Kamau v Pandya & another (Civil Appeal E019 of 2020)
[2023] KECA 505 (KLR) (12 May 2023) (Judgment)

Neutral citation: [2023] KECA 505 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E019 OF 2020

SG KAIRU, JW LESSIT & GV ODUNGA, JJA

MAY 12, 2023

BETWEEN

DORCAS WANGARI KAMAU ..... APPELLANT

AND

NITIN PANDYA ..... 1ST RESPONDENT

MILAN SHAH (PARTNERS T/A NITIN PANDYA & COMPANY CERTIFIED PUBLIC ACCOUNTANTS) ..... 2ND RESPONDENT

(Being an appeal from the judgement of the Employment and Labour Relations Court at Mombasa delivered on 22nd March 2019 by Hon Justice Rika in Mombasa ELRC Cause 50 of 2014)

JUDGMENT

1. The suit before the trial court, from which this appeal arises, was commenced by way of Memorandum of Claim dated February 24, 2014 by the Appellant herein against the Respondents.

2. The summary of the Appellant's claim was that she was employed as a secretary by the Respondents by virtue of an employment contract dated February 24, 1992. By the time she left the employment she was earning Kshs 32,000.00 and according to the Appellant, by that contract the Appellant was entitled to 21 days paid leave.

3. The Appellant's case was that due to her married niece's ill-health in Germany, being the one who brought her up, the Appellant applied for visa on September 3, 2013 which visa was ready before September 6, 2013. The said visa was due to expire on October 19, 2013, since it was just valid for 3 months. In order to attend to her said niece, on September 13, 2013, the Appellant orally requested for annual leave from the Respondents but did not disclose the circumstances under which the leave was being sought. She disclosed that her usual leave month was in December.

4. Upon seeking the request from one of the partners, Milan Shah, DW2, whereas DW2 had no objection to her request, DW2 informed her that he would have to seek the opinion of the 1st Respondent. The 1st Respondent however declined the Appellant's request on the ground that there was a case, Hammonds case (hereinafter referred to as the case) coming up for hearing and the Appellant's presence was necessary in order to prepare the witness statements for the purpose of the hearing. The Appellant was however, informed that she could take her leave after the hearing date of the case on September 30, 2013.

5. According to the Appellant, the case in question did not involve her employer, the 2nd Respondent, but involved the 1st Respondent, himself a partner in the 2nd Respondent and a company in which the 1st Respondent had an interest and the Appellant was not a witness in the case. After sending the documents relating to the case as instructed by DW2, the appellant left for Germany on September 22, 2013.

6. Upon her return on October 22, 2013, the Appellant found that she had already been replaced and was informed by the 1st Respondent that as a result of her disobedience of going for leave without the 1st Respondent's approval, the Appellant had three options: resign; or work at reduced salary of Kshs 20,000.00 per month; or have her employment terminated. The Appellant declined to resign and to accept the reduced salary. Accordingly, vide a letter dated October 30, 2013, issued to her 0n November 15, 2013, the Appellant's employment was terminated on the grounds that the Appellant was always late and did not control the messengers, allegations which she denied since she was not a manager and was not in charge of the employees. She was however informed by DW2 that the reason for her termination was disobedience.

7. According to the Appellant, the said action was wrongful, illegal, unlawful and without any legal and justifiable cause or reason and amounted to unfair termination. It was her case that the termination was done without any notice and without paying her salary in lieu of notice. The Appellant contended that she neither signed the said termination letter nor collected the amount of Kshs 39,008.00 offered by the Respondents as her alleged dues. It was her case that she was entitled to be notified of the reasons for her termination and given an opportunity to respond to the same, which opportunity she was not accorded. In the Appellant's view, her summary dismissal on the ground that she went on leave does not constitute a fair reason or ground for dismissal. As a result of the said action, it was her contention that she suffered loss and damage which she particularised and prayed for:

    a. Overtime from 2011 to 2013 at Kshs 204,480.00.

    b. 12 months' salary in compensation for unfair termination at Kshs 384,000.00.

    c. 3 months' salary in lieu of notice at Kshs 96,000.00.

    d. Salary for days worked in September 2013 at Kshs 33,466.00.

    e) Leave pay for 2012 /2013 at Kshs 32,000.00.

    f. Leave travelling allowance for 2012/2013 at Kshs 4,000.00.

    g. Service pay at the rate of 15 days salary for each complete year of service at Kshs 352,000.00.

    h. Leave for 2013/2014 on pro-rata basis at Kshs 18,666.00.

    i. Leave travelling allowance over the years served at Kshs 60,000.00

Total ... Kshs 1,184,613

f. Interest.

g. Costs.

8. The Respondents' case was that the Appellant was their employee and her duties were typing, reception and organisation of messengers. According to the Respondents, the Appellant had taken all her past annual leaves and her leave for 2013 was due in December of that year. According to the Respondents, since they had a case coming up in which they were required to submit their witness statements, they had no objection to the Appellant taking her leave but after September 30, 2013 which was the hearing date. The Respondents' case was that the Appellant neither showed them the travel documents nor informed them that it was an emergency. However, the Appellant proceeded on leave for 21 days notwithstanding the fact that she was told not to go.

9. Though the Appellant was offered her salary for September, 2013, it was the Respondents' case that she declined to take it. It was the Respondents' case that the Appellant was given an opportunity to be heard and that all other annual leaves were taken or encashed. They insisted that the Appellant was consistently reporting to work late and denied that they gave the Appellant the options of resigning, taking a pay cut or having her employment terminated. It was contended that the Appellant was given an opportunity to explain her absence which she failed to do. As a result, the Appellant was summarily dismissed.

10. In his judgement, the Learned Trial Judge found that it was not disputed that the Appellant was employed by the Respondents as a Secretary, on February 24, 1992; she orally asked to go on leave on September 6, 2013 and September 13, 2013; she desired to take annual leave and travel to Germany to see her Niece, beginning September 23, 2013; she left on 2September 3, 2013 and was on leave up to October 21, 2013; there was no approval obtained to take annual leave, from the Respondents; and the Appellant's contract was terminated by the Respondents, after she returned to Kenya from Germany, on September 30, 2013.

11. According to the Learned Judge, the issues in dispute were, whether termination was fair, based on valid reason and carried out fairly; and whether the Appellant merited the orders sought. He found that whereas it is the right of an Employee to have annual leave of at least 21 days, after working for a consecutive period of 12 months, under Section 28 of the *Employment Act, 2007*, there ought to be a consensus between the Employee and the Employer, on the timing. In this case, the Appellant obtained her visa and arranged to travel to Germany, days before she sought leave from the Respondents. The Court found that in so doing, the Appellant acted ill-advisedly. On the other hand, the Respondents acted reasonably, asking the Appellant to defer travel by 7 days, from 23rd September 2013, to 30th September 2013 due to the Appellant's presence for the 7 days leading to the hearing of the said case.

12. The Court found that since the Appellant's travel to Germany was not an emergency, she engaged in acts of gross misconduct, characterized as insubordination and not only behaved in a manner which was insulting to the employer under Section 44 [4] [d] of the *Employment Act* (hereinafter referred to as the Act), she knowingly failed or refused to obey a lawful and proper command, which was within the scope of her duty to obey, issued by the Respondents, under Section 44 [4] [e] of the *Act* and absconded. Therefore, the Court found, the Respondents had more than one valid reason, in terminating Appellant's contract.

13. The Court however, found that there was no disciplinary hearing before termination and that the Respondents ought to have fulfilled their obligations under Section 41 of the Act, by taking the

Appellant through a hearing hence the procedure was defective. Accordingly, taking into consideration the role played by the Appellant in the circumstances leading to termination of her contract, the Court awarded her compensation for unfair termination, the equivalent of 3 months' salary at Kshs 96,000.00.

14. According to the trial Court, the Appellant did not cite any contractual clause, law or wage instrument granting her 3 months' salary in lieu of notice. The Court however found that in light of the finding that the Respondents were entitled to summarily dismiss the Appellant, this disentitled the Appellant to notice or notice pay. It was found that there was no evidence of unpaid overtime. The Court held that if the Appellant assisted other businesses of the Respondents outside of her job description, she ought to have negotiated the terms of such service with the Respondents at the time she served which ought to have been taken into account in fixing her monthly salary. However, the Court found that the Appellant's involvement with other entities did not show she worked excess hours and did not establish the prayer for overtime pay.

15. The Court however found that the Appellant was entitled to salary for September 2013, which was awarded at Kshs 32,000.00. As regards leave travelling allowance, the Court found that it was not a statutory but a negotiated benefit and in this case the Appellant had not shown to the Court any contract, wage instrument or workplace policy, entitling her to leave travelling allowance. Similarly, it was found that the prayers for leave pay and pro-rata leave pay were not established since the Appellant utilized her annual leave entitlement, including her last annual leave entitlement just before termination.

16. It was further found that the pay slips showed that the Appellant was actively subscribed to the NSSF and was hence ineligible for service pay under Section 35 [6] [d] of the *Employment Act, 2007*. There was no order as to costs and the interests was awarded at 14% per annum from the date of judgment till payment is made in full.

17. It was this judgement that provoked the appeal before us in which the following grounds were raised:

    1. The Learned Judge erred in law and in fact in finding that the Appellant did not obtain approval to take annual leave from the Respondents despite the fact that the 2nd Respondent had allowed her to take leave.

    2. The Learned Judge erred in law and in fact in believing the Respondents' evidence and doubting the Appellant's evidence and eventually reached an unbalanced and biased conclusion and decision.

    3. The Learned Judge erred in law and in fact in deciding that the Appellant had committed acts of gross misconduct characterized as insubordination, which decision had no basis nor supported by the evidence on record.

    4. The Learned Judge misdirected himself in finding that the Appellant's actions were insulting to the employer and/or knowingly failed or refused to obey a lawful command and/or absconded and in thus deciding that the Respondents has more than one valid reaction in terminating the Appellant's employment.

    5. The Learned Judge erred in law and in fact in the finding supporting the unreasonable and unjustified demand by the Respondents that the Appellant takes resignation or a pay cut.

    6. The Learned Judge misdirected himself in failing to find that the Respondents' demand to the Appellant to take a pay cut or resign and coupled with the

flawed disciplinary process were all in support of the Respondents illegal, unfair, process in employment herein and thus the Appellant was entitled to the judgment for the amount sought in the claim/suit therein.

7. The Learned Judge erred in law and in fact in failing to find that the Appellant complied with all the Respondent's conditions demanded before taking the leave.

8. The Learned Judge erred in law and in fact in failing to take into account that the 2nd Respondent had not only authorized the Appellant to proceed on leave, for which reason she forwarded all the documents of the Hammonds Case to the Advocates and arranged for all the templates and forwarded the same to the 2nd Respondent as demanded.

9. The Learned Judge erred in law and in fact in failing to find that the 1st Respondent's reasons for refusing the Appellant to take leave were unfair and unreasonable and the eventual termination of her services by the 1st Respondent was unfair, unreasonable, illegal and wrongful and thus the Appellant is entitled to the damages sought.

10. The Learned Judge erred in law and in fact in failing to analyze and award the Appellant's claims for leave allowance, leave travelling allowance, salary in lieu of notice, leave pay, leave travelling allowance.

11. The Learned Honourable Judge erred in law and in fact in failing to appreciate and take into account the Appellant's evidence on record and solely relying on the evidence of the Respondents.

12. The Learned Judge erred in law and in fact in failing to award the Appellant costs of the suit herein.

18. This appeal was heard before us on December 13, 2022 vide virtual platform at which Learned Counsel, Mr Tindika appeared for the Appellant while Ms Muisyo appeared for the Respondents. Both counsel highlighted the written submissions filed.

19. According to the Appellant, having done all that which was required of her and receiving a signal from the 2nd Respondent, the Managing and equal Partner, that he had no objection to her taking leave, the Appellant justifiably, lawfully and legally took leave and that the said action could neither amount to gross misconduct or insubordination as found by the Learned Judge. To the contrary, the actions taken by the Respondents were grossly unfair to the Appellant. This submission was based on *Nebert Bernard Muriuki v Multimedia University of Kenya*, Civil Appeal No. 303 of 2015, [2020] eKLR, and it was submitted that the termination of the Appellant's employment was invalid and was based on flawed procedure. In addition, the said termination was grossly unfair since Section 46 of the Act states that the going on leave of an employee to which one is entitled under the law or a contract cannot constitute fair reasons for dismissal or for the imposition of a disciplinary penalty.

20. It was submitted that having proved her case to the required standard, the Appellant was entitled to the compensation as sought in the Memorandum of Claim pursuant to Section 49 of the Act. It was submitted that no reason was given why the costs were not awarded to the Appellant.

21. It was submitted on behalf of the Respondents that both the Employment Contract and *Employment Act* provide that the employee has a right to have annual leave of at least 21 days after a consecutive period of 12 months of working but there ought to be an agreement between the Employee and

Employee on the timing. In this case, it was submitted that the time the Appellant wanted to go for her annual leave was not convenient. It was further submitted, based on the same Section, that annual leave is to be taken after every 12 consecutive months and as the Appellant used to go on leave in December, she had not completed 12 months from the last leave hence not eligible to go on leave in September, 2013. It was therefore submitted that the Trial Judge did not err in law and fact in finding that the Appellant did not obtain approval from the Respondents to proceed for her annual leave on September 23, 2013. It was submitted, based on *Halsbury's Laws of England*, gross misconduct includes serious insubordination. Since the Appellant did not disclose to the Respondents the emergency that necessitated her travel, it was submitted that her termination was justified under Section 44(4) of the *Act* on the ground of insubordination amounting to gross misconduct.

22. In the Respondents' submission, for any work done by the Appellant beyond the normal working hours, she was compensated and that since the Appellant was summarily dismissed the claim of three (3) months' salary in lieu of notice was misconceived as the Respondents were under no obligation to give a month's notice or pay a salary in lieu of notice. In any case, the claim of 3 months' pay in lieu of notice in not provided in the employment contract and/or the Act or any other law and has no legal or contractual basis. On the claim of leave pay for 2012/2013 and pro-rata leave, it was submitted that the Appellant utilised her annual leave just before termination and was therefore, not entitled to this relief. With regards to the Appellant's claim for leave travelling allowance for 2012/2013 and over the years of service, it was the Respondents' submission that, this relief is not provided for in the Act nor in the Employment Contract therefore, it has no contractual nor statutory basis.

23. As regards the claim for service pay, it was submitted that Section 35(6)

    (a) and (d) of the *Employment Act* provides that an employee is not entitled to service pay where the employer is a member of a registered pension or provident fund scheme under the *Retirement Benefits Act* or a member of the National Social Security Fund (NSSF). From the pay slips produced, it was submitted by the Respondents that it was clear that the Respondents were members of the National Social Security Fund, a fact which the Appellant in cross examination confirmed.

24. As regards the order for costs it was submitted that the Appellant only partly succeeded in her case and the Court took into account the fact that her action warranted summary dismissal. Further, the Appellant declined to take the payment offered by the Respondents which would have made the filing of the suit unnecessary.

Analysis And Determination

25. We have considered the issues raised in this appeal. This being the first appeal, this Court's mandate was re-affirmed in *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2 EA 212 where this Court held that: -

> " On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

26. We have set out the respective cases for the parties at the beginning of this judgement. It is clear that though there was no concurrence between the 1st Respondent and DW2 regarding the Appellant's

request for leave at the particular time the Appellant intended to go on leave, the Appellant nevertheless proceeded on leave from September 22, 2013 till October 22, 2013.

27. The first question for our determination is whether the summary termination was fair and lawful. The Learned Trial Judge found that though termination was based on valid reason, the procedure followed in arriving at the decision was flawed as the Appellant was not given an opportunity of being heard before the decision was arrived at.

28. The Appellant has challenged this finding. According to her, there was no valid reason for her termination since she was exercising her right to go on leave and that ought not to have been a ground for her termination. She relied on Section 46 of the *Employment Act* which provides that:

> The following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty—
>
> a. a female employee's pregnancy, or any reason connected with her pregnancy;
>
> b. the going on leave of an employee, or the proposal of an employee to take, any leave to which he was entitled under the law or a contract;
>
> c. an employee's membership or proposed membership of a trade union;
>
> d. the participation or proposed participation of an employee in the activities of a trade union outside working hours or, with the consent of the employer, within working hours;
>
> e. an employee's seeking of office as, or acting or having acted in the capacity of, an officer of a trade union or a workers' representative;
>
> f. an employee's refusal or proposed refusal to join or withdrawal from a trade union;
>
> g. an employee's race, colour, tribe, sex, religion, political opinion or affiliation, national extraction, nationality, social origin, marital status, HIV status or disability;
>
> h. an employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation; or
>
> i. an employee's participation in a lawful strike.

29. It is clear from the foregoing that the going on leave of an employee, or the proposal of an employee to take, any leave is not a ground for dismissal. However, the leave must be one to which the employee was entitled. In this case, it is clear from the evidence that the Appellant was not entitled to take leave in the month of September, since her usual leave month was December. She however proceeded to make arrangements to take the leave and to travel outside the country, even before ensuring that her request for leave was made and approved. When she eventually made a request for leave, it was done without disclosing to her employer the reasons why she had to take leave at that particular time.

30. Apart from that, in order to determine whether an employer is entitled to leave, one must determine not only whether the leave was due but whether the timing of the leave was proper. We agree with the Learned Judge that a holistic consideration of Section 28 of the *Employment Act*, leads to a conclusion that though annual leave is a right, not a perk, it must not be taken without a common understanding with the employer. Therefore, while an employer cannot deny an employee the right to take the leave,

such leave ought to be regulated in such a manner that the employee is not denied of the right to take the leave while ensuring that the employer's business is not unduly disrupted by an unplanned leave. To decide otherwise would mean that an employee would be entitled to make a unilateral decision when to take the leave as long as it fell within the year. Such determination would make employment relationship intolerable and expose the employer to blackmail.

31. In this case we agree with the Learned Judge that the Appellant arranged to travel, and expected the Respondents to go along with her arrangement, without minding the views of the Respondents, and the needs and exigencies of the business. We agree with the Learned Judge that the Appellant was not under any obligation to inform the Respondents where she was travelling to and the arrangements she had made in order to go on leave. However, where, as in this case, an employee seeks to take the leave during the unscheduled period, it is only fair that the employee explains the reasons for doing so in order to enable the employer make an informed decision. We agree with the Learned Judge that the Appellant's action was ill-advised and we dare say, reckless. While the Respondents were willing to accommodate the Appellant even before her usual date for leave was due, the Appellant unreasonably made her travel arrangements without caring whether the timing was in the interests of her employer. We agree that such conduct amounts to gross misconduct as it was insubordination and the Respondents were entitled to terminate her employment under Section 44 (4) (a) and (e) of the *Employment Act*.

32. The Appellant however contends that she was in fact granted permission to go on leave by DW2. From the Appellant's own evidence, when she went to see DW2 to ask for leave, DW2, while giving his green light added a rider to the effect that he would consult with the 1st Respondent herein and after that consultation DW2 told her that the 1st Respondent had declined the request. It was therefore clear that the Appellant went on leave against the 1st Respondent's refusal of her request. In those circumstances, and as DW2's permission was expressly made subject to the 1st Respondent's concurrence, it was not proper for the Appellant to rely on the subjective permission given by the DW2 and proceed on leave.

33. However, notwithstanding the fact that an employee's conduct warrants dismissal, the employer is obliged constitutionally and legally to afford the employee an opportunity of being heard. In other words, in determining whether or not to dismiss the employee the rules of natural justice must be adhered to. It is in that regard that we understand the position in *Onyango Oloo vs. Attorney General* [1986-1989] EA 456 where this Court expressed itself as follows:

> " A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at..."

34. In this case, the Learned Trial Judge found, and rightly so in our view, that though termination was based on valid reason, the manner in which the termination was done was procedurally infirm due to the failure to afford the Appellant an opportunity of being heard. It is in that regard that the Appellant was awarded the Appellant compensation for unfair termination, the equivalent of 3 months' salary at Kshs 96,000.00. We find no reason therefore to fault the Learned Trial Judge in that regard since as this Court held in *Nebert Bernard Muriuki vs Multimedia University of Kenya* [2020] eKLR, termination of employment must be both substantially and procedurally fair and must be based on valid reason. In this case we reiterate the termination was substantially fair and was based on valid reasons. It was however faulty as regards the procedure adopted.

35. The next issue that follows is the remedies that the Appellant was entitled to in those circumstances. According to the Learned Judge, the Appellant's prayer for 3 months' salary in lieu of notice was not

based on any contractual clause, law or wage instrument granting her this amount of notice pay and further, having concluded that the Respondents were entitled to summarily dismiss the Appellant under Section 44 [4] of the *Employment Act*, the Appellant was disentitled to notice or notice pay. In arriving at his first part of the decision, the Learned Trial Judge seemed not to have considered the employment letter dated in which it was stated that:

> Probation: You will be on probation for a period of 3 months initially when1 days' notice of termination of employment may be given by either party, thereafter, your employment with us may be terminated at any time by either party giving a one calendar month prior written notice.

36. It was therefore not entirely erroneous on the part of the Learned Judge when he found that the Appellant's prayer for 3 months' salary in lieu of notice was not based on any contractual clause, law or wage instrument. Summary dismissal is provided for under Section 44 of the *Act* and Subsections (1) to (3) thereof provides that:

> 1. Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
>
> 2. Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.
>
> 3. Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.

37. Subsection (4) of the above Section sets out matters which may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause. We have found that in this matter, the Appellant's conduct amounted to gross misconduct as it was insubordination and the Respondents had valid reasons to summarily dismiss her under Section 44(4)(a) and (e) of the *Employment Act*. Having been awarded three months salary for unfair dismissal, we find no reason to interfere with the Learned Judge's decision not to award one month's salary in lieu of notice. Accordingly, we dismiss the ground of appeal dealing with this relief.

38. Regarding the prayer for overtime, apart from failure to make a specific prayer for the same, there was no sufficient evidence adduced on the basis of which the trial court or this Court can make such a determination in favour of the Appellant. In determining this issue, we must remind the parties of the circumstances under which this Court, on a first appeal, is entitled to interfere with the trial court's findings of fact. This Court (Apaloo, JA, as he then was) in *Kiruga vs Kiruga & another* [1988] KLR 348, while dealing with what amounts to proof, cited Watt vs Thomas [1947] AC 484; *Peters vs. Sunday Post Ltd* [1958] EA 424 and expressed itself as hereunder:

