for the jurisdiction of the Public Service Commission over disputes arising from the decisions of the County Public Service Board as follows:

    1. Any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any county public officer may appeal to the Public Service Commission (in this Part referred to as the "Commission") against the decision.

    2. The Commission shall entertain appeals on any decision relating to employment of a person in a county government including a decision in respect of:

        a. recruitment, selection, appointment and qualifications attached to any office;

        b. remuneration and terms and conditions of service;

        c. disciplinary control;

        d. national values and principles of governance, under Article 10, and values and principles of public service under Article 232 of *the Constitution*;

        e. retirement and other removal from service;

        f. pension benefits, gratuity and any other terminal benefits; or

        g. any other decision the Commission considers to fall within its constitutional competence to hear and determine on appeal in that regard.

33. What the appellants are invoking is the doctrine of exhaustion, which has been examined by this court in at least two decisions William Odhiambo Ramogi & 3 Others vs. Attorney General & 4 Others; Muslims for Human Rights & 2 Others (interested parties) (2020) eKLR where this Court differently constituted, held there were exceptions to the doctrine of exhaustion and considered the threshold of determining whether or not exhaustion of the appeal process could be excused; observing that exceptional circumstances ought to be considered in determining whether deferring to the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and allow the suit to proceed before it. We acknowledge that it is essential for a court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

34. In R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya & 6 Others [2017] eKLR, this Court stated that:

> "What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake."

35. We note that the learned judge in her judgment did not address the issue concerning available alternative statutory remedy, that even if respondents were aggrieved by the decision, they ought to first have appealed to the Public Service Commission, before bringing their grievances to court. Indeed, this Court considered the issue of doctrine of exhaustion in depth in NGOs Co-ordination Board vs. EG & 4 Others; Katiba Institute (Amicus Curiae) (Petition 16 of 2019) [2023] KESC 17 (KLR) where it observed that;

> " The principle running through these cases is where there was an alternative remedy and especially where parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it...".

Whereas the observation made by the appellants is correct, we take note that the issue in the matter was not so much the dismissal, rather it was on violation of the right to be heard, which in our view was on the verge of most likely necessitating Constitutional interpretation, a sole mandate of the courts; It is our considered view that the Public Service Commission has no mandate to interpret *the Constitution* and declare violations. We are thus satisfied that the mechanism under section 77 of the County Government Act was not an adequate and suitable forum for the respondents who had met the threshold to benefit from the exception rule from the application of doctrine of exhaustion applying the decision of the Court of Appeal in William Odhiambo Ramogi & 3 Others vs. Attorney General & 4 Others; Muslims for Human Rights & 2 Others (supra)

36. Turning to the issue of damages awarded, one of the guiding principles for the remedies under section 49 is that damages are awarded to compensate a claimant, and not as a punishment to the employer, but to make good the employees loss. In the case of 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 held:

> " 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."

37. The remedies for wrongful dismissal and unfair termination are provided for in section 49 as read with section 50 of the Act to constitute salary, allowances, notice and compensation capped at a year's gross pay, at the time of dismissal. Section 49(4) however goes further and sets out considerations which should be taken into account in deciding the appropriate remedies under 49(1). Section 49 provides as follows:

    49. Remedies for wrongful dismissal and unfair termination:

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

            a. the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;

            b. where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or

            c. the equivalent of a number of months' wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

38. The above section makes provision for a wide range of remedies, and the mode of assessment of those remedies was set out by this Court in the case of Co-operative Bank of Kenya Limited vs. Banking Insurance & Finance Union (2016) that:

> "Our understanding of the Act is that the prescribed remedies are discretionary rather that mandatory to be granted on case by case basis...the 13 considerations the court must take into account before determining what remedy is appropriate include the wishes of the employee, circumstances of termination and the extent to which the employee caused/ contributed to it, the practicality of reinstatement, employees length of service...etc the court before exercising discretion to determine what remedy to award, the court must be guided by the above comprehensive list of considerations."

Such discretion must be however exercised judiciously as per this Court's holding in Kenya Revenue Authority & 2 Others vs. Darasa Investments Limited [2018] eKLR, Civil Appeal No. 24 of 2018 which rendered itself thus:

> "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."

39. We acknowledge that under Rule 7(3] of the Employment & Labour Relations Court Rules 2016, a Party may seek the enforcement of any constitutional rights and freedoms, or any constitutional provision through a Statement of Claim, or other Suit filed before the court. Article 23(3) of *the Constitution* provides:

3. In any proceedings brought under Article 22, a court may grant appropriate relief, including:

   a. a declaration of rights;

   b. an injunction;

   c. a conservatory order;

   d. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

   e. an order for compensation; and

   f. an order of judicial review.

40. Indeed, the court is entitled to consider remedies under Article 23 of *the Constitution*, which would include damages beyond any statutory capping. However, as aptly pointed out by the appellants, that party must first demonstrate that the remedies guaranteed to them under legislation, are insufficient in redressing the violation so as to require the Court to look outside the *Employment Act*, 2007 and the *Employment and Labour Relations Court Act*. However, in the instant matter, no demonstration of a violation of any right that warranted an award in excess of the 12 months' compensation provided for under the *Employment Act* was made in this instance, and the appellants submit that as against the 2nd respondent, the award was excessive since there was no justification for making an award in excess of the statutory limit.

    In the instant appeal what is of concern relates to the 2nd respondent who was awarded the Kshs.3,500,000, a figure which is seriously contested as it seemed to have been plucked from the abacus since no evidence was led as to what were the salaries and allowance dues the respondents were owed. Butt vs. Khan [1981] KLR 349 set out the principle regarding an appellate court's consideration of the issue of damages thus:

    > " An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low".

