



**Tribe Hotel Limited v Muoki (Civil Appeal 244 of 2019)
[2024] KECA 1673 (KLR) (22 November 2024) (Judgment)**

Neutral citation: [2024] KECA 1673 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 244 OF 2019
DK MUSINGA, A ALI-ARONI & JM MATIVO, JJA
NOVEMBER 22, 2024**

BETWEEN

TRIBE HOTEL LIMITED APPELLANT

AND

ANGELA WOKABI MUOKI RESPONDENT

(Being an appeal from the judgment and decree in Employment & Labour Relations Court of Kenya, Nairobi (M. Mbaru, J.) dated 29th September, 2016 in ELRC Claim No.1712 of 2014)

JUDGMENT

1. A concise summary of the factual dispute which triggered the litigation before the Employment and Labour Relations Court (ELRC) at Nairobi is necessary in order to properly contextualize the issues urged by the parties in this appeal before us in support of their respective positions. Luckily, this history is essentially common ground or uncontroverted.
2. Briefly, the genesis of the parties' employer/employee relationship is the appellant's letter of appointment dated 29th August, 2009 appointing the respondent as its Group Human Resource Manager. The scope of the appointment entailed performing her duties in any area of the appellant's hotel business as directed by the hotel's management or in any capacity as may be required. The appointment was for a period of 5 years with effect from 1st September, 2008 at a gross monthly salary of Kshs.140,000.00 comprising of basic pay of Kshs.90,000.00 and a house allowance of Kshs.50,000.00, and upon the lapse of the 5 years, subject to the appellant scoring an average of 70% from the combined previous appraisals, and the appellant settling all the accrued benefits due to the respondent, "the appointment may be renewed for a new term and a re-negotiated package."
3. The respondent contended that she worked with a lot of dedication, honesty and loyalty, earning successive annual and merit increments, thereby enhancing her salary to Kshs. 645,623.00, but



subsequently, differences arose between them leading to the termination of her employment on 15th July, 2014.

4. Aggrieved by the termination, by a memorandum of claim dated 30th September, 2014, the respondent instituted a suit against the appellant at the ELRC being Cause No. 1712 of 2014, Angela Wokabi Muoki vs. Tribe Hotel Limited, seeking, inter-alia: (a) a declaration that her dismissal from employment was unprocedural, unfair, unlawful and unconstitutional; (b) Kshs.7,507,716.00 being compensation equivalent to 12 months' salary; (c) Kshs.1,876,929.00 being three months' pay in lieu of notice; (d) Kshs.333,676.00 being unpaid salary for July 2014; (e) Kshs.750,771.60 for 36 days untaken leave; (f) Kshs.53,000.00 for school fees refund; (g) Kshs.1,876,929.00 for severance pay @ 15 days for each completed year; (h) punitive and aggravated damages; (i) compensation for violation of constitutional rights to be assessed by the court; (j) certificate of service; (k) a fine of Kshs.100,000.00 against the appellant for failure to comply with section 51 (3) of the Employment Act and costs of the suit.
5. The appellant filed a reply dated 6th November, 2014 essentially disputing the respondent's claim and maintaining that the respondent terminated her employment on her own volition. It prayed that the respondent's claim be dismissed.
6. In the impugned judgment delivered on 29th September, 2016, Mbaru, J. held that despite the serious concerns the appellant had against the respondent, Section 43 and 41 of the Employment Act required that the respondent be given a fair chance to defend herself against the said allegations. The learned judge also found that the appellant's board convened an urgent meeting and asked the respondent to respond to the allegations without according her sufficient time in violation of her rights as set out in Section 41 of the Employment Act. Consequently, the judge found that the respondent's termination was unfair and granted the following orders:
 - a. Compensation for unfair termination awarded at Kshs.7,507,716.00;
 - b. July 2014 salary awarded at Kshs.333,676.00;
 - c. Leave due awarded at kshs.866,275.00;
 - d. School fees awarded at kshs.53,000.00;
 - e. Punitive damages awarded at Kshs.100, 000.00 to be paid within 7 days;
 - f. Interests on (b), (c) and (d) above;
 - g. Above dues shall be paid less what the respondent may owe to Kentours Sacco and any advances made while in employment;
 - h. Costs of the suit awarded to the claimant.
7. Dissatisfied by the above verdict, the appellant appealed to this Court vide a memorandum of appeal dated 10th April, 2019 listing 9 grounds as follows:
 - a. The learned judge erred in finding that the respondent had been unfairly terminated contrary to the evidence showing that she had resigned and sought employment elsewhere.
 - b. The learned judge failed to consider that the circumstances leading to her termination were precipitated by the respondent's conduct and overt acts.



- c. The learned judge failed to appreciate that the respondent's overt acts had led to loss and damages to the appellant and as such was not entitled to compensation of twelve months' salary.
 - d. The learned judge failed to consider that compensation for unfair termination should be commensurate with the respondent's prospect of getting another job which if she had, would have considered awarding a lower figure.
 - e. The learned judge erred in awarding the respondent Kshs.100,000.00 which in law is payable as a fine and punishment for criminal conduct and as such the appellant was not entitled to the same.
 - f. The appellant erred in awarding school fees which was not part of the respondent's salary or earning and failed to consider that it was paid at the appellant's discretion.
 - g. The appellant erred in awarding the respondent 3 months' salary in lieu of notice contrary to the terms of employment and law.
 - h. The learned judge erred in awarding three months' notice and twelve months compensation for unfair termination which amounts to double award and resulted into unfair enrichment to the respondent.
 - i. The learned judge erred in awarding amounts of compensation which were unsupported by evidence.
8. During the virtual hearing of this appeal on 16th July, 2024, learned counsel Mr. Musyoki appeared for the appellant, while Mr. Kamotho, learned counsel represented the respondent. Both parties adopted their written submissions dated 26th November, 2019 and 14th February, 2020 respectively.
 9. In his submissions, Mr. Musyoki combined grounds 1, 2, 3, 4 and 9 and argued that the respondent resigned on her own volition. He maintained that no evidence was tendered to support the allegations that the respondent's services were terminated verbally, nor did the meeting between the respondent and the appellant's directors which took place soon after the breakdown of the parties' relationship point to a sour relationship as claimed by the respondent. Counsel asserted that this was a case of mutual disengagement and cited the cordial text messages exchanged between the appellant's chairman and the respondent and also the respondent's request for recommendation letters vide her e- mail dated 26th June, 2014 which the respondent sent to her prospective employer while she was still in the appellant's employment.
 10. Addressing the question whether the termination was unfair, Mr. Musyoki maintained that the appellant and the respondent parted ways on 15th July, 2014 after a meeting between the respondent and its director, where the respondent was advised to pursue her resignation and final dues. Counsel asserted that appellant never accused the respondent of any misconduct and faulted the learned judge for analyzing the evidence with that erroneous position in mind.
 11. Mr. Musyoki maintained that the appellant complied with Section 43 (2) of the [Employment Act](#) which provides that the reasons for the termination of a contract are matters that the employer at the time of the termination genuinely believe they exist and which cause the employer to terminate the employment. It was his argument that there is sufficient evidence to show that the respondent was suspected to have been engaged in malpractices, therefore, it was incumbent upon the learned judge to give reasons why she believed the respondent's story over the appellant's story. Further, it was not



in the best interest of her employer for the respondent to remain in employment in light of the e-mails retrieved from her computer hard drive.

12. Regarding the award of damages, Mr. Musyoki maintained that the relationship between the parties must be governed by the contract and under the law, damages are meant to put an innocent party in the position they would have been had the breach not occurred. Furthermore, general damages cannot be awarded in an action for breach of contract. Therefore, the award of three months' salary in lieu of notice was sufficient. He also submitted that the award of 12 months' salary for unfair termination even though discretionary, was excessive and unjustifiable since the learned judge did not consider the circumstances under which the termination took place and the respondent's contribution towards the termination, the possibility of the respondent getting another job, the length of time the respondent would have worked if not terminated, the fact that the respondent was looking for jobs in China and in other institutions which were the appellant's competitors using the appellant's resources and time, and the fact that the relationship between the parties had broken down. Nevertheless, according to the learned judge, the discoveries came after termination and could not be used as reasons for termination of the respondent's employment.
13. The appellant's counsel maintained that considering the shared blame by both parties, had the learned judge considered all the factors, she would have awarded a salary for a lesser period, if at all, since the purpose of the employment and labour laws is to regulate and promote harmony and good labour practices in the market and indeed after the end of their relationship, the appellant issued the respondent with a recommendation letter and a certificate of service, although the respondent rejected the same because of misdescription of her rank/position.
14. Regarding the award of punitive damages, (ground 5), the appellant's counsel maintained that the same were not awardable under Section 49 of the *Employment Act* and argued that the learned judge referred to section 51 (3) of the *Employment Act* and convicted the appellant of the criminal offence of wilful failure to issue a certificate of service, without taking the appellant through a criminal prosecution, and without according the appellant an opportunity to be heard and prepare its defence contrary to Article 50 of *the Constitution*.
15. Regarding grounds 6, 7 and 8, Mr. Musyoki argued that under clause 16 (2) of the letter of appointment, the respondent is entitled to three months' notice or payment of three month's salary in lieu of notice, which is what the learned judge awarded to the respondent. He maintained that the contract between the parties fell under Section 35 (2) of the *Employment Act* and the termination was under section 36 which grants either party the right to terminate the contract without notice by paying the other party remuneration which the party would have earned had proper notice been given. Counsel maintained that the award of 12 months' salary amounts to double compensation and the three months' salary in lieu of notice amounted to duplication.
16. In opposition to the appeal, learned counsel for the respondent, Mr. Kamotho, dismissed the argument that the respondent willingly resigned from her employment. He underscored that asking an employee to resign amounts to unfair labour practice and referred to the appellant's testimony at page 159 of the record of appeal where its witness is recorded testifying that had the respondent resigned, she would have had good employability and that the appellant was willing to give her a good recommendation but the respondent did not resign despite alluding to her willingness to resign. Counsel also referred to page 160 of the record where the same witness is recorded stating that "it was a suggestion for the claimant to follow her resignation. Claimant had fallen out of trust with the respondent's staff and as human resource manager she could not do her work effectively."



17. Mr. Kamotho also submitted that the appellant did not produce any written notice of resignation from the respondent and that the short text messages exchanged between the respondent and the appellant after her dismissal did not mention the respondent's voluntary resignation. Therefore, the appellant failed to discharge its burden under Section 47 of the *Employment Act*, hence, the trial court cannot be faulted for finding that the respondent did not resign from the appellant's employment.
18. Addressing grounds 2 and 3 of the memorandum of appeal, Mr. Kamotho submitted that the respondent was not provided with the allegations against her in advance for her to prepare her rebuttal, nor did the appellant investigate the veracity of the contents of the anonymous e-mail before dismissing the respondent. Consequently, the respondent was ambushed in violation of the safeguards available to an employee under Sections 41 and 43 of the *Employment Act* were violated.
19. Regarding the award for 12 months' pay, (ground 4), counsel contended that the award was fair and just in the circumstances, and cited the Supreme Court decision in *Kenfreight (E.A) Limited vs. Benson K. Nguti* [2019] eKLR in support of the proposition that an award of twelve months' gross salary as damages for unfair termination was an exercise of judicial discretion.
20. Submitting on the award of three months' salary in lieu of notice, Mr. Kamotho maintained that the said payment cannot be a substitute to the legal remedies for unfair termination. Counsel asserted that notice pay is different from compensation for unfair termination of employment and it is possible for an employee to pursue a claim for damages for unfair termination regardless of the employer having complied with the notice requirement under the contract of employment. Therefore, awarding damages for unfair termination of employment and wages in lieu of notice does not in any way amount to double compensation. He relied on this Court's decision in *International Planned Parenthood Federation vs. Pamela Ebot Arrey Effiom* [2016] eKLR in which it upheld an award of three months' pay in lieu of notice plus 10 months' salary compensation for unfair termination and underscored that the two remedies can be awarded concurrently.
21. Regarding the award of punitive damages, (ground 5), the respondent's counsel contended that the appellant misled this Court to believe that the trial court converted the fine under Section 51 (3) of the *Employment Act* to damages payable to the respondent, which was not the case. It was his submission that a review of the judgment shows that the appellant's conduct fell within the test for the grant of exemplary damages as was held in *John vs. MG Limited* [1997] QB 586. Further, the trial court weighed the appellant's conduct as required by Section 45 (5) (b) and relied on *Obongo & Another vs. Municipal Council of Kisumu* [1971] E.A 91 in which this Court upheld an award of exemplary damages.
22. Regarding the award of Kshs.53,000.00 for school fees (ground 6), the respondent's counsel referred to the appellant's submissions before the trial court at page 106 of the record of appeal in which counsel submitted that "as at the time of her departure, the claimant earned a gross monthly salary of Kshs. 625,543.00. At the time, she was entitled to the days earned in the month of July, 2014, payment in lieu of 36 days leave, school fees refund..." Therefore, the appellant conceded the said claim, plus payment for the days worked in the month of July, 2014, plus payment in lieu of 36 days' leave.
23. We have considered the entire record of appeal and the parties' submissions. Rule 31 (1) (a) of the Court of Appeal Rules, 2022 requires us to re-appraise the evidence tendered before the trial court and arrive at our own independent conclusions. As we do so, we must bear in mind that this Court will not normally interfere with a finding of fact by the trial court unless the finding is based on no evidence, or they are founded on a misapprehension of the evidence, or the judge is demonstrably shown to have acted on wrong principles in arriving at his finding, or failed to take into account relevant materials or considered irrelevant materials. (See *Mwangi vs. Wambugu* [1984] KLR page 453).



24. Upon considering the material before us, we find that this appeal will stand or fall on two germane issues, namely (i) whether the respondent was unfairly terminated from the appellant's employment; and, (ii) whether the respondent was entitled to the reliefs sought in her statement of claim.
25. Regarding the 1st issue, Section 43 of the *Employment Act* places the burden of proving the reasons for the termination on the employer. It reads:
- “(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”
26. Section 45 of the Act provides:
- “45. Unfair termination
1. No employer shall terminate the employment of an employee unfairly.
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 procedure.”
27. It is common ground that the respondent was not served with a termination notice as required by Section 35 of the *Employment Act*. Also, there is nothing to suggest that the respondent tendered a resignation letter. In support of her case, the respondent contended that on 15th July, 2014 while going on with her duties, she was summoned to the boardroom for a meeting with the appellant's chairman, only for her to find the appellant's directors also present and she was orally asked to resign, handover and leave the appellant's premises the same day, and that her dues would be processed within seven days. The respondent inquired whether the reasons for her termination related to an anonymous e-mail dated 14th July, 2014 but the appellant's board dismissed her enquiries. It was also her case that she never went on leave as alleged by the appellant, and in any event, her leave had to be approved by the General Manager, Mr. Mark Somen, which he never did.
28. As the record shows, the appellant's director, one Eshani Hamed, testified that he was under the impression that the respondent was serving her notice period since she had indicated that she would resign and that when the meeting of 15th July, 2014 was called, she was verbally asked to join them and it is then that the issue of the respondent's resignation was discussed together with the issue of the anonymous e-mail dated 14th July, 2014, the contents of which the respondent denied. It was his evidence that at the end of the meeting, the respondent was asked to follow up on her resignation formally and to compute her dues.



29. It is noteworthy that the respondent's computation furnished to the appellant was based on three options for her exit, namely: dismissal, termination, and redundancy. Clearly, resignation was not one of the options suggested by the respondent. Also, the appellant's General Manager did not sign the respondent's exit proposal. It was also Eshani's testimony that had the respondent resigned, she would have had good employability and they were willing to give good recommendation, but the respondent did not resign although she had indicated her willingness to do so. Mr. Eshani also confirmed that during the meeting of 15th July, 2014, the respondent applied for leave but the appellant told her to hand over and leave the appellant's premises to give room for investigations and before the investigations could be concluded the respondent filed a suit before the ELRC. The foregoing evidence leaves no doubt that the respondent never resigned as alleged.