> " The word "proof", as a legal concept, is not pre-ordained and has no objective existence, discoverable either by logic or analysis. It is merely the conclusion that the tribunal draws on any given set of facts or evidence. If the evidence is available and accepted, unless the law directs that a certain fact should be "proved" in a certain way, it cannot be the proper province of an appellate court merely to read that evidence and hold "it is not proved". That really is another way of saying it is not persuaded by evidence. But the tribunal that needs to be persuaded, is the tribunal of fact to which the evidence is given not one which merely

reads it in print. The only suggestion of the trial Judge having misdirected himself was on the onus of proof; but the trial Judge, quite rightly, makes no reference to the onus of proof, for, as often pointed out, no question of the burden of proof as a determining factor of the case arises on a concluded proof, except in so far as the court is ultimately unable to come to a definite conclusion on the evidence, or some part of it, and the question will arise as to which party has to suffer thereby. The trial Judge came to a definite conclusion on the evidence and no question of onus did or could arise. An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the Judge can be said to be plainly wrong. It is a strong thing for an appellate court to differ, from the finding, on question of facts, of the Judge who tried the case and who had the advantage of seeing and hearing the witnesses. An appellate court has indeed the jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon evidence should stand. But this is jurisdiction, which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."

39. This Court (per Hancox, JA, as he then was), in *Mohammed Mahmoud Jabane vs Highstone Butty Tongoi Olenja* [1986] KLR 661; [1986-1989] EA 183, held that:

> "The appellate Court only interferes with the trial Court's findings of fact if it is shown that he took into account facts or factors which he should have not taken into account, or that he failed to take into account matters of which he should have taken into account, that he misapprehended the effect of the evidence or that he demonstrably acted on wrong principles in reaching the findings he did."

40. We have on our part considered the evidence adduced and we have no reason to depart from the Learned Trial Judge's factual finding regarding the allegations of services rendered by the appellant to other third parties and the alleged services rendered overtime. The trial Judge made a finding of fact based on the material that was placed on record.

41. Regarding leave travelling allowance, the trial Court found that this is not a statutory but a negotiated benefit. However, the Court was not shown any contract, wage instrument or workplace policy, entitling her to leave travelling allowance. We have ourselves gone through the Appellant's letter of appointment and we have not found any clause therein provision for leave travelling allowance. As no other evidence was adduced justifying the same, we have no reason to disturb the finding of the Learned Trial Judge in this regard. As for leave, there was evidence the Appellant utilised her last leave entitlement just before termination. In fact, the cause of action arose from that very leave. We therefore agree that her claim for leave and pro rata leave pay has no foundation.

42. Since the 2nd Respondent was registered with National Social Security Fund and the Appellant's payslips showed that she was actively subscribed to the said Fund, we agree with the trial Judge that the Appellant was ineligible for service pay under Section 35(6)(d) of the *Employment Act*.

43. Regarding the issue of costs, the Learned Trial Judge did not give any reason why he did not award the Appellant the costs. Clearly the Appellant was partly successful in the suit. The general rule as to costs is provided for in Section 27 of the *Civil Procedure Act* which states as follows:

> Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give

all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

44. This Court in *Supermarine Handling Services Ltd vs. Kenya Revenue Authority* Civil Appeal No. 85 of 2006 had this to say about the discretion to award costs:

> " Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance... Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where the reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the rule...In the instant case the learned Judge gave no reasons whatsoever for his decision to deprive the successful plaintiff of its costs and yet it was not shown that the defendant had been guilty of some misconduct which led to litigation. In the court's view the learned Judge's order was wrong and for the foregoing reasons, the plaintiff's appeal succeeds as to the award of interest and costs on the principal sum awarded."

45. As we have said there is no reason given for the exercise of the discretion on costs. We therefore find that the discretion was not properly exercised. We have considered the fact that the Appellant was only partly successful. However, that part success which constitutes the event for the purposes of the suit ought not to have counted for nothing. Therefore, taking into account the Appellant's conduct, we find that the Appellant ought to have been entitled to half the costs of the proceedings before the trial Court. We therefore set aside the order declining to grant the appellant costs and substitute therefor an order that the Appellant gets half the costs of the proceedings before the trial Court. Save for that, this appeal otherwise fails. We however make no order as to the costs of this appeal as the failure to award the costs of the trial court cannot be blamed on the Respondents.

46. Judgement accordingly.

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF MAY 2023.

S. GATEMBU KAIRU, FCI Arb.

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR