Tome v Bungoma County Assembly Service Board & 2 others (Civil Appeal E115 of 2024) [2025] KECA 1289 (KLR) (11 July 2025) (Judgment)

Neutral citation: [2025] KECA 1289 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL E115 OF 2024

HA OMONDI, F TUIYOTT & LK KIMARU, JJA

JULY 11, 2025

BETWEEN

FRANCIS SIMIYU TOME ..... APPELLANT

AND

BUNGOMA COUNTY ASSEMBLY SERVICE BOARD ..... 1ST RESPONDENT

SPEAKER/CHAIRMAN BUNGOMA (CASB) ..... 2ND RESPONDENT

CLERK/SECRETARY BUNGOMA (CASB) ..... 3RD RESPONDENT

(Being an appeal from Judgment and Decree of Employment and Labour Relations Court at Bungoma (J.W. Keli, J.) dated 14th March, 2024 in ELRC Cause No. E011 of 2022)

JUDGMENT

1. The contract of service of Francis Simiyu Tome (the appellant) as a Principal Clerk Assistant of the County Assembly of Bungoma was terminated on 8th February, 2022 by the Bungoma County Assembly Service Board (CASB), or the 1st Respondent). A judgment delivered on 4th March, 2024 by the Employment and Labour Relations Court sitting at Kakamega, (Hon. JW. Keli, J) found the termination to be both substantively and procedurally faulty and the dismissal to be unfair and unlawful.

2. The core findings of facts made by the ELRC around which the dispute resolved are not disputed by either of the parties.

3. On 29th June, 2020, the Public Administration and ICT Committee of the Assembly interrogated the proposed annual budget for the 2020/2021 in the presence of two Chief Officers of the County Government of Bungoma who were asked to provide further documents. The Chief Officers obliged to the request. On 17th July, 2020, the Clerk of the CASB caused the appellant to append his signature

on the register of documents in the office of the clerk to obtain the file documents that were to be availed before the committee. The file was on the same day tabled before the committee.

4. It turned out that some documents availed to the committee had information relevant to two public interest petitions which were being considered by the committee on the removal of the Governor. It was the appellant's case that being tasked with dealing with the procedural issues on the petitions, the Governor sought some information on the petition from him but he declined to provide any.

5. On 13th August, 2020, while the two petitions were pending, officers from the Director of Criminal Investigation Nairobi arrested the appellant and took him to Nairobi where he was arraigned at Kibera Chief Magistrates Court under Criminal Case No. 810 of 2020 and charged with the offence of stealing and handling a stolen file to which, the appellant contended, he transmitted to the Assembly.

6. On the basis of the pending Criminal Case at Kibera, the 3rd respondent interdicted the appellant on 18th August, 2020. The appellant asserted that under regulation 51(1) of the County Assembly Services Regulations 2020, it was only the 1st respondent, the Board, who could interdict him. Further, there was no evidence that the 1st respondent sanctioned the interdiction nor any internal complaint record existed on the same, thus the interdiction was solely based on a DCI letter that was never produced in any internal complaint investigation. In addition, the appellant also noted that the respondents in effecting the said interdiction, never granted him any hearing. During this interdiction period, from August 2020 to January 2022, he only received half of his basic salary.

7. The appellant challenged the criminal proceedings by way of judicial review in JR No. E1093 of 2020 and sought stay not just of the criminal proceedings but also the interdiction. The judicial review was successful and the criminal charges were quashed on 21st January, 2022. Similarly, the DPP was prohibited from preferring any charge(s) against him relating to the specified file. However the Judicial Review Court declined to grant a substantive order quashing the interdiction proceedings or reinstating the appellant. In its findings, the JR court was of the opinion that there was no factual basis upon which the appellant could be charged as there were inherent contradictions in the prosecution case, for example, the file which the appellant handled was described as being kept in common open office space and was not considered confidential. Crucially, no one at the County Assembly had ever inquired about the file's whereabouts or made any complaint of a missing or stolen file. Another contradiction was that the alleged file was found in Dennis Wasike's (a staff of the former Governor) possession on 6th August 2020 yet the report of it being stolen was booked at an unknown police station on 8th August 2020.

8. However, the relief that should have been enjoyed by the appellant was short-lived because ten days later, on 31st January, 2022, he was issued with a show cause letter citing that he had stolen a public office file, disclosed confidential information without authority and had a history of disciplinary issues. In addition, he was re-arrested and his interdiction continued.

9. The show cause letter was the precursor of the disciplinary proceedings which the court found to have failed the test for both procedural and substantive fairness.

10. Responding to the show cause letter in his response dated 7th February, 2022, the appellant sought for clarification and evidence attendant to the allegations. Further, he contended that the show cause letter did not comply with regulation 50(6) of the Bungoma County Assemblies Services Act Regulations 2020 which requires that investigations be done. He similarly contended that no investigation report was provided as evidence of theft, thus denied all allegations of theft and disclosure of confidential information. He further contended that he was never asked to return the file and that the show cause letter lacked specific details such as a date, time or venue for him to appear for a hearing.

11. Despite his response, the respondents denied him the requisite audience and on 8th February, 2022, he received a summary dismissal letter. The appellant claimed that the minutes of the Board meeting that approved his dismissal were not signed on the same date and were not jointly signed by the 2nd and 3rd respondents, and therefore were inauthentic. Ultimately, the appellant's case was that his dismissal was unlawful, unfair, irrational, and procedurally improper, arguing that it was based on an alleged misconduct that was never internally investigated or proved, and without granting him a fair hearing and was similarly a product of political machinations.

12. Although the appellant had sought a plethora of reliefs, many were declined and the ELRC in the end made the following dispositive order;

> " The court enters judgment for the claimant that the termination of his employment was unlawful and unfair and awards as follows:
>
> a. One month notice pay of Kshs.187,870/-
>
> b. Compensation pay equivalent of 12 months' gross salary awarded at a gross salary of Kshs.187,870). Total sum awarded Kshs.2,254,440/-
>
> c. The claimant is awarded costs in the claim for Kshs.150,000/-
>
> d. All the above amounts (a, b and c) to be paid to the claimant by the 1st respondent within 30 days, failing which interests at court rate to apply from date of this judgment until full payment."

13. The memorandum of appeal sets out 14 grounds. Some in argumentative fashion. We think those grounds can be comprehensively collapsed into four. That the trial Judge erred in law and fact in:

i. Finding that interdiction to be lawful.

ii. Failing to order reinstatement of the appellant.

iii. Failing to make an award of exemplary damages.

iv. Making a low award in costs.

14. Regarding the issue of reinstatement, the appellant submits that the trial court erred by refusing to grant the said order, particularly on the ground that the initiation of the suit against the respondents caused irretrievable loss of trust between them.

This reasoning, the appellant argues, directly contravenes Section 46(h) of the *Employment Act*, which explicitly states that an employee's initiation or intended initiation of legal proceedings cannot be the basis for disciplinary action. Furthermore, it impeaches Articles 22 and 258 of *the Constitution*, which upholds the right to institute court proceedings. The appellant contends that very exceptional circumstances exist to warrant reinstatement, distinguishing his case from Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR. He contends that in his case, such circumstances included the absence of any internal or external complaint regarding the theft allegations, and the fact that the basis for his arrest and interdiction was demonstrably false: police alleged arresting him in Nairobi on 6th August 2020 while he was actively performing official duties at the Bungoma County Assembly on that same date. The 3rd respondent (responsible for the assignment of duties and supervision of the staff on behalf of the 1st respondent) never brought to the attention of the 1st respondent any complaint regarding him pursuant to Regulation 50(6) of the Bungoma County Assembly Service Regulations 2020; and that there was no Occurrence Book (OB) report of the alleged

arrest or file recovery in Nairobi. In addition, the 1st respondent did not provide any evidence to show that his position was advertised and competitively filled.

15. Critically, the appellant asserts that the 1st respondent failed to involve the Staff Advisory Committee (SAC), which is mandated by Section 29(c)&(f) of the County Assemblies Services Act 2017 for purposes of undertaking mandatory investigations against an affected employee and advising the 1st respondent on administrative actions to be meted. This failure, supported by cases like Ojako v County Assembly Service Board, *Homa Bay & 2 others (Petition E004 of 2022*) [2022] KEELRC 1174 (KLR) and Robert Khamala Situma & 8 others v Acting Clerk of the Nairobi City County Assembly [2022] eKLR, renders the process malicious and a violation of fair administrative action and fair labour practices. The appellant thus submits that the trial court ignored the evidence and very exceptional circumstances for reinstatement pursuant to section 12(3)(vii) of the ELRC Act as read together with section 49(3)(a)(b) of the *Employment Act*. Additionally, the appellant points out that the allegations against him shifted during the trial, from stealing a file to not returning it, and the final dismissal ground inexplicably changed to insubordination without any evidence. The appellant submits that the trial court wrongly prioritised the common law principle against specific performance over the overwhelming evidence and exceptional circumstances, and erred by imposing external factors (commencement of the suits) as an impediment to reinstatement. He relies on precedents such as Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR and Samuel Nguru Mutonya v National Bank of Kenya Limited [2017] eKLR, where reinstatement was ordered due to unfair/unlawful termination, particularly considering long service and difficulty in securing similar employment.