41. Clearly, general damages are awarded if the claimant establishes in principle his legal entitlement to them, and a trial Judge must make his own assessment of the quantum of such general damages. In order to justify reversing the award of damages, this Court must be convinced that the trial Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, an entirely erroneous estimate of the damage to which the respondent is entitled.

42. In a host of decisions, this Court has established the rule that an award must be based on sound judicial principles; and the trial Judge must justify or explain why a claimant is entitled to the damages awarded. See Ol Pejeta Ranching Limited vs. David Wanjau Muhoro [2017] eKLR this Court was categorical

that the exercise of discretion must not be capricious or whimsical, as well articulated in the following paragraph:

> " The trial judge did not at all attempt to justify or explain why the respondent was entitled to the maximum award. Yes, the trial Judge may have been exercising discretion in making the award. However, such exercise should not be capricious or whimsical. It should be exercised on some sound judicial principles. We would have expected the Judge to exercise such discretion based on the aforesaid parameters. In the absence of any reasons justifying the maximum award, we are inclined to believe that the trial Judge in considering the award took into account irrelevant considerations and or failed to take into account relevant considerations, which act then invites our intervention".

43. In considering an award of damages, it is critical not to trivialize the economic injury suffered by the employee, yet at the same time not treat the compensation as some sort of punishment to the employer. We hasten to caution that courts must be wary of setting a precedent where employment disputes are all turned into constitutional issues since the issue of a fair hearing and fair administrative action always arise in such disputes. We take into account a number of comparative jurisprudence that limit the award of general damages in constitutional cases to only proven damages and not presumed damages. In Ntanda Zeli Fose vs. Minister of Safety and Security (supra), the Court held that an award of constitutional damages in addition to punitive or exemplary damages, would not be appropriate vindication of the Plaintiffs constitutional rights; although there was a general observation that the law was flexible to provide relief that was appropriate for a breach of constitutional rights.

44. The US Supreme Court in Carey vs. Piphus, 435 U.S. 247 (1978) ruled that while presumed compensatory damages may not be awarded in an action for a violation of procedural due process, nominal and proven compensatory damages are appropriate to redress such a grievance. Presumed compensatory damages in this regard are general damages that are recoverable without proof of actual loss.

45. The relevant principles applicable to award of damages for constitutional violations under *the Constitution* were also explained by the Privy Council in the case of Siewchand Ramanoop vs. The AG of T&T, PC Appeal No. 13 of 2004, where Lord Nicholls at Paragraphs *18* & 19 held that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense in the following terms:

> " When exercising this constitutional jurisdiction, the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases, more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.
>
> An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasize the importance of the constitutional right and the gravity of the breach, and deter further breaches."

46. The root of this complaint was the violation of the respondent's right to fair labour practices, as a consequence of being denied the right to a fair hearing. Article 24 of *the Constitution* demonstrates how crucial this right is in the following terms:

> Limitation of rights and fundamental freedoms. A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:
>
> a. the nature of the right or fundamental freedom;
>
> b. the importance of the purpose of the limitation;
>
> c. the nature and extent of the limitation;
>
> d. the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and
>
> e. the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

47. The respondents clearly proved a case of violation of their right to be heard under article 50 (1) and fair administrative action under article 47 of *the Constitution*. We have considered past compensatory awards related to violation of the right to a fair hearing so as to give us a snippet of judicial trends of awards in constitutional labour relations matters; for instance, in Jekim Hospital Nkubu Ltd & Another vs. Kenya Medical Practitioners and Dentists Council & 2 Others (Constitutional Petition 12 of 2023) [2023] KEHC 27205 (KLR) (28 December 2023) (Judgment), the court took into consideration the duration of the breach of the right of fair administrative action and fair hearing, to award a modest award of damages in the sum of Kshs.1,000,000/

48. Ultimately, the principles that guide this Court in such a scenario as we find ourselves in were stated by Kneller JA in Kemfro Africa Limited T/A Meru Express Services & Gathongo Kanini vs. A.M. Lubia & Olive Lubia (1982-88) I KAR 727 at page 730, as follows:

> " The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. See Ilango vs. Manyoka [1967] E.A. 705, 709, 713; Lukenya Ranching and Farming Cooperative Society Limited vs. Kalovoto [1970] E.A. 414, 418, 419. This court follows the same principles."

49. Indeed, this Court applied the aforesaid approach in Peter Ndegwa Kiai t/a Pema Wines & Spirits vs. Attorney General & 2 Others (Civil Appeal 243 of 2017) [2021] KECA 328 (KLR) (17 December 2021) (Judgment) whilst interfering with the trial court's ward thus:

> We note that the trial Judge did not indicate the factors and circumstances of the case that he took into account in coming to the global award of general damages of Kshs.1,000,000-"

We reiterate the caution in converting all employment disputes into constitutional issues, and consider it prudent that a conservative award of damages for the violation of the constitutional rights, with no additional compensation for the loss of employment should be sufficient. In this regard, we echo these very words in finding that in awarding the 2nd respondent the sum of Kshs.3,500,000/- as general damages, the trial Judge did not indicate the factors and circumstances of the case that he took into account in coming to the global award of general damages. Thus, taking into account the trends adopted by courts in the two decisions we have cited, as well as the current economic trends, in particular, the diminishing strength of the Kenyan shilling, we find that the sum awarded as damages was inordinately high as to warrant our interference. We set aside the sum awarded of Kshs.3,500,000/-; and substitute it with a sum of Kshs.1,500,000/-. Accordingly, the appeal succeeds only to this limited extent.

Each party shall bear their own costs in this appeal.

DATED AND DELIVERED AT KISUMU THIS 10TH DAY OF JANUARY, 2025.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR