



**Unilever Tea (K) Limited v Kenya Plantation & Agricultural Workers Union
(Civil Appeal 19 of 2016) [2024] KECA 540 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KECA 540 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 19 OF 2016
F SICHALE, P NYAMWEYA & WK KORIR, JJA
MAY 9, 2024**

BETWEEN

UNILEVER TEA (K) LIMITED APPELLANT

AND

**KENYA PLANTATION & AGRICULTURAL WORKERS
UNION RESPONDENT**

(An appeal from the Judgment and decree of the Employment and Labour Relations Court at Kericho (Njagi Marete J.) delivered on 14th December 2015 in Employment and Labour Relations Court Cause No. 9 of 2014)

JUDGMENT

Judgment Of Sichale, JA

1. The background, pleadings and the facts in this appeal have in my view, been concisely summarized in the judgment of my sister Hon. Nyamweya JA and I need not rehash them in detail save for an outline that will contextualize my judgment.
2. This appeal arises from the judgment of the Employment and Labour Relations Court at Kericho (D.K Marete J), in which the learned judge allowed a claim filed by the respondent on behalf of one Bethseba Kerubo (hereinafter the grievant) and ordered inter alia that the grievant be reinstated into employment without loss of benefits, promotion or emoluments and that she be paid her 12 months' salary as compensation for economic loss due to unlawful termination of employment, that is Kshs 9,256 x 12 months= Kshs 111,072.00/=.
3. Being aggrieved with the aforesaid judgment of the trial court, the appellant has now preferred an appeal to this Court vide a Notice of Appeal dated 17th December 2015 and a Memorandum of Appeal



dated 14th June 2016, raising 11 grounds of appeal which were subsequently condensed into 3 grounds of appeal as follows:

“Whether the learned judge erred in law and fact in disregarding the grievant’s and respondent’s own admission and in failing to deal with the issue of substantive justification. (Ground 4 and 5 of the Memorandum of Appeal).

- a. Whether the learned judge erred in law and fact by holding that the respondent’s termination was procedurally unfair and in awarding 12 months’ salary as compensation (Grounds 3, 6-11 of the Memorandum of Appeal.
 - b. Whether the learned judge erred in law by exceeding his jurisdiction in ordering that the grievant be reinstated and awarding her both the main relief and the alternative relief (Ground 1 and 2 of the Memorandum of Appeal).”
4. When the matter came up for plenary hearing on 16th October 2023, Ms Esther Opiyo learned counsel appeared for the appellant whereas Mr. Aduda appeared for the respondent. Both parties relied on their written submissions dated 31st October and 23rd November 2023 which they briefly highlighted in Court.
 5. Turning to the first issue and as to whether the learned judge erred in law and fact in disregarding the grievant’s and the respondent’s own admission and in failing to deal with the issue of substantive justification, it was submitted that during examination in chief, the grievant admitted to having sought forgiveness for her wrongdoing.
 6. In addition, before the grievant was summarily dismissed and after the disciplinary hearing on 31st October 2012, the respondent acknowledged the grievant’s wrong doing and admitted that the same amounted to gross misconduct. This was reduced into writing in an Industrial Relations-Joint Consultation Report/Notice of agreement between the appellant’s Management and the representatives of the respondent.
 7. It was thus submitted that the learned judge erred in disregarding the grievant’s own admission, the respondent’s acknowledgement of her wrongdoing and the appellant’s evidence on record without giving any reasons and that in disregarding the said evidence, the learned judge failed to appreciate that it was more likely than not, that the grievant had committed the misconduct accused of. For this proposition reliance was placed on the decision of this Court in the case of Barclays Bank of Kenya limited V Evans Ondusa Onzere [2015] eKLR.
 8. It was further submitted that the appellant had genuine and valid reasons to terminate the grievant’s employment as provided for by Section 43 (2) of the *Employment Act*; that from the investigations carried out, the recorded statements obtained from the interviews conducted, it was more probable than not that the grievant had indeed left her place of work to fight a fellow employee’s wife and in the process, broke the window panes to the house occupied by the fellow employee thereby causing damage to the appellant’s property.
 9. It was thus submitted that the learned judge failed to appreciate that in view of the conduct of the grievant, which was violent in nature, caused disturbance at the work place and resulted in damage to the appellant’s property, the appellant had sufficient genuine and valid reasons to dismiss the grievant.
 10. The learned judge was further faulted for finding that the grievant termination was procedurally unfair and in awarding her 12 months’ salary as compensation. In this regard, it was submitted that the appellant held a disciplinary hearing wherein the grievant was given an opportunity to be heard and



defend herself against the charges levelled against her in the presence of the respondent's shop stewards as required under Section 41 of the *Employment Act*.

11. It was further submitted that during the disciplinary hearing, the grievant admitted to being aware of the charges levelled against her and the basis for the same but she refused to participate in the disciplinary proceedings on the basis that her tribe and tradition did not allow pregnant women to be involved in cases and as a result of her lack of cooperation, the appellant requested that she steps outside in order to deliberate on the charges she was facing.
12. It was thus submitted that the appellant had provided the grievant with an opportunity to be heard in accordance with Section 41 of the *Employment Act* but she chose to squander the same by willfully refusing to respond to the questions put to her and chose not to defend herself and that in the circumstances, it was reasonable for the appellant to conclude that she did not have a reasonable defence hence the resolve to summarily dismiss her. For this proposition, reliance was placed on the case of *Sotik Highlands Tea Estates Limited V Kenya Plantation and Agricultural Workers Union* [2017] eKLR.
13. In view of the foregoing, it was submitted that the learned judge erred in making a finding of unfair termination and awarding the grievant 12 months' salary and that further he did not furnish any reasons justifying the award of 12 months' salary for unfair termination which he merely awarded the maximum compensation without considering the relevant factors including the grievant's actions, her conduct during the disciplinary hearing and her contribution to the termination.
14. Finally, it was submitted that the learned judge erred in awarding both the main relief and the alternative relief and that considering the circumstances of this case, he had no jurisdiction to award both reliefs. Consequently, it was submitted that the totality of the evidence before the Court irresistibly lead to one conclusion namely; that the Superior Court erred in finding that the grievant's termination was procedurally unfair.
15. On the other hand, it was submitted for the respondent that in making its judgment, the trial court looked at the totality of the events and the processes leading to dismissal of the grievant and that it was therefore not true that the learned judge disregarded both the grievant's and the respondent's own admission and failed to deal with the issue of substantive justification.
16. It was thus submitted that the trial judge stated that the grievant had brought out an overwhelming case of no consideration of procedure in the determination of disciplinary proceedings which led to a perverted decision of termination of employment.
17. Regarding the award of 12 months' salary as compensation for unfair termination, it was submitted that having found that this was a case of wrongful, unfair and unlawful termination of employment of the grievant, the learned judge was right in awarding the 12 months' salary as compensation, pursuant to the provisions of Section 49 the *Employment Act* 2007, which makes provisions for appropriate remedies for wrongful dismissal or unfair termination. Further, in giving an award under Section 49 of the aforesaid Act, the court was expected to exercise judicial discretion on what was fair in the circumstances.
18. It was thus submitted that on an award on damages, the Act limited the award a court of law could make to a maximum of 12 months' salary and that the court had the discretion on the quantum of damages it could award for unfair/wrongful termination of employment.
19. Lastly and as to whether the learned judge erred in ordering reinstatement of the grievant into employment, it was submitted that the learned judge exercised his discretion in ordering reinstatement of the grievant.



20. I have carefully considered the record, the grounds of appeal, the rival submissions by the parties, the responses thereto, the cited authorities and the law. This being a first appeal, the duty of this Court as stipulated under Rule 31 of the Rules of this Court is to re-evaluate and consider afresh the evidence tendered before the trial court and come to its own conclusion one way or another. This duty was reiterated in *Abok James Odera t/a A.J Odera & Associates V John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR where this Court pronounced itself as follows: -

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of *Kenya Ports Authority vs Kustron (Kenya) Limited* 2000 2EA 212.”

21. Turning to the first issue and as to whether the learned judge erred in law and fact in disregarding the grievant’s and respondent’s own admission and failing to deal with the issue of substantive justification, it is common ground that the grievant had been employed by the appellant on 13th April 2012, as a general worker attached to the appellant’s Tagabi factory.
22. It is also common ground that at the material time, the grievant was a member of the respondent union and her employment was inter alia governed by the Collective Bargaining Agreement dated 25th May 2012, between the appellant and the respondent.
23. It is also not in dispute that on 9th September 2012, the appellant received a report on allegations that the grievant had left her place of work without permission to beat up a fellow employee’s wife and in the process caused damage/destruction to the respondent’s property namely; window panes to the house occupied by the fellow employee and his family.
24. It is also not in dispute that vide a letter dated 13th September 2012, the grievant was invited to a show cause hearing to explain why disciplinary action should not be taken against her which show cause hearing was conducted on 31st October 2012, pursuant to which she was summarily dismissed from employment for gross misconduct.
25. John Mutuo Mutuku who was the only witness who testified on behalf of the appellant testified that he was the branch manager at the appellant’s Tagabi factory at the time of the grievant’s dismissal. That, on 9th September 2012, he received a call from the security town leader one Barnaba about an incident that had happened at the factory village.
26. He carried out investigations and established that the grievant had an altercation in a neighbouring house where she had gone demanding to see one George Nyakimo and on not finding him, broke a window by hitting it with a firewood.
27. Photos of the scene were taken and recorded it in the security book. The following day, he called the security team and the grievant to secure more information and the grievant denied having broken a window whereupon he issued her with a show cause letter.
28. He further testified that the grievant continued to make further denials prompting them to gather more reports on the incident. That on 11th September 2012, the grievant was allocated work in the factory and halfway through, she approached one George Nyakiamo saying that she had seen his wife going towards the posho mill and that she was going to fight her and she left the factory without permission to fight the lady.



29. The evidence of this particular witness remained largely uncontroverted in cross examination and he was candid enough when he stated that he did not witness the breakage but was called by one Limo and Barnabas and that there was a statement by one Ng'eno on the breakage.
30. In reexamination he reiterated that it was not the first time that the grievant was seeing the pictures of the breakage and that they were attached to the show cause letter and she did not protest. Indeed, the show cause letter dated 13th September 2012, inter alia reads; "It is noted with deep concern your conduct unbecoming of causing malicious damage to company property as per photos overleaf."
31. The grievant on the other hand while denying having broken the window testified that on the material day i.e. 9th September 2012, she had left for Nyamira in the morning and came back in the evening. In cross examination, she admitted that she did not have any document to confirm that indeed she was away during the breakage incident. She further stated in cross examination that she was not sure of the breakage on that fateful day, that one Dorine was her co-wife and that they had tensions at the time.
32. Despite denying that she did not break the window as alleged, the grievant appeared to contradict herself when she testified thus in her examination in chief;
- ".... I was asked to explain about the broken window and posho mill incident...." ".....I asked for forgiveness but he told off..."
33. One wonders why the grievant was pleading for forgiveness if indeed she was innocent as she alleged. Further, the Industrial Relations Joint Consultation Report signed between the appellant and the representatives of the respondent on 31st October 2012, it was clearly agreed that the grievant was guilty of misconduct. the shop stewards' views were clearly captured thus;
- "Destruction of company's property, leaving work place without permission and threatening one's life is gross misconduct." (Emphasis mine).
34. Additionally, the points of agreement are captured inter alia thus;
- " 1. We agree this is gross misconduct.
2. We agree to summary dismissal of Bethseba Kerubo."
35. From the circumstances of this case and the evidence on record, I am satisfied that the appellant had firmly established a reason (s) to summarily dismiss the grievant for gross misconduct pursuant to the provisions of Section 44 (4) of the *Employment Act* CAP 226 of the Laws of Kenya and clause 24 of the Collective Bargaining Agreement between the appellant and the respondent dated 25th May 2012; namely destruction of the appellant's property on 9th September 2012.
36. In my humble respectful view, the holding by the learned judge in addressing this issue inter alia; "This is the defence on destruction of the respondent's property. It must be noted that incidences of romantic relationships between workers are likely to and do occur at the work place. In her evidence the grievant clearly and occasionally referred to Mr. George Nyakina as my husband. It is on these situations that the maturity of the employer is put at utmost test. Any goof at this stage, like I suspect was in this case produces hazardous results. Proper and considered management of these situations by all parties would best serve appropriate labour relations. Unfortunately for the respondent, even this formula does not tilt the case in its favour but that of the claimant. This jurisprudence is not relevant in the circumstances." was clearly without any basis in light of the admission by the grievant that she was at fault and even sought forgiveness and the Industrial Relations Joint Consultation Report dated 31st



October 2012, between the appellant and the representatives of the respondent where it was agreed that indeed the grievant was guilty of gross misconduct.

37. Consequently, I find merit in this ground of appeal and hold and find that the learned judge erred in law and fact in disregarding the grievant's and the respondent's own admission and failing to deal with the issue of substantive justification and accordingly find that there was substantive justification to summarily dismiss the grievant.
38. Turning to the next issue, the learned judge was faulted for holding that the termination of the grievant was procedurally unfair and awarding her 12 months' salary as compensation. It is indeed not in dispute that 13th September 2012, the grievant was issued with a notice to show cause letter why disciplinary proceedings should not be taken against her for destruction of the appellant's property.
39. The record shows that the disciplinary hearing was held on 31st October 2012, initially, in the presence of the grievant and shop stewards namely; Yona Sisa, Emily Chelang and John Kiprono.
40. The proceedings further indicate as follows;

“Statement by Kerubo started by informing that she was before the group on account of incident in the village and incident that happened at the company premises in the milling station.

Kerubo started by saying that she can't proceed with the case because her situation will not allow her to do so.

When prodded, she insisted that her situation was still not good when asked to produce a letter from a medical practitioner, she said she didn't have.

I went on to ask Kerubo if she had any idea on why we were calling her and to explain to us on the 2 incidents but she didn't reply.

Kerubo kept quiet as we waited for an answer for 2 minutes in silence. She then indicated that she can't respond because in her tribe and tradition as a pregnant woman she is not supposed to be involved in cases.

I then sent Kerubo back to the waiting area and deliberated with the shop stewards that the case had to continue to its logical end.

Failure to talk due to pregnancy was found to be not a strong factor to postpone the meeting since the next available time based on the reasons above would be in 2013 and well after 3 months' maternity leave and 1-month annual leave.

I then called her supervisor, security team leaders and security personnel who witnessed the incidences in the milling center as well as being among the first on the scene after the incident of destruction of company property and windows. I also got a statement from George Nyakina whose house was broken into.” (Emphasis supplied).

41. Section 41 of the *Employment Act* provides for Notification and hearing before termination on grounds of misconduct. The Section provides as

“41. Notification and hearing before termination on grounds of misconduct

1. Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have



another employee or a shop floor union representative of his choice present during this explanation.

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

42. Applying the provisions of Section 41 to the instant case, it is my considered opinion that there was substantial compliance with the said Section and the grievant actually impeded full compliance with the said Section and the summary dismissal of the grievant was proper for the following reasons.

43. First of all, the grievant was informed vide the show cause letter dated 13 September 2012, that the appellant was considering taking disciplinary action against her for destruction of the company property and during the disciplinary hearing on 31st October 2012, the grievant was accompanied by shop stewards namely; Yona Sisa, Emily Chelangat and John Kiprono. Additionally, when questions were put to her she refused to answer the same whereupon she was asked to step out but the shop stewards remained inside.

44. In the case of *Beatrice W. Mbogo v Oceanfreight (EA) Limited* [2014] eKLR Radido J persuasively stated thus as regards substantial compliance with Section 41 of the [Employment Act](#);

“It is clear that the Respondent notified the Claimant of the allegations it had and was considering using to take disciplinary action against her. The Claimant replied to the notices in writing.

It appears from the evidence that the Claimant expected an oral hearing as well. The question therefore arises whether an oral hearing is also mandatory. Section 41 of the [Employment Act](#) does not explicitly provide for an oral hearing. But one of the rights of an employee is to

have another employee or shop floor union representative present when the employer is explaining the contemplated reasons for dismissal.

When considering this issue, it is my humble opinion that section 41 of the Act has not created a mechanical rote or checklist which an employer or the Court should tick against to ensure there has been compliance. Rather it is the substance that should be looked into.

And therefore while a prudent employer may want hold an oral hearing, lack of an oral hearing by itself should not lead to a finding of unfairness. The real questions would be, was the employee informed/notified of the charges, was the employee granted reasonable opportunity to respond and were the employee’s explanations considered.

In my view the Respondent was substantially in compliance with the procedural fairness requirements in the process it adopted. The failure to hold an oral hearing did not prejudice or occasion an injustice to the Claimant.

45. I fully agree with sentiments expressed by the learned judge in the above case I have cited. In the instant case, the grievant despite attending the disciplinary hearing on 31st October 2012, she insisted that she could not proceed with the case as “her situation” would not allow her. Prodded further, she insisted that her situation was still not good and when she was asked to produce a letter from a medical



practitioner, she said she didn't have any. Her contention that she was unwell during the disciplinary hearing was therefore not supported by any evidence.

46. Additionally, her contention that she could not respond to questions put to her because in her tribe and tradition as a pregnant woman she was not supposed to be involved in cases is in my considered opinion preposterous!

47. Further, it is my considered opinion that the grievant was the author of her own misfortunes when the proceedings subsequently proceeded in her absence but in presence of the shop stewards, having deliberately refused to answer the question that were put to her. Faced with a similar situation in the case of *Sotik Highlands Tea Estates Limited V Kenya Plantation and Agricultural Workers Union* [2017] eKLR. This Court stated;

“.....This resulted in disciplinary meetings being called where Siro was present and was represented by two shop stewards. He was asked to explain his conduct but refused to do so asking the appellants management to take whatever disciplinary action it deemed fit. Siro was accorded every opportunity to explain himself and retain his job but he maintained a rude and arrogant attitude to his employer which amounted to gross misconduct as defined in the *Collective Bargaining Agreement* between the appellant and the respondent and in the *Employment Act*. The evidence produced before the learned trial judge was more than sufficient to show that Siro was accorded every opportunity to explain himself and save his job but he did not avail himself of that opportunity at all. fair administrative action was given to him and the learned judge erred in finding that termination of employment was unfair and unlawful.” (My Emphasis)

48. In the instant case and the grievant having deliberately refused to answer the questions that were put to her by her employer what more was the appellant supposed to do. In my considered view the grievant displayed a rude attitude and feigned ignorance by refusing to answer the questions that were put to her and having squandered the opportunity to defend herself, she can now not be heard to be saying that her termination from employment was unfair.

49. In the case of *Judicial Service Commission V Gladys Boss Shollei & Another*, [2014] eKLR Kiage JA, succinctly stated thus;

“From my own analysis, of the record before us, I would very much doubt that there are many employers who, faced with conduct such as displayed by the 1st respondent, would have retained her in her position. I am not saying there would be none, only that such an employer would be a rarity indeed. As to the action of dismissing the 1st respondent, I find and hold that it was an eminently reasonable action to take by an employer. The dismissal therefore passes with ease the test propounded by Lord Denning in the same *British Leyland* case (ibid.);

“Was it reasonable for the employer to dismiss him? if no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might have reasonably dismissed him then the dismissal was fair.”(My emphasis).

The dismissal was fair and the orders by the learned judge quashing the proceedings and the dismissal cannot be countenanced.”

50. I fully agree and adopt the reasoning by Kiage JA in the above decision in this case. The holding by the learned judge inter alia that; “The entire evidence of the grievant is replete with bouts of hostility and



indignity on part of the respondent's agents in dealing with this matter. It would appear that there was a pre determination and finality in the manner of dealing with the grievant case, all this while she was pregnant and sickly. This is unfair, to say the least. It is sadistic and inhuman." was clearly without basis and not supported by any evidence as there was nothing on the record to show that indeed the grievant was sickly on the date of the disciplinary hearing on 31st October 2012 which she was well aware of in advance. Additionally, she tendered no evidence to the effect that in her tribe's culture, pregnant women do not take part in disciplinary proceedings.

51. Accordingly, it is my finding that the grievant was accorded an opportunity to be heard in accordance with Section 41 of the *Employment Act* which opportunity she squandered by willfully and deliberately refusing to answer the questions put to her and the only logical inference that can be made is that she did not have any reasonable defence (if at all) to the allegations levelled against her.
52. Accordingly, I find merit in this ground of appeal and hold and find that the grievant termination from employment was procedurally fair and lawful.
53. Lastly and turning to the last issue as to whether the learned judge erred in law by exceeding his jurisdiction in ordering that the grievant be reinstated and awarding her both the main and the alternative relief, Mr. Aduda learned counsel for the respondent during plenary hearing of this appeal conceded that it was in error for the trial judge to award both the main relief and the alternative relief and more so the remedy of reinstatement was not tenable in the circumstances having been issued 3 years from the date of dismissal, contrary to the provisions of Section 12 (3) (vii) of the *Employment and Labour Relations Court Act*. I indeed appreciate that to be the correct position of the law.
54. In the instant appeal and having found that that there was substantive justification to summarily dismiss the grievant on account of gross misconduct and that her termination from employment was procedurally fair and lawful, the remedies provided for under Section 49 of the *Employment Act* for wrongful dismissal and unfair termination would not have been available to the grievant.
55. Accordingly, I find merit in the appellant's appeal which I allow in its entirety and set aside all the consequential orders issued by the Employment and Labour Relations Court (Marete J), on 14th December 2015, with no order as to costs. Since my brother Korir JA, agrees, this will be the final order of the Court.
56. It is so ordered.

Dissenting Judgment Of Nyamweya, JA

1. This judgment arises from a judgment delivered by the Employment and Labour Relations Court at Kericho (Njagi Marete J.) on 14th December 2015, allowing a claim filed by the Kenya Plantation & Agricultural Workers Union in Employment and Labour Relations Court Cause No 9 of 2014, where they challenged the wrongful, unlawful and unfair dismissal of one Bethseba Kerubo by Unilever Tea (K,) the Appellant herein. The Respondent's case in the Memorandum of Claim dated 22nd July, 2014 was that it is a registered union representing unionisable workers within the agricultural sector and had a valid recognisable agreement with the Appellant having concluded a Collective Bargaining Agreement (CBA) with it. It was its assertion that the grievant, Bethseba Kerubo was employed by the Appellant on 13th April 2004 as a general worker and deployed to Tagabi Factory but was not given any letter of appointment or contract of employment. That on 31st October, 2012, the Appellant wrongfully, unlawfully and unfairly dismissed the grievant on allegations of absenteeism and destruction of the Appellant's property, which she denied. At the time of dismissal, the grievant was earning Kshs. 9,256.00 per month.



2. A chronology of the events giving rise to the claim as stated by the Respondent is as follows. That on 9th September, 2012 a Sunday, the grievant left her place of work at Tagabi Factory village in the morning, went to her rural home, returned in the evening, and reported to work on 10th September 2012 at around 11.00am. The Appellant's assistant manager thereupon told the grievant to go and see the factory/plant manager who informed her that she had broken the Appellant's window panes, and requested her to explain this in writing which she did. On 13th September, 2012, the grievant was issued with a show cause letter of even date, with respect to destruction of the Appellant's property, and the grievant showed cause in writing on 14th September 2012 and thereafter the matter went silent as she went on with her duties. The grievant continued with her work until 12th October, 2012 when she fell ill while at work, and after she was assessed by the medical officer and found to be as a result of her pregnancy, she reported back to work on 13th October, 2012, but was not allocated any duties but sent home until further communication.
3. That due to the state of her health, the grievant decided to travel to her rural home as she awaited further communication, where she experienced pregnancy complications and was admitted for four (4) days from 14th October 2012 to 17th October 2012. Upon discharge, she was advised to take bed rest and do light duties. On 18th October 2012, she went to the Appellant's hospital where she was given drugs and allowed sick off days. However, that on 29th October, 2012, she was served with a letter requiring that she attends disciplinary proceedings scheduled for 30th October 2012, which were rescheduled to 31st October 2012, and that despite being on sick off and/or bed rest she attended the disciplinary meeting, and was ordered to sit through it despite pleading with the manager that she was ill. That after the grievant's health condition deteriorated she pleaded to be excused, whereupon the Manager ordered her to go outside, which she did and after everyone else had gone, the manager called her to his office and handed her a letter dismissing her summarily. Further, that on 5th November, 2012, she was given a letter requiring that she vacates the Appellant's residential premises.
4. The grievant reported the dispute to the Branch officials of the Respondent, who wrote an appeal letter contesting the grievant's summary dismissal, requested for a meeting between the Respondent and the Appellant with a view of reviewing the grievant's dismissal, and also pointed that pursuant to the CBA, the grievant was allowed to stay in her quarters until the impasse was resolved. The Respondent's officials met the Appellant's official on 9th November 2012, but that the meeting ended in a stalemate and the branch officials reported the dispute to the General Secretary, who in turn reported the dispute to the Minister of Labour, and the Minister appointed a conciliator to help the parties in resolving the dispute. The grievant in the meantime reported the dispute to the County Labour Office at Kericho, who wrote to the Appellant directing it to allow the grievant to occupy the house allotted to her pending the resolution of the dispute through conciliation. The conciliation meeting was held on 21st November 2013 but the parties could not reach a compromise, and the conciliator issued a Certificate of Disagreement pursuant to the provisions of the law.
5. It was the Respondent's claim that throughout her employment, the grievant maintained a good and clean employment record devoid of any indiscipline, carried out her duties with enthusiasm and a great sense of dedication; and served the Appellant for over eight years. The Respondent asserted that the grievant was dismissed summarily without being accorded an opportunity to be heard or to put forth her defence to the allegation levelled against her, owing to the reason that the decision to dismiss her was arrived at in her absence after she pleaded that she was ill and could not sit through the session. Further, that she was not accorded adequate time to put forth her defence including but not limited to availing treatment notes and the discharge summary from Nyamira District Hospital to rebut the allegation of absconding duty. In addition, that the letter of dismissal did not spell out the dates of



the alleged absenteeism and that if it was on 12th October 2012, the Assistant Manager knew the grievant's whereabouts having instructed her to seek medical attention in the Appellant's dispensary, where she was kept waiting past working hours.

6. The Respondent further claimed that the allegation of broken window panes was not supported by evidence and no witnesses were brought forward to testify in support of the allegation, and that on the particular day when the window panes were broken, the grievant was away in her rural home having left Tagabi Factory village very early in the morning and returned later that day. Lastly, that the decision to dismiss the grievant was arrived at in a bid to avoid paying the grievant her maternity leave which action is not only against the CBA entered into by the parties but also the *Employment Act*. Therefore, that the decision to dismiss the grievant summarily was unprocedural and unlawful, unfair and wrongful.
7. The Respondent accordingly sought orders directing the Appellant herein to unconditionally reinstate the grievant; to pay the grievant for the entire period within which she was dismissed, for all the leave days due to her as at the time of reinstatement, and her leave travelling allowance; compelling the Appellant to produce the grievant's household goods that were withheld when the grievant was thrown out or compensation thereof. In the alternative an order directing the Appellant to pay the grievant gratuity for the years she had served with the Respondent at the rates provided for in the CBA, her house allowance from the time of the dismissal until judgment, her monthly salary for the period of twelve (12) months, payment in lieu of leave for the period dismissed, her leave travelling allowance for the period of the dismissal, an equivalent of two months' salary in lieu of notice of termination, damages for unlawful, illegal and unfair dismissal, and interest.

Additionally, that the Appellant be ordered to produce all the household goods that were withheld by the Respondent when the grievant was thrown out or payment in lieu thereof.

8. The Appellant subsequently filed a defence dated 30th September 2014 wherein it admitted that the grievant was duly employed by them as a general worker at Tagabi Factory and during the time in question resided in Tagabi Factory Village. The Appellant also admitted to entering into a Collective Bargaining Agreement (CBA) with the Respondent on behalf of the employees which was in force during the period in question. The Appellant denied the claim while referencing clause 24 of the CBA which provided for summary dismissal for matters which amounted to gross misconduct and Clause 30 which stated that an employee who is dismissed or terminated for gross misconduct shall not be entitled to gratuity.
9. The Appellant's version of events was that it received a report that the grievant had on 9th September 2012 left her place of work without permission to beat up a fellow employee's (George Nyakina's) wife, and in the process caused damage and destruction to the Appellant's property, namely, window panes in the house occupied by George Nyakina and his family. The grievant was requested to furnish a written explanation on the incident which she did on 10th September 2012, and after investigations were concluded, it was established that the employee in fact caused damage to the Appellant's property. The employee was consequently by a letter dated 13th September, 2012 invited to show cause why disciplinary action should not be taken against her for gross misconduct, and at a disciplinary meeting held on 31st October, 2012 in the presence of Tagabi Factory Shop Steward, the employee was given a fair hearing and an opportunity to give a verbal explanation. That after listening to the explanation by the employee and the witnesses, the Appellant and the Union Representatives present at the disciplinary hearing came to the conclusion that the explanation given by the employee was inadequate and unsatisfactory, and her actions amounted to gross misconduct under clause 24 (d) of the CBA and this warranted summary dismissal.



10. The Appellant accordingly summarily dismissed the grievant from employment in a letter dated 31st October 2012 on account of gross misconduct, and the grievant was duly paid wages earned up to the last working day being 31st October 2012, pro rata leave earned as per the CBA clause 7 (a)(ii) and a one-way bus fare as per the CBA clause 23 (1). It is also the Appellant's case that the Respondent's Branch Secretary appealed the decision and a meeting was held on 9th November 2012 in the presence of the Appellant's officials and the Shop Stewards, all parties in agreement that the employee had committed acts of gross misconduct and malicious damage to the Respondent's property, even though Respondent sought a reversal of the dismissal which was still upheld by the Appellant. The matter was referred to the Minister of Labour and a conciliator was appointed by the letter dated 20th May 2013 and he met the parties on 21st November 2013 for the purpose of conciliation. After they failed to agree the parties signed a Certificate of Disagreement.
11. The Appellant denied that the dismissal of the employee was wrongful, unlawful or unfair as alleged or at all. It is their averment that the employee was invited to a disciplinary hearing by the Appellant, along with the Shop Stewards, to present her account on the gross misconduct, the Appellant held a fair hearing for the employee before arriving at the decision to summarily dismiss her on account of gross misconduct, the employee was found to have committed an act of gross misconduct and all the actions taken by the Appellant were in line with the agreement between the parties and in particular the Collective Bargaining Agreement. The Appellant submitted that the employee was required to vacate the quarters allocated to her and the Appellant was within their rights to demand that the employee do vacate the quarters after the summary dismissal and denied withholding the employee's household goods.
12. The Appellant asserted that the grievant was not entitled to reinstatement, to any payment after the date of the summary dismissal, any additional annual leave days, travelling allowance, gratuity, house allowance, twelve
 - (12) month's pay in lieu of notice, production of any household goods, damages and costs, or any other reliefs sought in the memorandum of claim. The Appellant in answer to the claim for payment of an equivalent of 12 month's pay as a compensation for wrongful loss of employment, stated that the employee was lawfully dismissed for gross misconduct and therefore not entitled to claim for wrongful loss of employment as alleged. Additionally, the Respondent had failed to reveal all the details concerning the disciplinary process undertaken by the Appellant and had not come to Court with clean hands.
13. The trial Judge (Njagi Marete J.) after hearing the parties, considering the evidence, perusing the pleadings and the submissions filed therein found that the termination of the employment of the grievant was unlawful, wrongful and unfair principally for the reasons that the grievant's was not able to participate in the disciplinary meeting due to her state of health, and it appeared that "there was a pre-determination and finality in the manner of dealing with the grievant's case, all this while she was pregnant and sickly, which the learned Judge found to be " unfair, to say the least" and "sadistic and inhuman". In addition, that the grievant clearly and occasionally referred to Mr. George Nyakina as her husband and their romantic involvement was not considered nor controverted.
14. The learned Judge therefore ordered that the grievant, Bethseba Kerubo be reinstated to employment without loss of benefits, promotion or emoluments, and that the grievant reports to work on 15th December, 2015. Further, that the Appellant was ordered to pay the claimant twelve (12) months' salary of Kshs. 111,072.00 as compensation for economic loss due to unlawful termination of employment; all leave untaken at the time of termination, and to return to the grievant all household



goods and other property withheld at the time of eviction from her living quarters. Each party was ordered to bear its own costs of the cause.

15. The Appellant being aggrieved by this decision lodged an appeal in this Court, and has raised eleven (11) grounds of appeal in its Memorandum of Appeal dated 14th June 2016 namely:
 1. The Learned Judge erred in law and exceeded his jurisdiction in holding that the grievant should be reinstated whereas the time for reinstatement had lapsed under the provisions of section 12 (3) (vii) of the *Employment and Labour Relations Court Act*;
 2. The Learned Judge erred in law in awarding to the Claimants both compensations for unfair dismissal and reinstatement whereas these prayers were made in the alternative;
 3. The Learned Judge erred in law in failing to take into consideration the circumstances in which the termination took place, including the extent to which the employee caused or contributed to the termination thereby contravening the mandatory provisions of the *Employment Act*;
 4. The Learned Judge erred in law in failing to consider all the evidence before the Court and in failing to give reasons for the decision;
 5. The Learned Judge erred in law by failing to consider issues which were pleaded thereby prejudicing the Appellant and contravening its right to a fair hearing;
 6. The Learned Judge erred in failing to find that the Respondent had demonstrated, on a balance of probabilities that its decision to summarily dismiss the grievant was warranted;
 7. The Learned Judge erred in law and in fact in finding the Respondent responsible for the gross misconduct of the grievant;
 8. The Learned Judge failed to fulfil his legal duty by making general sweeping statements on the Appellant's case instead of dealing with each issue raised by the parties;
 9. The Learned Judge erred in failing to find that the Respondent followed due process in summarily dismissing the grievant;
 10. The learned Judge erred in law in failing to find that the Claimant had not discharged its burden of proof in making its claim against the Respondent; and
 11. The Learned Judge erred in entering judgment for the Claimant in any event.
16. The Appellant accordingly asked this Court to allow the appeal, set aside the judgment delivered by the ELRC on 14th December 2015 in so far as the same makes a finding in favour of the Claimant for reinstatement and in its entirety, and to make a declaration that the learned judge exceeded his jurisdiction under section 12 (3) of the *Employment and Labour Relations Court Act* in reinstating the grievant. Further, that the costs of this appeal be paid by the Appellant.
17. The appeal was heard on this Court's virtual platform on 16th October 2023. Learned counsel Mrs. Esther Opiyo appeared for the Appellant while learned counsel Mr. Aduda, appeared for the Respondent, and the two counsel highlighted their respective written submissions, dated 31st October 2022 and 23rd November 2022. This being a first appeal, I am mindful of the duty of this Court as set out in the decision of *Selle & Another vs Associated Motor Boats Co. Ltd & others* (1968) EA 123, which is to reconsider the evidence, evaluate it and draw independent conclusions of the facts and law; and to depart from the findings by the trial Court only if they were not based on evidence on record, where the said Court is shown to have acted on wrong principles of law as was held in the



Jabane vs Olenja (1968) KLR 661, or where its discretion was exercised injudiciously as held in Mbogo & Another vs Shah (1968) EA 93.

18. Mrs Opiyo and Mr Aduda submitted on three issues during the hearing of the appeal, namely, whether the learned Judge disregarded both the grievant's and Respondent's own admission and failed to deal with the issue of substantive justification; whether the learned trial Judge erred in finding a case of unfair termination and awarding 12 months' salary as compensation for unfair termination, and whether the learned trial Judge erred in issuing an award for reinstatement and an award of both the main relief and the alternative relief. I shall accordingly discuss these issues along two fronts, the first being whether the termination of the grievant's employment was lawful and fair, and second, whether the remedies awarded by the learned trial Judge were appropriate and justified.
19. On the termination of the grievant's employment, Mrs Opiyo's position was that the Appellant had a genuine and valid reason to terminate the grievant's employment as provided by section 43 (2) of the *Employment Act*, based on the investigation carried out and the recorded statements obtained from the interviews conducted. Further, while citing the decision in the case of Kenya Revenue Authority vs Reuwel Waithaka Gitahi & 2 others [2019] eKLR on the balance of proof, the counsel submitted that it was more probable than not that the grievant left her place of work to fight a fellow employee's wife and in the process broke the window panes to the house occupied by the said employee and his family thereby causing damage to the Respondent's property. The counsel in this respect submitted that the learned trial Judge erred in disregarding that the grievant admitted and sought forgiveness for her own wrongdoing during examination in chief, and that after the disciplinary hearing on 31st October 2012 and appeal therefrom, the Respondent acknowledged the grievant's wrongdoing.
20. In addition, it was submitted that the learned trial Judge, from his sentiments that the Court would have not dismissed the grievant based on the facts which arose from incidences of romantic relationship between co- workers, substituted his own views for those of the Appellant as the employer and as a result arrived at the wrong conclusion. Reliance was placed on the decisions in the cases of Reuben Ikatwa & 17 others v Commanding Officer, British Army Training Unit, Kenya & another [2017] eKLR and East Africa Portland Cement Co. Ltd vs Ishmael Otieno Odingo, Civil Appeal No 13 of 2016.
21. Lastly, Mrs Opiyo submitted that the procedure followed in terminating the grievant's employment was both lawful and fair since the Appellant held a disciplinary hearing and the grievant was given an opportunity to be heard and defend herself against the charges levelled against her in the presence of the Appellant's shop stewards as required by section 41 of the *Employment Act*. Further, that the Learned Judge's findings that the Appellant had acted unfairly in proceeding with the disciplinary hearing after the grievant had indicated that she was unwell on account of her pregnancy and therefore unable to proceed with the disciplinary hearing, and of hostility and indignity on the part of the Appellant's agents was unsupported by evidence. In particular, that the learned Judge failed to consider that the Appellant's testimony which was uncontested by the Respondent at the time of the disciplinary hearing. Additionally, that the grievant was asked to produce a medical report to support her claim that she was unwell and therefore unable to proceed with the disciplinary hearing however, she indicated that she did not have one, despite admitting that she was issued with a notice to show cause letter on 29th October 2012 and the disciplinary hearing took place on 31st October 2012.
22. Therefore, that it was reasonable in the circumstances to proceed with the disciplinary hearing and conclude that the grievant did not have a reasonable defence and resolve to summarily dismiss her. Further, that the Appellant asked the grievant to step outside as a result of her lack of cooperation during the disciplinary hearing, and her deliberate failure to respond to the questions put to her or offer



any defence to the charges. Reliance was placed on the Court of Appeal's decision in the case of *Sotik Highlands Tea Estate Limited vs Kenya Plantation and Agricultural Workers Union* [2017] eKLR.

23. Mr. Aduda on his part submitted that the trial Court looked at the totality of the events and processes leading to the dismissal of the grievant, analysed the evidence and applied the law to the facts presented, and specifically sections 41, 42, 43, 44 and 45 of the *Employment Act*, 2007. Therefore, that it was not true that the learned Judge disregarded both the grievant and the Respondent's own admission and failed to deal with the issue of substantive justification. According to counsel, after considering the evidence, the learned Judge found that there was an overwhelming case of non-consideration of procedure in determination of the disciplinary proceedings, which led to the finding of wrongful, unfair and unlawful termination of employment of the grievant.
24. I have considered the arguments made on the issue of the legality and fairness of the termination of the grievant's employment. Section 44 of the *Employment Act* provides for the circumstances in which an employee may be summarily dismissed without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term. The allowable grounds are when the employee has by his conduct fundamentally breached his obligations arising under the contract of service, or when the circumstances enumerated in section 44(4) of gross misconduct arise. In the present appeal, the Appellant alleges that the CBA that it had signed with the Respondent also provided for summary dismissal in clause 24 in circumstances where an employee absented himself or herself from work without leave or other lawful cause, or committed a criminal offence among other instances of gross misconduct.
25. I have perused the record of appeal and my first observation is that the notice to show cause that is on record is dated 13th September 2012, and is with respect to an incident that occurred at the Tagabi factory village on the morning of 9th September 2012; the grievant's "conduct unbecoming of causing malicious damage to company property as per photos overleaf"; and that the management had considered the grievant's statement and found that these amounted to gross misconduct on her part. However, I note that the letter of summary dismissal dated 31st October 2012 refers to the grievant's gross misconduct in "failure to follow procedure and without leave or other lawful cause, absenting from the place proper and appointed to work as per CBA clause 24A" and "destruction of company assets." Although the Appellant availed statements to demonstrate that the grievant was absent from work, there is no evidence that she was given a notice to show cause with respect to this particular allegation, nor an opportunity to respond to any of the allegations made in this regard. It is also notable that a number of the statements made by the witnesses and relied on by the Appellant's management in its decision to dismiss the grievant were dated 30th October 2012 and 31st October 2012, which was the date of the disciplinary hearing. It is elementary that procedural fairness requires that an affected person is given adequate notice of the issues that are to be considered in any decision making process, to enable the person an opportunity to make effective representation.
26. My second observation is that the proceedings of the disciplinary hearing held on 31st October 2012 commenced with a statement by the grievant and was reported as follows by the Appellant's representative:

"..Started by informing that she was before the group on account of incident in the village and incident that happened at the company premises in the milling station. Kerubo started by staying that she can't proceed with the case because her situation will not allow her to do so. When prodded, she insisted that her situation was still not good. When asked to produce a letter from a medical practitioner, she said she didn't have. I went on to ask Kerubo if she had any idea on why we were calling her and to explain to us on the 2 incidences, but she did



not reply Kerubo kept quiet as we waited for an answer for two minutes in silence. She then indicated that she cannot respond because in her tribe and tradition, as a pregnant woman, she is not supposed to be involved in cases. I then sent Kerubo back to the waiting area and deliberated with the shop stewards that the case had to continue to its logical end. Failure to talk due to pregnancy was found to be not a strong factor to postpone the meeting since the next available time based on the reasons above would be in 2013 and well after three months' maternity leave and one- month annual leave. I then called her supervisor, security team leaders and security personnel who witnessed the incidences in the milling center as well as being among the first on the scene after the incident of destruction of company property and windows. I also got a statement from George Nyakina whose house was broken into”

27. A total of eight witnesses were then called and proceeded to give their evidence during the disciplinary hearing in the absence of the grievant, including on the ground of her alleged absenteeism. As pointed out earlier, the majority of the statements of these witnesses were dated 30th October 2012 and 31st October 2012, and there was no evidence that they were availed to the grievant. Section 45 (2) of the *Employment Act* in this respect specifically provides for the following requirements for fair termination of employment, with respect to the reasons and procedure for termination:

- “(2) A termination of employment by an employer is unfair if the employer fails to prove—
- a. that the reason for the termination is valid;
 - b. that the reason for the termination is a fair reason—
 - i. related to the employee’s conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; and
 - c. that the employment was terminated in accordance with fair

28. An express procedure and requirement of notification of the reason for which the employer is considering termination of employment, and of a hearing and consideration of any representations from an employee before termination of employment on grounds of misconduct is set out in section 41 of the *Employment Act*. It was held by this Court in *Kenya Revenue Authority vs Reuwel Waithaka Gitahi & 2 others* [2019] eKLR that section 41 provided the minimum standards of a fair procedure that an employer ought to comply with when terminating the employment of an employee, and that the four elements that had to be discernible for termination to pass muster were:

- a. an explanation of the grounds of termination in a language understood by the employee,
- b. the reason for which the employer was considering termination,
- c. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination was made; and
- d. hearing and considering any representations made by the employee and the person chosen by the employee.

29. The evidence on record shows that the procedure followed in the termination of the grievant’s employment was breached in material respects. Firstly, no notification of the ground of dismissal of absenteeism from duty was given to the grievant, and therefore no opportunity to the grievant to make representations on this ground, yet it was one of the reasons put forward for her summary dismissal. Secondly, there was no opportunity given to the employee to participate in, or make any



representations on the evidence adduced against her during the disciplinary hearing, and on the contrary she was asked to leave the proceedings. Section 45(4) and (5) of the *Employment Act* in this respect provides that a termination of employment shall be unfair where in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee, and in deciding whether it was just and equitable for an employer to terminate the employment of an employee, the Court shall consider among other factors the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision.

30. It is also pertinent in this respect that the decision by the Appellant's representatives not to consider the grievant's request for more time during the disciplinary hearing was motivated by the fact that the next hearing would be delayed due to the grievant's pregnancy and maternity leave, a consideration which is expressly prohibited by section 46(a) of the *Employment Act* which provides that a female employee's pregnancy, or any reason connected with her pregnancy is not a fair reason for dismissal or for the imposition of a disciplinary penalty, and Article 27(5) of *the Constitution* expressly forbids discrimination of any person either directly or indirectly on the ground of pregnancy. Put differently, the grievant was prejudiced and given differential treatment upon her request to be given adequate opportunity to be heard for reason of the implications that her pregnancy, namely that "the next available time based on the reasons above would be in 2013 and well after three months' maternity leave and one- month annual leave".
31. As regards the presence of shop steward during the hearing and its legal effect, the requirement of the law in section 55(2) (a) of the *Labour Relations Act* is that shop stewards they are required to represent an employee during disciplinary proceedings and therefore safeguard and promote the employee's interests. In the present appeal, the grievant having clearly indicated that she was not ready to proceed, the shop stewards cannot therefore be deemed to have participated at the disciplinary hearings at the grievant's request or choice, nor were they representing her views or interests at the hearing. It is thus evident that whatever views that were presented by the shop stewards were clearly their own views, contrary to the provisions of section 55(2)(a) of the *Labour Relations Act* and section 41 of the *Employment Act*.
32. These facts in my view clearly distinguish this appeal from the circumstances obtaining in *Sotik Highlands Tea Estate Limited vs Kenya Plantation and Agricultural Workers Union* (supra) where it was found that the employee therein was asked to explain his conduct but refused to do so and instead asked "the appellants' management to take whatever disciplinary action it deemed fit", and "maintained a rude and arrogant attitude to his employer which amounted to gross misconduct". In the present appeal the grievant specifically indicated that she was not well and not ready to proceed on that account, and was instead sent out of the hearing which proceeded in her absence.
33. Lastly, the Appellant's case is that the grievant admitted to the gross misconduct. In light of the fact that the disciplinary proceedings took place in the absence of the grievant, this clearly could not have happened, and I am at pains to appreciate this argument. The record of the proceedings in the trial Court also shows that the grievant was persistent in her denial during her examination-in-chief and cross-examination that she did not undertake the destruction. Her alleged request for forgiveness was made in mitigation upon being issued with the letter for summary dismissal, and after the hearing and decision to terminate her employment had been made.



34. The context in which the said request was made was in the trial Court, when the grievant was giving evidence of what transpired during the disciplinary hearing as follows:

“I reported to work at 645 hours and left at 1200 hours, others left later. I was on light duty. I would not work for eight hours. I was pregnant and sickly. Later, I was instructed to report on 22/10/2012 and I was informed of a meeting on 29/10/2012 which was postponed to 31/10/2012. On 31/10/2012 I went to the manager's office where I met him, shop stewards, John Nyakundi. I was asked to explain about the broken window and posho mill incident. I could not go through hearing and explained as such. I was asked to move out. At 1400 hours, I was given a letter of summary dismissal.

I asked for forgiveness but he told me off. I went to the union. The union did an appeal letter but we disagreed as they refused to hear us. A disagreement was done and the matter referred to the labour office.

35. It is evident that there was no admission by the grievant to having committed any specific act of gross misconduct. In any event, the onus of proving the reason for termination always remained with the Appellant under section 43 of the *Employment Act*, and it is my view that any reasons that may have been demonstrated were vitiated by the procedural infractions during the termination process. The legal effect is that the termination of the grievant's employment was inevitably rendered unfair, whether or not there was substantial justification or reason. I therefore find that the learned trial Judge did not err in finding that the termination of the grievant's employment was unfair and unlawful.
36. On the remedies awarded to the grievant, Mrs Opiyo submitted that the learned trial Judge did not furnish any reason justifying the award of 12 months' salary for unfair termination and awarded the maximum compensation without considering the relevant factors including the grievant's action, the conduct of the grievant during the disciplinary hearing and her contribution to her termination as held by the Court of Appeal in the case of *Ol Pejeta Ranching Limited vs David Wanjau Muhoro* [2017] eKLR. Furthermore, that the learned Judge erred in ordering that the grievant be reinstated to employment despite three (3) years having lapsed since the date of the termination, as the grievant was summarily dismissed on 31st October 2012 whilst the impugned judgment was delivered on 14th December 2015. the learned Judge erred in failing to consider the factors stipulated in section 49 (4) (a) to (m) of the *Employment Act*, 2007 before considering reinstatement. Further, the learned Judge's award of reinstatement did not provide any indication of consideration of the factors that made their case appropriate and/or the exceptional circumstances of their cases before ordering reinstatement. Additionally, the learned Judge failed to appreciate the remedy of reinstatement was not an automatic right for an employee, it was a discretionary remedy and only limited in exceptional circumstances.
37. Consequently, counsel submitted, that there was no legal or factual basis for the Court's justification as required by the Act in awarding reinstatement, and reliance was placed on this Court's decisions in *Kenya Power and Lighting Company Limited vs Aggrey Lukorito Wasike* [2017] eKLR and *Sotik Highlands Tea Estates Limited vs Kenya Plantation and Agricultural Workers Union* [2017] eKLR. Lastly, that that the Learned Judge erred in awarding both the main relief and the alternative relief. Further, the learned Judge had no jurisdiction to award the main relief of reinstatement, he only had jurisdiction to award the alternative relief but not both reliefs as held by this Court in the case of *National Bank of Kenya vs Samuel Nguru Mutonya* [2019] eKLR.
38. Mr. Aduda's submissions were that the learned trial Judge having found a case of wrongful, unfair and unlawful termination of employment for the grievant, was right to award twelve (12) months' salary as compensation and was guided by the principles and parameters set out in section 49 of the *Employment*



- Act in which the Court can make an award of damages of a maximum of 12 months' salary. Further, a Court of law is expected to exercise judicial discretion on what is fair in the circumstances, and that the learned Judge exercised this jurisdiction in issuing an award for reinstatement of the grievant.
39. Mr. Aduda conceded during the hearing of this appeal that it was in error for the trial Judge to award both the main relief and the alternative relief. In addition, it is not contested that the remedy of reinstatement was awarded after the lapse of three years, contrary to the express provisions of section 12 (3) (vii) of the Employment and Labour Relations Court Act which barred the trial court from granting that relief where three years have lapsed from the date of dismissal.
40. As regards, the outstanding remedies sought by the grievant, Section 49(1) provides as follows as regards payments to be made to an employee by an employer in the event of unjustified termination:
- 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.
41. It is notable that the payment of salary in lieu of notice under section 49(1)(a) is independent of, and additional to the compensation payable either under section 49(1)(b) or section 49(1)(c). In the present appeal, the grievant's evidence that she was employed on 13th April 2004 to 31st October 2012, and that her monthly salary was Kshs 9,236/= at a daily rate of Kshs 356/= was not contested. It is also not in dispute that the grievant was dismissed summarily and that there was no notice of termination of employment given. I note that the subject CBA in clause 23 provided that after 3 to 5 years' continuous service, an employee was entitled to not less than 45 days' notice of termination of service or pay in lieu. Having been persuaded that the termination of the grievant's employment was unfair and unlawful, it is my view that the grievant was therefore entitled to 45 days' pay in lieu of notice at the rate of Kshs 356 per day which translates to an award of Kshs 16,020/=.
42. I also note that the Appellant brought evidence that it prorated the grievant's leave from the month of April to October 2012 and paid her Kshs 4811.67 for 13.5 days leave allowance, and also Kshs 510/= one-way bus fare for the grievant and her two children pursuant to clause 23(f) of the CBA. However, under clause 8 of the CBA, the grievant was in addition entitled to a return bus fare as annual leave transport allowance which she claimed, and was therefore entitled to an award of Kshs 1020/= on this account. In addition, the Appellant paid the grievant Kshs 1700/= as her wages for the days worked in October 2012. Given that her termination of employment was on 31st October 2012, and having found her termination to have been unlawful, I also find that the grievant was entitled to her full monthly pay for October 2012, and was therefore entitled to an award of the outstanding monthly pay of Kshs 7,536/=.
43. As regards the claim for the return of the grievant's household goods, the Appellant's witness, John Mutuo Mutuku (DW1), testified that some items were collected from the grievant's house on 14th May 2013 and were not released to her due to lack of clearance and her continued stay in the Appellant's premises pending the trial. The grievant is therefore entitled to a return of her household and personal



items that were taken by the Appellant, or compensation thereof at market rates as prayed given the time that has lapsed since the time the said items were taken.

44. On the claim for payment of gratuity, the grievant was not in the continuous employment of the Appellant for 10 years as required under clause 30 of the subject CBA, and therefore not entitled to any gratuity. Likewise, the grievant was also housed by the Appellant and was therefore not entitled to any housing allowance under clause 15. Lastly, under section 49(1)(c) it is specifically provided that the figures that guide the quantum of an award for unlawful termination is the gross wages or salary. I am in this regard of the view that given the length of the Respondent's employment from 13rd April 2004 until on 31st October 2012; her entitlements as a result of the unlawful termination which I have computed in the foregoing, and the manner and circumstances in which her employment was terminated, particularly when she was about to proceed on her maternity leave, I find that the award of twelve months' gross salary as compensation for unfair termination was reasonable in the circumstances.
45. In the end, I would therefore allow the Appellant's appeal only partially, to the extent of setting aside the order of the trial Court reinstating the grievant, Bethseba Kerubo, to employment without loss of benefits, promotion or emoluments, and the order that the grievant reports back to work on 15th December 2015. I would however uphold the award by the trial Court of compensation of 12 months' salary of Kshs 111,072/= and the order by the trial Court that the Appellant returns to the grievant her household items taken from her housing accommodation. Lastly, I would order that each party shall bear own costs of the trial and of this appeal.
46. As the majority of the Court are of a contrary opinion, the final orders in these consolidated appeal will however be as proposed by Sichale, JA.

Concurring Judgment of Korir, JA

1. I have had the advantage of reading the draft judgment of Sichale, JA. I wholly agree with the reasoning and conclusions therein, and I have nothing useful to add.

DATED AND DELIVERED AT NAKURU THIS 9TH DAY OF MAY 2024.

F. SICHALE

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