30. Our above conclusion is strengthened by the fact that upon cross-examination, Mr. Eshani confirmed that the respondent ceased being the appellant's employee the moment she informed him she would resign and that the respondent ceased being the appellant's employee on 15th July, 2014 since she was told to hand over and leave the appellant's premises on the said date. Even if there were any doubts on our conclusion that the respondent never resigned as alleged, the same are cleared by the evidence that on 16th July, 2014 Mr. Harjit wrote to Mr. Hamed in which he stated, inter alia, that they had removed the respondent from the payroll. He wrote:

“Dear Sanjay/Hamed,

FYI. Angela came up with the attached final dues workout due to her and the covering letter.

I have told her that as far as I understood we were due to pay her only for the month of July 2014, up to 31st July, together with any accumulated leave (which is being verified). Hamed further clarified that leave was to be half taken and half paid.

We have removed her from her payroll and mail passwords and she shall be leaving before 5pm today.” (Emphasis added)

31. In the impugned judgment, the learned judge after considering the evidence on record held as follows:

“80. Though the Claimant has not claimed constructive dismissal, effectively, by the conduct of the respondent, she was forced out of her employment. I find no reasons or notice given at the time of such termination of employment. The evidence that there was a meeting called on 13th August, 2014 and the Claimant was in attendance on 15th August, 2014 came after the fact. Termination had taken effect and to the Respondent it did not matter what explanations existed with regard to the anonymous emails or the responses the Claimant made effort to address while at home after the 16th of July 2017

...

84. Mr Hamed testified that on 15th July, 2014 he convened an urgent board meeting following the anonymous email circulated by third parties. Present were Sanjay Shah, Manoj Shah and hamed. The Claimant was called from her office without the knowledge of the supervisor the general manager and asked to explain the contents of the email. Mr Hamed in his evidence did not indicate as to whether this was a disciplinary meeting or whether the Claimant was required to show cause why her employment should not be terminated. He testified that;



...

At the meeting, the first issue was the claimant's resignation as she told me she would. The second issue was the email on the claimant's character making it a challenge to the good work conditions with other staff. The Claimant denied the allegations. We asked the Claimant to follow up on her resignation and to compute her dues

...

83. From such evidence, it was apparent that the Respondent had serious concerns against the Claimant. However, the protections under section 43 and 41 of the *Employment Act* required that the Claimant be given a fair chance to defend herself upon notification of the allegations made against her. I find the time the Respondent board convened an urgent meeting and called the Claimant to answer questions is not time sufficient to have given the Claimant fair notification of the allegations and accord her the rights set out under section 41 of the *Employment Act*. The resulting action of sending the Claimant away from her employment, ended in termination of employment that was unfair.”

32. Section 41 of the *Employment Act* stipulates as follows:

- “41 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.”

33. Section 47 (5) of the *Employment Act* provides:

- “(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

34. Unfair dismissal is the termination of employment for no good cause or acceptable reason. An employer must produce enough evidence to prove on a balance of probabilities that there is good reason to dismiss an employee. Whether or not a termination is fair depends on whether the reason(s) for termination and the procedure for dismissal were fair. (See this Court's decision in CFC Stanbic Bank Limited vs. Danson Mwashako Mwakuwona [2015] eKLR). The fairness of the dismissal must be considered in light of whether an employer has satisfied the requirements of the *Employment Act* to dismiss the employee.



35. In the above paragraphs, we re-evaluated the appellant’s evidence and discounted its argument that that the respondent opted to resign. Accordingly, we find ourselves in agreement with the trial judge that the respondent did not resign as claimed by the appellant. Conversely, she was forced out of her employment. We are persuaded that no notice of termination was served upon her and that by the time the appellant was calling for a meeting on 13th August, 2014, the respondent had already been terminated as evinced by the above cited letter dated 16th July, 2014.
36. Regarding the process that resulted in the termination, we agree with the learned judge that the respondent was not given a fair chance to know the allegations against her since she was verbally summoned to the meeting on 15th July, 2014. She was not accompanied by an employee of her choice nor was she accorded an opportunity to prepare her defence on the allegations against her and the anonymous e-mail sent on 14th July, 2014. The allegations were being raised in the hurriedly convened meeting for the first time. The foregoing lapses were a clear affront to Section 41 of the Employment Act. The fairness of a dismissal from employment must be considered in light of whether an employer has satisfied the requirements of the Employment Act which provide for termination of employment or dismissal of an employee, therefore, we uphold the trial court’s finding that the termination was unfair.
37. The second issue is whether the respondent was entitled to the reliefs sought in her statement of claim. We propose to begin with the award for unfair termination, which according to the appellant was excessive. Section 49 (1) (c) of the Employment Act permits the trial court to award compensation up to a maximum of 12 months’ salary. The trial court in this case exercised its discretion and awarded the maximum. The question is whether the trial court was justified in allowing the said award.
38. Section 50 of the Employment Act obligates courts to be guided by the provisions of Section 49 of the Act in determining a complaint or suit involving wrongful dismissal or unfair termination. Section 49 (1) provides as follows:
- “(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.”
39. The compensation applicable in the circumstances of the present appeal is the one prescribed in Section 49 (1) (c). The factors that the courts are required to take into account in determining the quantum in this regard are set out in section 49 (4) as follows:
- “a) the wishes of the employee;
 - b. the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and



- c. the practicability of recommending reinstatement or re-engagement
- d. the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
- e. the employee's length of service with the employer;
- f. the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
- g. the opportunities available to the employee for securing comparable or suitable employment with another employer;
- h. the value of any severance payable by law;
- i. the right to press claims or any unpaid wages, expenses or other claims owing to the employee;
- j. any expenses reasonably incurred by the employee as a consequence of the termination;
- k. any conduct of the employee which to any extent caused or contributed to the termination;
- l. any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and
- m. any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee."

40. In awarding the maximum compensation under the [Employment Act](#), the learned judge held:

"106. On the finding that the Respondent engaged in unfair labour practice contrary to section 54 of the [Employment Act](#), compensation is due. Putting into account that the Claimant was of starling performance and had no disciplinary case for the entire period of her employment, maximum compensation at 12 months is appropriate. On the evidence that the Claimant was earning a gross salary of Kshs.625,643.00 per month she is awarded kshs.7,507,716.00."

41. It is trite law that quantum of damages is a matter for the trial court's discretion. In *Edward Sargent vs. Chhotabhai Jhaverbhat Patel* [1949] 16 EACA 63, the predecessor of this Court held that an appeal does lie to an appellate court against an order made in the exercise of judicial discretion, but the Court of Appeal will interfere with the award only if it is shown that the discretion has not been exercised judicially. (See also *Spry, VP in Haman Singh & Others vs. Mistri* [1971] EA 122, 125). The circumstances in which Appellate Courts can interfere with discretionary orders is well settled. In *Mbogo & Another vs. Shah* [1968] EA 93, at page 96, the predecessor of this Court held that an appellate court will only interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.

42. We have considered the reasons provided by the learned judge in arriving at the maximum award of 12 months' salary. We are not satisfied that the trial court injudiciously or capriciously exercised its



discretion in awarding the 12 months' salary as compensatory damages. Furthermore, the appellant has not satisfactorily demonstrated to us how the trial court abused its discretion or if the court misdirected itself in any way. We decline to interfere with the order that the appellant is to pay the respondent 12 months' salary. The awarded sum of Kshs.7,507,716.00 shall however be subject to all applicable statutory deductions, loans or advances (if any) to the respondent.

43. Regarding punitive damages of Kshs.100,000.00 awarded to the respondent on account of the appellant's failure to comply with section 51 (1) of the *Employment Act*, the applicant contended that that the said fine applies to criminal charges, therefore it was not applicable in this case. Section 51 (3) of the *Employment Act* provides:

“An employer who wilfully or by neglect fails to give an employee a certificate of service in accordance with subsection (1), or who in a certificate of service includes a statement which he knows to be false, commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding six months or to both.”

44. This Court in Centre for African Family Studies (CAFS) vs. Jonathan Spangler (Civil Appeal 281 of 2018) [2019] KECA 16 (KLR) (Civ) (20 September 2019) (Judgment) cited with approval Rika, J. in Said Ndege vs. Steel Makers Limited [2018] eKLR who said the following about section 51 (3) of the *Employment Act*:

“There is no reason shown by the Claimant why the Court should declare that failure to issue him a Certificate of Service attracts penal consequences under Section 51 of the *Employment Act*. Section 51 [3] states such default is an offence, punishable upon conviction. Why does the Court have to re-declare what the law has declared with no ambiguity? What would be the benefit of such a declaration to the Claimant? If the Claimant has not received his Certificate of Service, he ought to simply ask for an order for release of his Certificate of Service under Section 51[1] and [2] of the *Employment Act*. If he desires the Court to find the Respondent guilty of an offence under Section 51 [3], he ought to make a complaint to the Police or an authorized Labour Officer, and instigate a criminal trial against the Respondent, at the right platform.”

45. It is noteworthy that the learned judge found that the failure by the appellant to comply with Section 51 was quite deliberate. The learned judge went on to hold that the appellant chose not to follow the law and did not issue a certificate of service stating the nature of employment and term served. In our view, if the respondent desired the appellant to be found guilty for the offence under Section 51 (2) of the *Employment Act*, she ought to have complained to the police and or authorized labour officer and instigate the commencement of criminal proceedings against her former employer. We note that condemning the appellant to pay a fine of Kshs.100,000.00 and converting the same to a payment to the respondent was not in conformity with Section 51 (3) and as a result, we quash the said award and substitute it with an order that the appellant issues the respondent with a certificate of service within 30 days from the date of this judgment.

46. Regarding the award of school fees which the appellant submitted was not part of the respondent's salary or earning and the trial court failed to consider that it was paid at the appellant's discretion, our reading of the record leaves us with no doubt that the respondent was entitled to school fee refund in the sum of Kshs.26,500.00. This is clearly captured at page 63 of the record of appeal under the respondent's final dues. The said amount is also captured at page 27 of the record of appeal which is a payslip for the month of April, 2014 which shows that the respondent was paid an additional sum



of Kshs.26,500.00. Even more important is the fact that the appellant did not object to the school fees refund before the trial court. Earlier in this judgment, we referred to page 106 of the record where the appellant’s counsel conceded the said sum in his submissions before the trial court. Consequently, we find no basis for interfering with the said award.

47. Lastly, regarding the argument that the award of three months’ salary in lieu of notice and the 12 months’ compensation for unfair termination amounts to double compensation, as earlier stated, Section 49 (1) of the [Employment Act](#) provides a range of remedies. These are:

- 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. Reinstatement of the employee and re-engagement (Section 49 (3)).

48. This Court in *International Planned Parenthood Federation vs. Pamela Ebot Arrey Effiom* [2016] KECA 429 (KLR) while commenting on the remedies provided under Section 49 (1) (a) and (b) of the [Employment Act](#) held:

“Section 49 (1) of the [Employment Act](#) particularly provides as follows:

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

From our emphasis, it is clear that the first two remedies of notice pay and twelve months pay can be awarded concurrently. There is no doubt that the remedies are discretionary in nature and the discretion should be exercised judiciously.

32. In *C.P.C. Industrial Products v Angima*, Civil Appeal No. 197 of 1992, the Court (Gicheru, Kwach and Muli, JJ.A), in a departure from the previous decisions, held that the principle that damages will only be limited to the period of notice agreed between the parties could only apply if, in exercising its right to terminate the appointment, the employer was not actuated by ulterior motives or did not act in bad faith; and that if the employer acted maliciously, oppressively or even callously the court was bound to consider that fact in assessing the damages the employee would be entitled to for wrongful termination or dismissal.” (Emphasis added)

49. It is apparent from the above discourse that the trial court had the discretion to award the appellant both the reliefs provided under Section 49 (1) (a) and (b) of the [Employment Act](#) and as such the award by the learned judge did not amount to double compensation.

50. Flowing from our analysis of the issues discussed above and the conclusions arrived at, we find that this appeal partly succeeds and issue the following orders:



- a. The award of Kshs.100,000.00 to the respondent for violating section 51 (3) of the [Employment Act](#) is hereby set aside and substituted with an order that the appellant issues to the respondent a certificate of service within 30 days from the date of this judgment.
- b. We affirm all the other awards issued by the trial court.
- c. Each party shall bear its own costs of the appeal, but the appellant shall bear the costs of the suit before the ELRC.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER, 2024.

D. K. MUSINGA, (P.)

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR.