16. On the question of whether a summary dismissal can be premised on unauthenticated minutes, the appellant strongly asserts that his dismissal was founded on such minutes. He highlights that the 2nd respondent confirmed the 3rd respondent (secretary to the 1st respondent) did not sign the minutes of the disciplinary meeting, nor did any other members. It is further noted that the 2nd respondent alone signed the minutes on 22nd September 2022, long after the 8th February 2022 meeting, without any evidence of any meeting being held on the later date. The appellant argues that minutes must be signed at the meeting they are taken, citing Kiilu v Isinya Resorts Limited (supra), and therefore, any action, including the summary dismissal letter dated 8th February 2022, premised on such inauthentic and tainted minutes is null and void ab initio. Despite the trial court acknowledging the inauthenticity of these minutes, it inexplicably failed to vitiate them or the actions stemming from them.

17. Regarding the lawfulness of the appellant's interdiction, while Regulation 51(1) of the Bungoma County Assembly Service Regulations 2020 permits interdiction for criminal charges, the appellant argues his interdiction was unlawful because it was based on a falsities having noted that he was in the precincts of Bungoma County Assembly on 6th August, 2020 for the entire day and whereas it was alleged that the police arrested him on the same day. He contends that as demonstrated in Republic v Kibera Chief Magistrates Court & 6 others Ex parte Francis Simiyu Tome [2022] eKLR, there was no evidence of any incident booked in any OB of any Police Station regarding the alleged file recovery or arrest in Nairobi on that date.

18. Finally, concerning the award of exemplary damages, the appellant submits that the trial court erred in disallowing them and failing to appreciate the context of the respondents' oppressive actions. He emphasizes that he was subjected to incarceration and false criminal charges that were commenced and sustained by the police in collusion with the respondents. He was also unilaterally and unlawfully interdicted, with the interdiction subsisting despite a lawful High Court stay order. The appellant points out that the 1st respondent was the complainant in the criminal suit, and its servants actively participated to support the charges, aiming to have him jailed as a basis for termination of his

employment. The dismissal occurred without investigation or hearing, even after the criminal charges were quashed. The appellant contends that the respondents' conduct was oppressive, arbitrary, and unconstitutional and calculated to achieve his summary dismissal, which was more profitable to them compared to the 12 months' compensation awarded under section 49(1)(c) of the *Employment Act* 2007. He cites Godfrey Julius Ndumba Mbogori & another v Nairobi City County [2018] eKLR for the definition of exemplary damages in cases of oppressive, arbitrary or unconstitutional action by the servants of the government or conduct calculated to make a profit exceeding compensation. He further relies on Leonard Gethoi Kamweti v National Bank of Kenya Limited [2020] eKLR, which held that being "arrested by police or being charged with trumped up criminal charges as a way of pushing the appellant out of employment" warrants exemplary damages.

19. The respondents raise several preliminary procedural challenges regarding the appellant's submissions. They claim that the record of appeal is not certified, there is no memorandum of appeal, and the grounds of appeal are merely listed in the notice of appeal. Furthermore, they note that the appellant has not argued his appeal ground by ground but rather presented his submissions in prose, which they view as creating ambiguities in the appeal itself. They also state that despite the Honourable Court advising the appellant on 15th October 2024 on how to proceed with his appeal, he has not followed the advice.

20. In their analysis, the respondents address the issues raised by the appellant in the appeal vis-à-vis the trial court and contend that the appellant is seeking fresh reliefs in the appeal which prayers were not sought in the trial court. Regarding the reinstatement of the appellant, they submit that reinstatement is a premiere remedy. They argue that it is only available under sections 49 and 50 of the *Employment Act*, 2007. The respondents strongly emphasize the common law principle that there should be no order for specific performance in a contract of service except in very exceptional circumstances. They contend that no such exceptional circumstances exist to warrant reinstatement in this case. The respondents highlight the trial judge's finding of a long-running feud and bad blood between the appellant and the respondents, exacerbated by the appellant's initiation of multiple suits against the employer. They argue that this relationship has deteriorated such that the remedy of reinstatement would not suffice. They also refer to the trial court's previous rulings in other petitions (Bungoma ELRC Petition No. 11 of 2021, Bungoma ELRC Petition No. E006 of 2021, and Bungoma ELRC Petition No. E007 of 2021), where the prayer for a permanent injunction restraining the respondent from recruiting another person to take over the appellant's office was addressed, which, they suggest, further indicates the unavailability of the remedy of reinstatement. They cite Ol Pejeta Ranching Limited v David Wanjau Muhoro (Civil Appeal 42 of 2015) [2017] KECA 329 (KLR) to support their position that no ground has been raised to make this Court differ with the finding of the trial court and its exercise of discretion in that regard as they are based on evidence.

21. Concerning the award of damages, the respondents submit that compensation is generally awardable, but the award of damages is discretionary, and general damages are not necessarily awardable in breach. Citing the case of Kenfreight (E.A) Limited v Benson K. Nguti (Civil Application 31 of 2015) [2016] KECA 409 (KLR) on the basis of awarding compensation, they argue that the trial court did not exercise its discretion injudiciously in its award of damages. Specifically regarding exemplary and punitive damages, the respondents submit that there is no ground for such an award. They contend that the appellant failed to present evidence to the trial court to demonstrate his entitlement to these damages.

22. Finally, regarding the costs of the trial, the respondents submit that the granting of costs is also discretionary, and they maintain that the court below did exercise its discretion judicially in this regard

as well. They cite Kithangari & 4 others v Mutahi (Application E024 of 2024) [2024] KESC 72 (KLR) to support this argument.

23. In the supplementary submissions, and in response to the procedural issues raised by the respondents, the appellant asserts that there is no legal requirement to argue grounds of appeal sequentially; submissions are merely a "marketing language" and courts can rule on all grounds in the memorandum of appeal regardless as held in Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014] eKLR. He maintains that his record of appeal is duly compliant with Court of Appeal Rules, with key documents bearing the trial court's seal. The appellant denies claims of fresh reliefs, stating that reinstatement relief was in his original claim, and other grounds (e.g. unauthenticated minutes, costs) arose post- filing or post-judgment, which is permissible. He further highlights that the constitutional principle of non-technicality (Article 159(2)(d)) should guide the court, especially given his status as a lay person. Finally, the appellant notes that the respondents' submissions were filed late and improperly merged with authorities, contrary to court directions.

24. This being a first appeal, our duty is to re-evaluate the evidence afresh and to draw our own conclusion having regard to the fact that, unlike the trial court, we did not see or hear the witnesses testify. This position was stated in the case of Selle & Another v. Associated Motor Boat Company Ltd. & Others [1968] EA 123 as follows:-

> " I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An 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 allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v. Ali Mohamed Sholan (1955) 22 EACA 210)."

25. Although the appellant takes issue with the finding that his interdiction was lawful, we think that once the trial court found the termination to be unlawful the controversy around the interdiction was rendered otiose. This is because not only did the trial court find that termination failed the procedural fairness test but that there was no proof of valid reason for dismissing the claimant from the employment of the 1st respondent. A finding that there was no substantive reason for dismissing the appellant would mean that he would be entitled to any salary withheld during the period of interdiction, from 18th August, 2020 until his dismissal on 8th February, 2022.

26. While the trial court made a finding that the appellant would not be entitled to the withheld salary because it was not pleaded in the statement of claim, such a stance may be rather pedantic.

    The trial court having found that there was no valid reason for the termination of appellant's contract then they would be no reason why any salary withheld during the interdiction should not be paid. Payment of those withheld sums would be a natural consequence of a finding that the termination failed the substantive test.

27. Section 49 of the *Employment Act* sets out a raft of remedies available for wrongful dismissal and unfair termination. Reinstatement is one such remedy. Whether or not to order reinstatement is a call to be made within the straits of section 49(4) of the Act:

> "A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following:
>
> a. The wishes of the employee
>
> b. The circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
>
> c. The practicability of recommending reinstatement or re-engagement;
>
> d. The common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
>
> e. The employee's length of service with the employer;
>
> f. The reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
>
> g. The opportunities available to the employee for securing comparable or suitable employment with another employer;
>
> h. The value of any severance payable by law;
>
> i. The right to press claims or any unpaid wages, expenses or other claims owing to the employee;
>
> j. Any expenses reasonable incurred by the employee as a consequence of the termination;
>
> k. Any conduct of the employee which to any extent cause or contributed to the termination;
>
> l. Any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and
>
> m. Any compensation, including ex-gratia payment, in respect of termination of employment paid by the employer and received by the employee."

28. This Court has discussed when the remedy for reinstatement is deserved. In the case of Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike [2017] KECA 446 (KLR) the Court held:

> "A striking feature of the learned Judge's award of reinstatement is that it is not preceded, accompanied or followed by any indication that the foregoing matters were given serious or any consideration as they were required to be. We consider that to be a serious error of law because, as set out in (d), the order of specific performance in a contract for personal services, which an order of reinstatement amounts to, is not to be made except in very exceptional circumstances. At the very least a Judge ought to set out the factors that mark out a particular case as possessed of exceptional circumstances before reinstatement can be ordered. This provision, properly understood, ought to render orders of reinstatement

rarities, not common place and routine pronouncements as appear to come from certain sections of the Employment and Labour Relations Court. This calls for a strict adherence to the law as carefully and mandatorily set out in the controlling statute.

This Court has authoritatively spoken on this subject in several judgments and we do no more than reiterate the same. In the KENYA AIRWAYS LTD case (supra) Githinji, J.A expressed himself thus;

> "(27) The remedy of reinstatement is discretionary. However, the Industrial Court is required to be guided by factors stipulated in section 49(4) of the EA which includes the practicability of reinstatement or re- engagement and the common law principle that specific performance in a contract for employment should not be offered except in very exceptional circumstances. The court should also balance the interest of the employees with the interest of the employer."

This was echoed in the same case by Maraga JA (now CJ);

> "68. As I have said in Kenya, reinstatement is one of the remedies provided for in Section 49(3) as read with Section 50 of the *Employment Act* and Section 12(3) (vii) of the Industrial Court Act that the court can grant. Reinstatement is, however, not an automatic right of an employee. It is discretionary and each case has to be considered on its own merits based on the spirit of fairness and justice in keeping with the objectives of industrial adjudication. In this regard, there are fairly well settled principles to be applied. For instance the traditional common law position is that courts will not force parties in a personal relationship to continue in such relationship against the will of one of them."

The learned Judge cited with approval the decision of the Court of Appeal down under in the case of New Zealand Educational Institute vs. Board of Trustees of Auckland Normal Intermediate School [1994]2 ERNZ 414 CA stated as follows;

> "Whether ... it would not be practicable to reinstate [the employee] involves a balancing of the interests of the parties and the justice of the cases with regard not only to the past but more particularly to the future. It is not uncommon for this Court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship."

With respect, we agree."

29. The trial Court did not find reinstatement to be ideal for the reasons that; the trust relationship between the employer and employee had broken down based on the various court proceedings between them; there was no proof that the appellant had sought alternative employment and failed to secure it; and the claimant had been out of the position for over three years, beginning the interdiction in August, 2020.

30. On our part we do not think that the appellant should be disadvantaged because of the various court proceedings he commenced against the employer. This is because those proceedings were not frivolous. They were triggered by legitimate pursuit for justice which in the end found vindication in the finding by the trial court that his termination was unlawful. If that was the only reason for declining the order for reinstatement, then we would have set it aside.

31. Yet it is not enough as posited by the appellant that reinstatement was deserved simply because there was no substantive and procedural rectitude in his dismissal. Such a proposition is inconsistent with the guidelines set out in section 49(4) which are premised on the basis that there has been a wrongful dismissal or unfair termination in the first place. The remedy of reinstatement is contingent on the existence of exceptional circumstances which vary from case to case and the statutory considerations that we have set out. We also do not think that reinstatement should have been a suitable remedy if only as we are asked by the appellant "to ensure that Public Institutions such as the 1st respondent are not to be administered akin to private property where employee are hired and dismissed at the whims of the proprietor(s)". Such a finding could be read to mean that an automatic remedy for unlawful dismissal or unfair termination from a public sector contract of employment is reinstatement because "hii kazi si ya mama yako ama baba yako". The clarion test for reinstatement is set out in section 49(4) and this would apply regardless of whether the contract of service is in private or public sector.

32. While the trial court found the termination to be unjustified and unreasonable there was no evidence that the action by the respondent was oppressive. We cannot fault this finding by the trial court. In Judicial Review Application No. E1093 of 2020, the Court summarizes and states this;

> "Given the urgency of the matter and considering that both the Clerk of the Bungoma County Assembly and his Deputy were away from office, the applicant signed for the said file for purposes of extracting information for generation of a report to be submitted to the Public Administration and ICT Committee. Indeed, the report was extracted and was jointly signed by the Chairperson of the aforementioned Committee and the applicant.
>
> The same report was forwarded to the County Assembly Fiscal Analyst as well as the Clerk to the Budget and Appropriations Committee in accordance with Standing Order No. 212 (4) of the Bungoma County Assembly Standing Orders.
>
> The applicant retained the subject file at his desk in an office or room he described in the affidavit as "the common open office space", which he shares with other committee clerks and a section of staff in the County Assembly of Bungoma. In the meantime, nobody ever enquired of its whereabouts or made any complaint about it either at the office or any police station."

33. To be deduced from the evidence is that a file which was in the custody of the appellant was found in the hands of strangers. While a complaint in that regard was made in Nairobi and by a person other than the Clerk to the County Assembly, a report was nevertheless made. While the Judicial Review Court eventually found that the charges against the appellant were unfounded and could not be a basis for criminal proceedings, the question as to whether disciplinary proceedings could be brought against the appellant regarding the file was found by that Court not to be properly before it, and it cannot be said that the disciplinary proceedings violated any court orders. In addition, the disciplinary proceedings went beyond the issue of the file as the appellant was also asked to answer a charge of disclosing confidential information to the public without authority and previous disciplinary issues. In the end, to characterize the conduct of the employer as oppressive, is too harsh.

34. In addition, the appellant had not established that given his age training or profession he was unlikely to get alternative employment. We have no reason to fault the trial court's finding that no exceptional circumstances had been established to warrant an order or reinstatement. This also answers the appellant's complaint that he deserved exemplary damages.

35. It is common cause that exemplary damage is awarded in limited instances; where the act of the employer is oppressive, arbitrarily or unconstitutional; and where the defendant has calculated that its conduct will result in a profit for himself and may well exceed the compensation payable to the claimant (see Obonyo & Another v Municipal Council of Kisumu [1971] EA 91 cited with approval in D K Njagi Marete v Teachers Service Commission [2020] KECA 840 (KLR)). In the latter instance the employer's action will be deliberate and calculated to derive a gain by unlawfully terminating the contract of the employee. The law would frown upon such conniving minds. These do not exist here.

36. Under section 12(4) of the Employment and Labour Court Act, the ELRC is empowered to make such order on costs as it thinks just in proceedings before it. In this matter, the court in the impugned judgment, made an order of costs at Kshs. 150,000.00 in favour of the appellant and simply stated that:

> " The court exercising its powers under the law awards reasonable costs in the claim to the claimant to cover court attendance and filing costs which were voluminous and related costs for sum of Kshs.150,000."

37. The appellant's contention is that there is lack of clarity whether the costs include; costs of the dismissed preliminary objection, costs of the counterclaim that was dismissed; and costs awarded to the claimant on 28th September, 2023 and on other occasions during trial. On this we agree with the appellant. Whereas costs would be in the discretion of the court, it needs to be exercised judiciously and it is not possible to test such an order if no explanation is made on how it is reached. We think that if the court has to make specific award of costs in a judgment then it should give some basis or justification for the figure awarded. This avoids the criticism that it is unreasonable or manifestly high or low or, like here, blurred.

38. Ultimately the appeal succeeds only to the extent that the appellant shall be paid all the salary withheld during the period of interdiction and that the order of costs of Kshs.150,000.00 is hereby set aside. The sums due to attract interest at court rates from the date the suit was filed at the ELRC until payment in full. The matter shall be remitted to the ELRC for taxation of costs of the suit before that Court. Those proceedings or any references therefrom shall be dealt with by any other Judge other than J.W. Keli, J. Since this appeal was partially successful, the appellant shall be paid half of the costs of the appeal. Those are our orders.

DATED AND DELIVERED AT KISUMU THIS 11TH DAY OF JULY 2025.

H.A. OMONDI

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

Signed

DEPUTY REGISTRAR