



**Population Services Kenya v Wetende & 2 others (Civil Appeal  
3 of 2021) [2024] KECA 450 (KLR) (12 April 2024) (Judgment)**

Neutral citation: [2024] KECA 450 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 3 OF 2021  
HM OKWENGU, HA OMONDI & JM NGUGI, JJA  
APRIL 12, 2024**

**BETWEEN**

**POPULATION SERVICES KENYA ..... APPELLANT**

**AND**

**JEREMIAH MAKORE WETENDE ..... 1<sup>ST</sup> RESPONDENT**

**MICHAEL KARANI GAKUYA ..... 2<sup>ND</sup> RESPONDENT**

**JAMES MWANGI MUCHIRI ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal against the Decision of the Honourable Mr. Justice Mathews  
N. Nduma delivered on 4th November, 2019 in Kisumu ELRC Cause No.  
253 of 2016 as consolidated with ELRC Cause No. 254 and 255 of 2016))*

**JUDGMENT**

1. This appeal arises from the judgment of the Employment and Labour Relations Court (ELRC) at Kisumu where Jeremiah Makore Wetende, Michael Karani Gakuya and James Mwangi Muchiri, the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> respondents respectively, were the claimants against Population Services Kenya, who is the appellant before us.
2. In his statement of claim filed in the trial court, the 1<sup>st</sup> respondent Jeremiah Makore Wetende (Jeremiah) stated that on 4<sup>th</sup> October, 2013 he was employed by Population Services International (PSI), a company that was later taken over by the appellant who was its Kenyan subsidiary. Jeremiah averred that he worked diligently for the appellant for 16 years and rose through the ranks from Motorcycle Sales Representative (MSR) to Trade Development Manager directly answerable to the Senior Trade Development Manager of the appellant.
3. Jeremiah stated that at the beginning of every year, he conducted a self-appraisal on his performance for the year ending 31st December, which he would submit to the appellant for evaluation and grading



as per the year's objectives/targets. In 2015, Jeremiah attained a performance average of 3.4 surpassing the average organization performance of 3.2. Consequently, he was paid individual and team bonuses of Kshs. 97,594/-.

4. Surprisingly, on 31<sup>st</sup> March, 2016, Jeremiah received an internal memo from the Human Resource Director, informing him that due to his poor performance between January and December 2015, which fell below the company average of 3.2, he was not eligible for a salary increment. On 7<sup>th</sup> April, 2016 he received another memo from the Senior Manager, National Sales, citing him for poor performance in the period between January and December 2015. He was asked to show cause why serious disciplinary action should not be taken against him. He responded to the show cause letter and was, thereafter, by an email dated 27<sup>th</sup> May, 2016, invited for a disciplinary hearing on 30<sup>th</sup> May, 2016. He attended the disciplinary hearing and, subsequently, received a letter dated 7<sup>th</sup> June, 2016, written by the Chief Executive Officer terminating his services.
5. The appellant then put up an announcement on its website, through which it informed the public that Jeremiah's employment had been terminated on account of poor performance. This made it difficult for Jeremiah to secure alternative employment. Consequently, Jeremiah filed a claim against the appellant seeking a declaration that the termination of his employment was wrongful and unfair. He also sought compensation for wrongful dismissal, award of general and exemplary damages, and costs.
6. Michael Karani Gakuya (Michael), the 2<sup>nd</sup> respondent, also filed a statement of claim in which he stated that he had worked for the appellant for a total of nineteen (19) years and had risen through the ranks from Retail Sales Force Supervisor to Trade Development Manager, directly answerable to the appellant's Senior Manager Trade and Development. He averred that in 2015, just like other years, he surpassed the organization's average performance and was awarded both individual and team bonuses of Kshs. 101,449/= for the period 2015. He did a self-appraisal for himself at the beginning of every year ending 31st December and submitted it to the appellant for evaluation and grading. In the year 2015, the appellant rated his performance at 3.1.
7. Michael further stated that on 31st March 2016, he received a memo from the Human Resource Director informing him that he was not eligible for a salary increment owing to his poor performance during the period January to December 2015. On 7th April 2016, Michael received a memo from the Senior Manager, National Sales citing him for Disciplinary action for poor performance for the period January to December 2015. He was asked to show cause why serious disciplinary action should not be taken against him. Michael responded by a letter dated 13th April 2016, and was, thereafter, by an email dated 27<sup>th</sup> May, 2016, invited for a disciplinary hearing on 30th May, 2016. He attended the disciplinary hearing and subsequently received a letter dated 7<sup>th</sup> June, 2016 dated by the appellant's Chief Executive terminating his services. Just like his colleague, an announcement was placed on the appellant's website informing the public that Michael services had been terminated on account of poor performance. He contended that the appellant terminated his services without following the proper procedure that is provided under its Human Resource Manual. He prayed for a declaration that his termination was unfair and wrongful, and sought compensation for wrongful and unfair termination, as well as general and exemplary damages.
8. Likewise, the 3<sup>rd</sup> respondent James Mwangi Muchiri (James), also filed a statement of claim in which he sought a declaration that his termination was unfair and wrongful. He sought compensation for wrongful and unfair termination of employment as well as refund of Kshs. 41,070/- that was illegally deducted from his salary, general and exemplary damages. In his statement of claim, James stated that he was employed by the appellant' predecessor PSI, and worked for a total of 16 years rising from



the position of Motor Sales Representative to Trade Development Manager. He averred that in 2015, he surpassed the appellant's average performance and was paid individual and team bonuses totaling Kshs.81,503/- for that period. However, like Jeremiah and Michael, the tables turned against him as his services were terminated allegedly for poor performance in 2015. He maintained that the appellant did not follow the proper disciplinary procedure contained in its Human Resource Manual.

9. The appellant filed a defence to each of the respondents' claim in which it admitted that the respondents were in their employment until 7<sup>th</sup> June, 2016, when their services were terminated for poor performance. The appellant stated that the respondents failed to meet the commercial targets for the year, and that it followed a fair procedure in terminating each of the respondent's employment. This involved each respondent being evaluated in a participatory appraisal for the year 2015, and each being informed of the unsatisfactory performance, given an opportunity to show cause as to why disciplinary action should not be taken, and invited for a disciplinary hearing in accordance with Section 41 of the *Employment Act*.
10. The appellant maintained that the decision to terminate the respondents' services was in accordance with Section 45 of the *Employment Act*. It denied the respondents' claim for wrongful and unfair termination, and maintained that they were not entitled to compensation, general damages or exemplary damages.
11. During the hearing before the trial court, each of the respondents testified. Jeremiah reiterated what he had stated in his claim, he explained that on 26<sup>th</sup> February, 2016, he discussed his appraisal with his supervisor and on 29<sup>th</sup> February, 2016, the supervisor gave him a rating of 3.4. On 7<sup>th</sup> April, 2016, he received communication from his Senior Manager National Sales who informed him that he had a poor rating of 2.9 for the year 2015. He was informed that a show cause letter had been written to him and he was expected to respond. He responded to the letter and explained each of the allegations contained in the letter. Six months later, on 30<sup>th</sup> May, 2016, he was in Kisumu when he received a text message informing him that he was required in Nairobi and asking him to read his email for the communication. He proceeded to Nairobi and on checking his email at a cyber café, found an email inviting him for a disciplinary hearing on 30<sup>th</sup> May, 2016. The email had been sent to him at 2pm on Friday 27<sup>th</sup> May, 2016. He went to the appellant's office and attended the disciplinary hearing. It was thereafter that he received the termination letter. He maintained that during the period that he worked with the appellant he was very hardworking; achieved his targets; and was able to get promotions and performance-based bonuses. For the year 2015, he received about Kshs. 97,000/- as annual bonus. He explained that for the year 2015 he was earning bonuses for every month. He contended that his dismissal was unfair and wrongful and urged the Court to award him compensation and damages including exemplary damages.
12. Jeremiah called Isaack Onyango Onyonyi (Isaack) as his witness. Isaack was at the material time a Senior Manager Trade Development in the appellant's company and Jeremiah's immediate supervisor. In his evidence Isaack adopted his witness statement in which he had explained that his duties included quarterly and yearly appraising the performance of Trade Development Managers' who included Jeremiah. For the year 2015, he did an appraisal with Jeremiah's participation and rated Jeremiah at 3.1. He was later informed by the National Sales Manager, one Timothy Wambugu that the Human Resource Department had rejected Jeremiah's appraisal and he was required to re-do the appraisal and ensure that the performance was rated at a score of 2.9 which was below the expected average. Isaack added that at the material time Timothy Wambugu had only been in the company for six months and was still on probation, and his involvement in the appraisal of Jeremiah was intended to push Jeremiah out of his employment. He stated that at the time Jeremiah's services were terminated the region under Jeremiah's jurisdiction was amongst the best performing regions countrywide.



13. Michael also testified and adopted his statement which he had recorded in support of his statement of claim. James also similarly adopted a statement that he had made in support of his statement of claim. Both statements were along similar lines as the statement of claims that had been filed and we do not find it necessary to restate the statements.
14. The appellant testified through Timothy Wambugu Kariuki (Timothy), its Senior Manager in charge of National Sales, and Allan Mutaki Ngunze (Allan), its Human Resource Director. Timothy adopted his witness statement that he had recorded on 25<sup>th</sup> July, 2018.  
  
In the statement, Timothy had stated that the three respondents worked in his team in the year 2015 and were reporting to the Senior Manager Trade Development, who in turn, reported to him. He worked with and interacted with the respondents closely, due to the nature of the teamwork. He explained that the sales incentive for the salesmen is product-based and is paid monthly, depending on the achievement of sales targets and the financial element of the sales works, and that annual appraisal constitutes about 25% on overall objectives.
15. Timothy asserted that Jeremiah did not achieve his sales targets in all the months of 2015, except in March when he achieved 124%. In January, he achieved 11%; April 12%; May 25%; August 19% and September 18%. As for Michael, he achieved targets only in March and July at 162% and 108% respectively. In June he had achieved 5%; August 5%; September 45%; October 30%; November 57% and December 24%. James only achieved the set target in February at 146%. In January he had achieved 25%; November 60% and December 69%.
16. Timothy testified that his direct interaction with the respondents and his assessment of their performance in the trade, led him to recommend a review of their appraisal by their line manager to reflect their actual performance. This was after he got the team review from the Human Resource department. Under cross examination, Timothy conceded that the respondents got bonuses in February, and that there was a letter dated 18<sup>th</sup> January, 2016 from the Human Resource directed to Jeremiah awarding him bonus for 2015 and congratulating him for attaining targets. He stated that a review was done based on his suggestion wherein, the respondents got below 3. In his view, the previous appraisal by the line manager was not accurate. He added that the line manager was also sacked as he was underperforming.
17. Allan the appellant's Human Resource Director testified that the three respondents were guilty of poor work performance in violation of Section 9 of the appellant's Human Resource Manual. This was because they failed to meet the agreed objectives and set targets. He pointed out that they were in breach of sections 9.0.0 and 9.1.4 which dealt with the offences committed by the respondents.
18. Allan admitted that whereas clause 9.0.0 had a procedure for warnings and clause 9.1.4 had an outright procedure for dismissal, the charges against the respondents were not specific to either of the clauses. He explained that the respondents were notified of the charges vide notices to show cause to which they responded and were thereafter heard in a disciplinary hearing on 30<sup>th</sup> May, 2019. Since their explanation was not satisfactory, their services were terminated. He reiterated that the final evaluation score for all the respondents was 2.9 and that the previous evaluation which had rated them above 3.0 was erroneous.
19. In addition, Allan admitted that there was no provision in the Human Resource Manual for review of a final rating given by a supervisor, and that the respondents got a bonus for the year under review, in respect of which they were subsequently terminated for poor performance. He admitted further that the appellant had, by a letter dated 18<sup>th</sup> January, 2016 congratulated the respondents for their good performance in the year 2015 and that the appraisals were done by the respondents and the



- supervisor, and there was no provision for review. He stated that this was a Human Resource function and admitted that no objections had been raised by the Human Resource department on the rating of the respondents as given by their supervisor, but that a review was subsequently done to reflect the true scenario on the ground.
20. In his determination, the learned judge held that: the performance grade of 2.9 that was given to the respondents by the appellant, was arbitrary, oppressive and un-procedural, as it was applied without according the respondents a fair hearing, and was not a true reflection of their performance. In addition, the notices to show cause were issued before the respondents were given an opportunity to remedy their scores, and the proper procedural step in terms of the appellant's human resource manual was not followed as the appellant failed to demonstrate that there was a valid reason to terminate the respondents' employment. Consequently, the learned Judge held that the termination of the respondents' employment was unlawful and unfair as it was done in violation of Sections 43 and 45 of the Employments Act. The learned Judge awarded each respondent ten (10) months' salary as compensation, computed as Kshs.1,034,800, to the 1<sup>st</sup> respondent, Kshs. 1,099,030 to the 2<sup>nd</sup> respondent, and Kshs. 1, 149,900 to the 3<sup>rd</sup> respondent. The learned Judge also awarded interest on the judgment sum and costs of the suits.
  21. Aggrieved by the decision of the learned Judge, the appellant preferred the appeal before us in which it relied on a memorandum of appeal stating ten grounds. The grounds were that the learned Judge erred: in unilaterally revising the respondents' evaluation; in misconstruing the appellant's Human Resource Manual; in applying the FAA Act to the respondents' employment contract; in derogating from the appellant's rights under Section 43 of the *Employment Act* to terminate the services of an employee for reasons it genuinely believes exist; in misapplying Section 47(5) of the *Employment Act*; in failing to appreciate that the appellant had justified reasons for terminating the respondents' employment; in holding that the termination of the respondents' employment was unfair and unlawful; in misconstruing the evidence before him, and in holding that the respondents had worked for the appellant for a period of 16 years when they had only been employment for 2 years; in holding that the appellants had published the respondents' termination on a public website; in failing to accord the appellant the benefit of its ex gratia payment that it had made to the respondents, resulting in unjust enrichment to the respondents; and in abusing his discretion in awarding each of the respondents ten (10) months' salary as compensation, to the detriment of the appellant.
  22. In support of the appeal, the appellant filed written submissions dated 28<sup>th</sup> June, 2021. It submitted amongst other things, that the respondents' services were terminated on account of poor performance, which reason was pleaded in the defence and proved through the evidence of Allan and Timothy; that the respondents were made aware of their scores in January, 2016, and granted sufficient time to improve before they were given show cause letters due to continued poor performance.
  23. In addition, the appellant contended that it made the decision to terminate the services of the respondents in accordance with clause 9 of its Human Resource Manual, which provides for disciplinary action for poor performance and failure to meet agreed objectives/targets; that although the respondents took issue in the trial court with the appraisal of 2.9, they never at any time appealed against that appraisal; and that the appraisal was not arbitrary, but was a participatory online process with the respondents being in communication with their supervisor throughout the process.
  24. In regard to the ground of appeal faulting the learned Judge for erroneously applying the provisions of Section 47 of the FAA Act, the appellant maintained: that the respondents' employment was governed by the *Employment Act* and the appellant's Human Resource Manual; that the issues raised by the respondents fell outside the scope of the FAA Act, and this legislation should not have been imported into the respondents' contract of employment. The appellant asserted that the respondents were given



- show cause letters, in accordance with the appellant's Human Resource Manual, due to continued poor performance. They were thereafter invited to disciplinary proceedings that were held on 30<sup>th</sup> May, 2016, following which their services were terminated in accordance with Clause 9 of the appellant's Human Resource Manual.
25. The appellant relied on Section 43 of the *Employment Act*, that grants an employer the right to terminate an employee's service for reasons the employer genuinely believes to exist, at the time of the termination of employment. It conceded that it did not provide the trial court with the reasons for termination of the respondents' employment, but demonstrated to the learned Judge that it believed the reasons to be sound and to have been in existence at the time the termination decision was made.
  26. On publication of the respondents' names on the website, the appellant contended that no evidence was tendered by the respondents in support of this complaint; that the issue of publication was not raised before the ELRC, and therefore should not have formed part of the holding in the ELRC's judgment; and that the proceedings before the ELRC were an abuse of process as they were used by the respondents to gain unjust enrichment.
  27. The appellant cited a decision of this Court Dorothy Nelima Wafula vs Hellen Nekesa Nelsen and Paul Fredrick Nelson (2017) eKLR and a decision of the High Court Paramount Bank Limited vs Nagvi Syed Kumar vs [2020] eKLR. The appellant submitted that the respondents were employed on 1<sup>st</sup> January, 2014 as per letters of employments that were produced in evidence, and therefore the learned Judge erred in holding that they had served for 16, 19 and 16 years respectively. In relation to unjust enrichment, the appellant relied on Kenya Broadcasting Corporation -vs- Geoffrey Wakio [2019] eKLR.
  28. The respondents who were all represented by Hammerton Maloba & Co Advocates, filed joint written submissions dated 23<sup>rd</sup> June, 2022 in which they opposed the appeal. They submitted that while the appellant had the burden of proving the legality of the termination of their services, including substantive justification, and procedural fairness, the appellant failed to discharge this burden, as the evidence that was adduced before the trial court showed that the respondents' termination was both wrongful and unfair. This was because although the respondents were terminated on account of alleged poor performance during the year 2015, the appraisal of the respondents which was a collaborative effort between the respondents and their respective supervisors, was clear that in their performance appraisal the three respondents obtained good scores that were above the required average.
  29. The respondents argued that there was no evidence adduced to justify the downgrading of the scores from what had been initially awarded to them, to a lower score of 2.9, nor was there any evidence that the provisions of FAA Act were complied with, before the downgrading was done. The respondents submitted that the appellant did not produce any adverse record or warning letters issued to any of them, nor did the appellants follow clause 9 of their Human Resource Manual in regard to the disciplinary process for poor performance. They pointed out that Section 49 as read with Section 50 of the *Employment Act* provide remedy for wrongful and unfair termination, and the learned Judge based his award on Section 49 (4), which provides the principles upon which such compensation can be made.
  30. The respondents relied on this Court's decision in Cooperative Bank of Kenya Ltd -vs- Banking Insurance & Finance Union [2016] eKLR, and also cited Section 50 of the *Employment Act* and Section 12(3), (vi) and (vii) of the *Employment and Labour Relations Court Act* (ELRC Act).
  31. Finally, the respondents argued that the learned Judge had discretion under Section 49 of the *Employment Act*, to award compensation, and there was no justification for an appellate court to



interfere with the exercise of such discretion. They relied on a quotation from this Court's decision in *Kenya Revenue Authority & 2 Others -vs- Darasa Investments Limited* [2018] eKLR that:

“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.”

32. Upon careful perusal of the record of appeal, the submissions filed by both parties and the digest of authorities filed, and being mindful of our obligation as a first appellate Court to reconsider and re-evaluate the evidence in order to come to our own conclusion (see *Sanitam Services (EA) Ltd. vs. Rentokil* [2006] 2 KLR 70), we discern the following issues for determination in this appeal. First, whether the learned trial judge erred in law in finding that there was substantive and procedural unfairness in the termination of the respondent's employment; and second, whether the learned judge erred in the award of compensation.
33. Section 43(1) of the *Employment Act* states:
- (i) 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
  - (ii) 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 calls to the employer to terminate the services of the employee.”
34. This means that an employer is under an obligation to show that there were valid reasons for terminating an employee's employment. These reasons must be related to the employee's conduct, capacity or compatibility, or based on the employer's operational requirements. In addition, Section 41(2) of the *Employment Act* requires that before an employer terminates the services of an employee, the employee must be given an opportunity to be heard. The section provides that the employer must:
- “...hear and consider any representation 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.”
35. It was not disputed that the appellant terminated the respondents' employment on grounds of poor performance. It behooves us to consider whether the appellant established that there were good and justifiable reasons for its conclusion regarding the respondents' performance, and whether the disciplinary process that led to the termination of the respondents' employment was properly conducted in accordance with the provisions of the relevant law and the respondents' contract of employment.
36. It is common ground that at the beginning of 2016 the respondents each conducted a performance appraisal for the year ending 31<sup>st</sup> December, 2015, and this was done with the participation of their supervisor. From that appraisal each respondent obtained a score that was above 3.1 which was above the required performance level. It is also not disputed that the respondents were commended for their performance for the period January to December, 2015, and they were each awarded bonus for their good performance.
37. It is evident that at the instigation of Timothy, who was the appellant's senior manager in charge of national sales, the respondents' performance appraisal was reviewed and each of the respondents



received an appraisal of 2.9 which was below the required performance level of 3.0. Of concern is whether the decision to review the respondents' performance appraisal was proper, whether the respondents were involved in the review process, and whether the review of the performance downwards was done fairly. In addition, whether the process leading to the appellant's decision to terminate the respondents' services for poor performance was procedurally fair.

38. The appellant's witnesses Timothy and Allan both conceded that the initial performance appraisal for the year 2015 gave the respondents a good score. Allan who was the Human Resource Manager confirmed that the respondents received congratulatory letters and were awarded bonuses for the good performance. Isaack who was the respondents' supervisor at the material time also confirmed that he participated in the initial appraisal, and that the respondents received the scores they deserved. While it was Timothy's position that the appraisal was not properly done, and that the supervisor was over generous, Timothy was not able to substantiate this allegation.
39. We note that there were letters served on the respondents on 7<sup>th</sup> April 2016 requiring them to show cause, regarding their alleged poor performance for the year 2015. However, these letters were written and served on the respondents after the review of their initial appraisal. Clause 9 of the appellant's Human Resource Manual obligated the appellant to keep every employee "regularly" informed of his shortcomings in work performance or conduct. There was no evidence of any warning letters written in the year 2015 or soon thereafter, to any of the respondents regarding poor performance or any issue regarding dereliction of duty. Nor was there any evidence of any issue raised with Isaack before the appraisal review, regarding the performance of the respondents generally or any shortcomings in the initial performance appraisal for the year 2015. We find that there was no justification for the review of the respondents' appraisal that had been done for the year 2015. Nor did the appellant demonstrate that the downward review of the respondents' performance appraisal was fairly done with the participation of the respondents.
40. With regard to the disciplinary procedure, the appellant has failed to demonstrate that there was a good reason to justify the disciplinary process being put in place. This is because, the evidence before the trial court did not demonstrate that there was any poor performance on the part of the respondents. In addition, the process adopted by the appellant was not a fair process as the respondents were not given sufficient time to prepare for the disciplinary hearing. Jeremiah demonstrated that he was served with a letter through email on a Friday and was expected for the disciplinary hearing on the following Monday. Thus, the appellant failed to discharge the burden of proof with regard to both substantive justification and procedural fairness, and accordingly its appeal in regard to liability fails
41. As regards the damages awarded to the respondents, the learned Judge of the ELRC stated:
  43. In answer to issue (b) the claimants having lost their employment contrary to sections 43 and 45 of the Act are entitled to compensation in terms of section 49(1)(c) and (4) of the Act.
  44. The claimants served in similar capacities and for similar long periods firstly for the parent organization which later transferred their services to the 1<sup>st</sup> respondent. The 1<sup>st</sup> Claimant served for 16 years, the 2<sup>nd</sup> claimant for 19 years and the 3<sup>rd</sup> claimant for 16 years. They lost their employment under similar circumstances unlawfully and unfairly. The three did not contribute to their loss and detriment. The claimants were paid terminal benefits and were each given two months as ex gratia payment for loss of their employment. The respondents maliciously published their names in a public website indicating that they had lost their jobs for poor work performance, which was not true. The respondents also unfairly failed to provide the claimants with certificates of service to help them get alternative jobs. The claimants



suffered psychological trauma and mental stress. They lost means of livelihood abruptly and sustained loss and damage as a result.

45. ....
46. The claimants have not proved the particulars of discrimination in this matter, but the manner in which the claimants were treated by their employer after many years of loyal service has invited the court to consider an award equivalent of 10 months' salary in compensation to each of the three claimants."
42. We discern several misdirections that influenced the award that was made by the learned Judge. First, the learned Judge took into account as an aggravating factor, the humiliation of the respondents arising from the publication of their alleged poor performance in the appellant's website. This was a misdirection as what was before the learned Judge was a suit for unlawful and unfair termination and not a suit for defamation. The defamation was the subject of a separate claim in tort.
43. Secondly, notwithstanding the clear pleadings by the respondents at paragraph 5 in each of the memorandum of claim, stating that each had entered into a new contract of employment with the appellant that was effective from 1<sup>st</sup> January, 2014, the learned Judge considered the respondents' employment as continuous from their previous employment adding up to 16 years and 19 years, hence the reference to "years of loyal service." The respondents having each entered into a new contract of service on 1<sup>st</sup> January, 2014, the termination of employment was termination of the new contract in which they had each only served for just under two years and six months
44. Thirdly, the failure to issue the respondents with certificate of service was not a relevant consideration in regard to compensation for unlawful and unfair termination of service. Issuance of certificate of service is provided for under section 51 of the [Employment Act](#), and penal sanction is provided for any breach.
45. In *Butt vs. Khan* [1981] KLR 349 this Court restated as follows;
- "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".
46. We find that there is justification for this court to interfere with the award of compensation as the learned judge did not exercise his discretion judicially, having failed to take into account relevant factors and having been influenced by extraneous matters, with the result that the award he made was exaggerated.
47. Under Section 49(4) as read with section 50 of the [Employment Act](#), the learned Judge was not only required in awarding compensation, to take into account the circumstances in which the respondent's termination took place, but also to take into account the respondents length of service with the appellant of slightly over 2 years and 6 months, and the reasonable expectation of the respondent of the length of time for which his employment with the appellant might have continued but for the termination. In addition, the learned Judge also ought to have taken into account the ex-gratia payment of two months that was paid by the appellant and received by the respondent in regard to the respondent's termination of employment. Taking all these factors into account, we would allow the appeal in regard to the award of compensation, set aside the award of 10 months' salary and substitute thereto an award of 4 months' salary which is in addition to the two months' ex gratia payment already made to the respondents by the appellant.



48. The upshot of the above is that the appeal is allowed to the limited extent of the award of 10 months' salary awarded by the learned Judge as compensation for unlawful and unfair termination, being reduced to an award of 4 months' salary. The appellant, having only partly succeeded, each party shall bear their own costs in the appeal.

It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 12<sup>TH</sup> DAY OF APRIL, 2024.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**H.A. OMONDI**

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**JUDGE OF APPEAL**

**JOEL NGUGI**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

