Harambee Co-operative Savings and Credit Society Limited v Nyongesa & another (Civil Appeal 176 of 2018) [2023] KECA 837 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KECA 837 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 176 OF 2018

DK MUSINGA, KI LAIBUTA & GWN MACHARIA, JJA

JULY 7, 2023

BETWEEN

HARAMBEE CO-OPERATIVE SAVINGS AND CREDIT SOCIETY LIMITED ..... APPELLANT

AND

ROBERT NYONGESA ..... 1ST RESPONDENT

THE SACCO SOCIETIES REGULATORY AUTHORITY ..... 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Nairobi (H. Wasilwa, J.) delivered on 30th November 2017 In E.L.R.C Cause No. 789 of 2013)

JUDGMENT

1. The 1st respondent, Robert Nyongesa, was employed by the appellant, Harambee Co-Operative Savings and Credit Society Limited, as its ICT Department manager in May 2003 at a gross monthly salary of Kshs 79,606/50. His letter of appointment dated 4th April 2003 provided, inter alia: that, upon satisfactory completion of the probationary period of six (6)months, he would be confirmed and appointed on renewable three (3)years contract terms with effect from the date of first appointment (to wit 15th May 2003 when he accepted the appointment); and that during the contract period either party may terminate the employment by giving two(2) months' notice or paying two (2) months' salary in lieu thereof.

2. The 1st respondent remained in the appellant's employment until 22nd February 2013 when he was removed from office pursuant to section 51(c) of the *SACCO Societies Act*, 2008 as read together with regulation 72(6), and on the 2nd respondent's (the SACCO Societies Regulatory Authority) recommendation vide its letter dated 22nd February 2013. By then, he was earning a gross monthly

salary of Kshs 239,768. Aggrieved by his removal, he instituted proceedings in the Employment and Labour Relations Court (the ELRC) for compensation.

3. By a Statement of Claim dated 23rd May 2013 filed in the ELRC on 24th May 2013 and subsequently amended on 5th February 2016, the 1st respondent sued the appellant and the 2nd respondent praying for a declaration that the Authority and the appellant wrongfully terminated his employment in violation of the *Employment Act*, 2007 (the Act) and the Employment Policy. He sought reinstatement and claimed Kshs 8,631,648 on account of salary payable up to the end of his contract; gratuity at 31% of his basic salary in the sum of Kshs 1,432,608; Kshs479,536 being two (2) months' salary in lieu of notice; unpaid leave in the sum of Kshs 239,768; severance pay for a period of one year in the sum of Kshs 1,438,608; Kshs 2,877,216 being twelve (12) months' salary in compensation; costs and interest; and a certificate of service.

4. In its Memorandum of Defence dated 14th October 2013, the appellant denied the 1st respondent's claim that he was wrongfully dismissed from employment and prayed that the claim be struck out for want of jurisdiction. According to the appellant, the ELRC was obligated to allow the appellant to undertake its administrative procedures and determine the appropriate disciplinary action to be taken against the 1st respondent in light of the 2nd respondent's recommendations vide its letter aforesaid. The mainstay of the appellant's defence was that the 1st respondent remained in employment, but on suspension pending investigations on recommendation by the 2nd respondent.

5. Subsequent thereto, the appellant amended its Memorandum of Defence on 8th March 2016 and raised a counterclaim against the 1st respondent for Kshs 3,425,554 on account of an outstanding loan allegedly advanced to the 1st respondent. In addition to its counterclaim, the appellant associated itself with the 2nd respondent's contention that the 1st respondent was accorded a fair hearing; that the ELRC was not the proper forum for determination of the 1st respondent's claim; and that, therefore, the court had no jurisdiction to entertain the claim.

6. In its Memorandum of Reply, the 2nd respondent contended that the 1st respondent has never been in their employment; that there is no, and has never been, a contract of employment between it and the 1st respondent; that the 2nd respondent was not privy to the contract of employment between the 1st respondent and the appellant; that the 1st respondent has no reasonable cause of action against it; that in exercise of its regulatory powers under section 51(c) of the *SACCO Societies Act*, 2008 and regulation 72(6) and (7) of the *Regulations* made thereunder, the 2nd respondent issued a directive to the appellant vide its letter dated 23rd November 2012 to suspend the 1st respondent and also gave the appellant notice of intention to remove him from office unless sufficient cause was shown as to why he should not be removed from office; that the 1st respondent was required to respond to the said notice within thirty (30) days of service; that the 1st respondent failed to show cause within the required period but, instead, wrote a letter dated 8th January 2013 requesting for certain documents to enable him respond to the 2nd respondent's notice to show cause; that, by its letter dated 18th January 2013, the 2nd respondent delivered to the 1st respondent's advocates, M/s. Wafula Simiyu & Company, the documents requested for and gave the 1st respondent 30 more days to respond to its notice; that the 1st respondent failed to show cause as required; and that by a letter dated 22nd February 2013, the 2nd respondent directed the immediate removal of the 1st respondent from office as an officer of the appellant.

7. In addition to the foregoing, the 2nd respondent denied that the 1st respondent was not given an opportunity to be heard before removal from office. According to the 2nd respondent, it was at all material times acting in performance of its statutory obligations. It contended that the court had no jurisdiction to hear and determine the dispute in view of the fact that the 1st respondent ought to have

first appealed to the Minister in charge of Co- Operative Societies; and that all disputes relating to SACCO business were the preserve of the Corporative Tribunal.

8. In addition to its Memorandum of Reply, the 2nd respondent raised a preliminary objection dated 14th August 2014 essentially on the ground that the court had no jurisdiction to entertain the 1st respondent's claim.

9. It is noteworthy that, even though the show-cause letter aforesaid is not part of the record as put to us, an excerpt thereof contained in the 1st respondent's Memorandum of Claim explains the reasons for his removal from office thus:

> "i. That during the year 2011 and 2012, being the Manager, ICT Department of Harambee Sacco he continuously operated and/or allowed the operations of the Sacco to run on a heavily compromised and insecure MIS contrary to the requirements of Regulation 4 (3) of the 2010 regulations, and without due regards to safe and sound business practices, thereby putting to risk the financial stability and survival of the Sacco as evidenced by the facts of :-
>
> a. The deliberate inaccurate and incorrect financial statutory reports generated from the Sacco's MIS.
>
> b. The inaccurate and misleading reporting of the financial condition of the Sacco from the MIS.
>
> c. The absence of segregation of duties in the MIS and/or concentration of all rights in a few users thereby compromising the entire data in the MIS.
>
> d. The deliberate manipulative, deletion and falsification of the data generated from the Sacco's MIS.
>
> e. The failure to ensure that the Sacco's MIS is properly configured in tandem with the provisions of the law on risk classification and loss provisions, to produce reports showing the true financial condition of the Sacco.
>
> f. The failure to strictly comply with the directive of the Authority contained in the letter dated 2nd August 2011 with regard to the maintenance of an effective MIS.
>
> g. The failure to ensure that the MIS Department of the Sacco maintains an efficient, effective and secure MIS for all the transactions of the Sacco as envisaged under the law.
>
> ii. That during the period up to and including August 2012 being an employee of the Sacco as it's Manager, ICT Department which is a senior management position he overdrew and/or caused/allowed to be overdrawn his FOSA Account to the tune of negative Kshs,523,825.98 with the consequential results of:-
>
> a. Deriving the Sacco of these funds which would otherwise be available as credit to the other members.

b. Depriving the Sacco of likely income from such funds, if the same had been availed to members as credit.

c. Contributing to the acute liquidity challenges facing the Sacco.

d. Breaching the fiduciary duty and responsibility placed upon him as a senior manager of the Sacco."

10. The substance of the 1st respondent's reply to the accusations contained in the 2nd respondent's show-cause letter is not part of the record as put to us, but is alluded to in the trial court's judgment dated 30th November 2017 in which H. Wasilwa, J. took note in the following words:

> " 49. The Claimant filed a reply to the defence on 15th March 2016 wherein he reiterates the contents of his amended claim. He however adds that in the 2nd Respondent's Supervisory Committee Report to its 42nd Annual Delegates meeting held on 30th April 2013 at page 5 on item No. 5 on ATM and MSACCO (MPESA) services confirm that the idea was noble one but its planning and implementation was not properly formulated and lacks control to detect and present fraud.
>
> 50. That also daily reconciliations were required but the deliverable (system service code) which would be used for reconciliation was not available from the service provider. They therefore recommended the product should be reintroduced but only after proper systems have been introduced through consultants with a wealth of experience on this, preferably a bank.
>
> 51. On item 13 of the said report, it was stated that computerization of the Society is only 70% complete and this explains the problems of integration. Weaknesses in the ICT Department were noted that the department is not fully staffed and there is need to employ a system analyst to boost the performance of the department.
>
> Recommendation was that the Board and Management must ensure that the computerization project is complete, commissioned and audited.
>
> 52. The Claimant therefore submits that he was not in charge of M-banking and ATM banking where the fraud leading to loss of Kshs81,933,519 and Kshs72,560,200 took place but the Respondents still insisted on blackmailing him into carrying the mistakes of the Board and Management in not ensuring that the system codes are handed over from the providers, Cortec System and Solutions Limited and Craft Silicon Limited. He avers that M- banking and ATM services were functions of FOSA and not his."

11. In its judgment dated 30th November 2017, the ELRC (H. Wasilwa, J.) allowed the 1st respondent's claim and awarded him:

> " 1. 2 months' salary in lieu of notice = 239,768 X 2 = 479,536/=.
>
> 2. Salary withheld from November 2012 to November 2013 when the 2nd Respondent communicated the termination = 12 months X 239,768 = 2,877,216/=.

3. Gratuity for the contract expiring in May 2012 = 1,172,685/=.

4. Damages for unlawful termination equivalent to 12 months' salary = 12 X 239,768 = 2,877,216/=.

5. Salary equivalent to the remainder of the contract unfairly terminated which was to expire in May 2015 for 2013 and May 2015

   = 239,768 X 18 months = 4,315,824/=.

6. Gratuity payable on the contract expiring on May 2015 = 1,432,608/=

   Total 13,155,085/=

7. The Claimant is also entitled to costs of this suit plus interest at Court rates with effect from the date of this judgment."

12. Aggrieved by the judgment and decree of the trial court, the appellant moved to this Court on appeal on eight (8) grounds set out in its Memorandum of Appeal dated 5th June 2018, and which we take the liberty to summarise and reframe as follows, namely: that the learned Judge erred in law and in fact: in failing to appreciate the appellant's evidence; by considering extraneous circumstances and facts not pleaded; in awarding excessive terminal benefits and benefits not specifically pleaded; and in failing to take account of the circumstances in which the termination took place. It urges the Court to allow the appeal with costs and set aside the impugned judgment of the ELRC.

13. On its part, the 2nd respondent lodged what it styles "Notice of Cross- Appeal" in which it prays that "the cross-appeal be allowed with costs and the decision of the Employment Court be reversed and be substituted with:

    (a) An order dismissing the claimant's claim entirely.

    (b) Costs of this appeal and cross-appeal to the 2nd respondent."

14. In its "Cross-Appeal", the 2nd respondent faults the learned Judge for, inter alia: failing to appreciate its mandate and authority; holding that the court had jurisdiction to hear and determine the 1st respondent's claim; holding that the directive letter dated 22nd February 2013 from the 2nd respondent to the 1st respondent was not a directive, but an actual removal of the 1st respondent from office; holding that there were no valid reasons to justify the suspension and subsequent removal of the 1st respondent; considering extraneous circumstances; and for delivering an ambiguous judgment not directed at either the appellant or the 2nd respondent, or to both jointly and severally.

15. In support of the appeal, learned counsel for the appellant, Mr. Dickens M. Ouma, filed written submissions and case digest dated 10th January 2023 citing the cases of *Nzoia Sugar Company Limited v Francis Oyatsi* [2019] eKLR submitting that there should be justification why the trial Judge should give salary and benefits for the remainder of the contract; *D.K. Njagi Marete v TSC* [2020] eKLR where the court set out the parameters that ought to be considered in awarding compensation outside the provisions of section 49 of the Act; and *Ben Panhill Sifuna v Kenya Urban Roads Authority* [2014] eKLR in which the Employment and Labour Relations Court observed that gratuity ought to be paid only when there is completion of the contract of service.

16. On their part, learned counsel for the 2nd respondent, M/s. Hamilton Harrison & Mathews, filed written submissions, list and bundle of authorities dated 24th January 2023 citing seven (7) authorities, namely: *Republic v Karisa Kyengo & 2 Others* [2017] eKLR; *Peter Gichuki King'ara v IEBC & 2 Others*

[2014] eKLR; *Republic v SACCO Societies Regulatory Authority, ex parte Joseph Kiprono Maiyo & 3 Others* [2017] eKLR and *Kenya Ports authority v Modern Holdings EA Limited* [2017] eKLR, on the jurisdiction of the ELRC in respect of employment disputes to which we will shortly return.

17. On the authority of *Mary Wagikuyu Komu v the Kenya Hospital Association T/A. the Nairobi Hospital* [2016] eKLR, counsel submitted on the principle that an employee is not at liberty to decline to respond to the allegations levelled against them and, if they have an issue with the process, they must raise them directly with the employer within the timelines provided.

18. On the issue as to whether the Judge considered extraneous circumstances, counsel cited the case of *Dakianga Distributors K. Ltd v Kenya Seed Company Limited* [2015] eKLR where this Court observed that the Judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination. On the authority of *Standard Chartered Bank Kenya Ltd v Intercom Services Ltd & 4 Others* [2004] eKLR,counsel submitted that the Judge had not confined her judgment to what the 1st respondent had pleaded.

19. In opposition to the appeal, learned counsel for the 1st respondent, M/s. Wafula Simiyu & Company, filed written submissions, list of authorities and case digest dated 20th January 2023. Counsel cited the cases of *Selle v Associated Motor Boat Company Limited* [1968] EA p.123 and *Peters v Sunday Post* [1958] EA p.429 on this Court's mandate on first appeal to which we will shortly return. In addition to the foregoing, learned counsel cited the cases of *Ken Freight EA Limited v Benson K. Ngugi* [2019] eKLR and *International Planned Parenthood Association vs Pamela Ebot Arrey Effiom* [2016] eKLR, highlighting the application of section 49 of the *Act* on the remedies for wrongful dismissal and unfair termination; and *CMC Aviation Limited v Mohamed Noor* [2015] eKLR,submitting that it is mandatory that an employee be taken through the processes stipulated in section 41 of the Act before termination.

20. We need to observe right at the outset that what the 2nd respondent terms as its cross-appeal is in essence a notice affirming the appeal on grounds in addition to those advanced in the appellant's memorandum of appeal. For all intents and purposes, the appeal and the 2nd respondent's "cross-appeal" essentially comprise one appeal from the impugned judgment, but for the specific prayers, namely: that its cross-appeal be allowed with costs; that the judgment of the ELRC be reversed and substituted for an order dismissing the 1st respondent's claim; and that the costs of the appeal and cross-appeal be awarded to the 2nd respondent. In our considered view, the appeal and cross-appeal may be considered as one and the same appeal.

21. This being a first appeal, it is this Court's duty, in addition to considering submissions by the appellants and the respondent, to analyze and re-assess the report and other evidence on record and reach our own conclusions in the matter. This approach was adopted by this Court in *Arthi Highway Developers Limited v West End Butchery Limited and 6 others* [2015] eKLR citing the case of *Selle v Associated Motor Boat Company Limited*.(*supra*)

22. In Selle's case (ibid), the Court held that:

> " An appeal to this Court from a trial by the High Court (as well as the ELRC) is by way of retrial, and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions...."

23. Having examined the record of appeal and the grounds on which it is founded, the 2nd respondent's "cross-appeal", the impugned judgment, the written and oral submissions of learned counsel for the

appellant and learned counsel for the respondents, statute law and cited authorities, we are of the considered view that the appeal from the impugned judgment stands or falls on our findings on the following main issues of law and fact in respect of which learned counsel for the parties submitted, namely: whether the trial court had jurisdiction to hear and determine the 1st respondent's claim; whether the process by which the 1st respondent was removed from office amounted to wrongful dismissal or unfair termination; if the answer is in the affirmative, whether, in reaching her decision, the learned Judge considered extraneous facts not pleaded or adduced in evidence at the trial; whether the awards given by the learned Judge were excessive, and whether the Judge granted relief not sought; and what orders ought we to make in determination of this appeal, including orders as to costs. Put differently, the decisive issue falling to be determined is whether the learned Judge, in exercise of her judicial discretion, made an award that was so grossly excessive as to be a misdirection in law, justifying our interference.

24. As this Court aptly observed in *Kenya Broadcasting Corporation vs Geoffrey Wakio* [2019] eKLR –

> "The law on when an appellate court can interfere with an award of damages is firmly established. General damages are awarded if the claimant establishes in principle his legal entitlement to them, and a trial Judge must make his own assessment of the quantum of such general damages. In order to justify reversing the award of damages, this Court must be convinced that the trial Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. (See *Rook v Rairre* [1941] 1 ALL ER 297)."

25. In the same vein, this principle was underscored in *Butt v Khan*[1981] KLR 349 thus:

> "An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low" (See *Southern Engineering Company Ltd v Mutia* [1985] eKLR; *Kenfro Africa Ltd t/a Meru Express Services v Lubia &Another (No 2)* [1985] eKLR; and *Gicheru v Morton & Another* (2005) 2 KLR 333).

26. The foregoing sets out the law and the guiding principles which we are bound to apply in the determination of this appeal. The appellant's main complaint is that the respondent was awarded damages over and beyond what is prescribed under section 49 of the *Employment Act*, not to mention the express terms of his contract.

27. Suffice it for the moment to observe that section 49 of the Act grants various remedies which may be awarded in singular or multiple terms, and which are discretionary rather than mandatory, and which are to be granted on the basis of the peculiar facts of each case. This is made clear by section 49(4) of the Act, which sets out 13 considerations which the trial court must take into account before determining what remedy is appropriate in each case. Those considerations include, inter alia, the circumstances of the termination, the extent to which the employee caused or contributed to it, and the practicability of reinstatement or re-engagement. There being no cross-appeal on the part of the 1st respondent for reinstatement or re- engagement, we need not say more about it. The same goes for the statutory right to a certificate of service on which we need not pronounce ourselves.

28. We begin with the 1st issue as to whether the trial court had jurisdiction to entertain the 1st respondent's claim. It is noteworthy that the appellant says nothing of it. However, the 2nd respondent submits that, the trial court having found that it had jurisdiction over matters of employment, it ought to have found the 2nd respondent as an unnecessary party to the proceedings, there being no employment relationship between it and the 1st respondent; that, in any event, the 2nd respondent's regulatory intervention complained of by the 1st respondent was in exercise of its administrative functions within the scope of the *Fair Administrative Action Act*; that the proceedings for review of an administrative action can only be instituted in the High Court or a tribunal conferred with jurisdiction under any written law; and that the 1st respondent ought to have instituted proceedings either in the Co-operative Tribunal or in the High Court.

29. Holding that the trial court had jurisdiction to determine the 1st respondent's claim, the learned Judge correctly observed:

> " The issue before me is an employment matter and an attempt to refer the matter to the Co-operative Tribunal would be abrogating this court's jurisdiction which this court will not do."

30. It is common ground that the 1st respondent was at all material times in the employment of the appellant as its ICT Department Manager. It goes without saying that the dispute relating to his removal from office was within the jurisdiction of the ELRC to determine. In our considered view, it is immaterial that the genesis of the process for his removal was premised on a letter addressed to him by the 2nd respondent in exercise of its regulatory authority. What is clear to our mind is that the directive letter aforesaid kicked off the disciplinary action that led to the 1st respondent's removal from office, which was contested in the ELRC as either wrongful dismissal or unfair termination, a dispute that falls squarely within the jurisdiction of the trial court.

31. Section 12 of the *Employment and Labour Relations Court Act*, 2011 read with Article 162(2) (a) of the *Constitution* (which requires Parliament to establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations) confers exclusive jurisdiction on the ELRC to hear matters relating to employment disputes. Section 12 of the *Act* reads:

> 12. Jurisdiction of the Court
>
> (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the *Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations ....

32. We take to mind the fact that section 12 of the *Employment and Labour Relations Court Act* read together with Article 162(2) of the *Constitution* confers exclusive jurisdiction on the ELRC to hear matters relating to employment disputes. The dispute between the appellant and the 1st respondent relates to employment and removal from office. Accordingly, the 2nd respondent's contention that the 1st respondent ought to have referred his claim either to the Co-operatives Tribunal or to the High Court does not hold. What was essentially in issue was neither a complaint over the administrative procedure for his removal (which would have called for judicial review) nor any matter relating to the business or membership of the Tribunal that would ordinarily fall within the jurisdiction of the Tribunal as contemplated under section 76 of the *Co-Operative Societies Act*, 1997. Section 76(1) of the Act reads:

76. Disputes

1. If any dispute concerning the business of a co- operative society arises —

a. among members, past members and persons claiming through members, past members and deceased members; or

b. between members, past members or deceased members, and the society, its Committee or any officer of the society; or

c. between the society and any other co-operative society, it shall be referred to the Tribunal.

33. Having found that the ELRC has exclusive jurisdiction to determine disputes relating to employment and labour relations as is the case here, we turn to the 2nd issue as to whether the process by which the 1st respondent was removed from office amounted to wrongful dismissal or unfair termination within the meaning of the *Employment Act*.

34. It is not in contention that, in exercise of its regulatory powers under section 51(c) of the *SACCO Societies Act*, 2008 and regulation 72(6) and (7) of the *Regulations* made thereunder, the 2nd respondent wrote to the appellant on 23rd November 2012 directing it to suspend the 1st respondent, and simultaneously gave the appellant notice of intention to remove him from office unless he showed sufficient cause as to why he should not be removed on account of the allegations mentioned above, and which may be summed up as neglect of duty, poor performance, incompetence or misconduct said to have compromised the appellant's management information systems and the related information communication technology.

35. The appellant and the 2nd respondent contend that, despite the 1st respondent having been supplied with the requisite records and accorded sufficient time to show cause, he failed to do so. Consequently, by a letter dated 22nd February 2013, the 2nd respondent directed his immediate removal by the appellant from office as its ICT Manager. According to them, he was lawfully terminated, and was not entitled to the sums awarded in the impugned judgment. According to the appellant –

> " Section 51 (c) of the *Sacco Societies Act*, 2008 stipulates that the Authority shall direct the suspension or removal of a Sacco officer if certain determinable acts of misconduct are established. The direction to suspend or remove is meant for the Sacco which should effect such directions without any discretion."

36. On the authority of *Mary Wagikuyu Komu v The Kenya Hospital Association T/A. The Nairobi Hospital* [2016] eKLR, learned counsel for the 2nd respondent submitted that the court cannot help an employee who refuses and fails to show cause. According to them –

> " The learned judge did not consider the fact that the 2nd Respondent proved in evidence that it allowed the 1st Respondent sufficient time to show cause why he should have not be removed. The time for response was extended twice to allow the 1st Respondent respond to the allegations against him. Even after the extensions, the 1st Respondent did not show cause as required."

37. We cite with approval the judgment of the ELRC in *Mary Wagikuyu Komu's* (ibid) case where the court had this to say:

> " The procedural fairness requirements set out under Section 41 of the *Employment Act*, 2007 are fulfilled by asking an employee facing disciplinary proceedings to respond to a show cause letter and to attend an oral disciplinary hearing. The employee is not at liberty to decline to respond to the allegations leveled against them and if they have any issues with the process, they must raise them directly with the employer within the timelines provided."

38. With regard to the requisite fairness of process, the provisions of section 41 of the Act are instructive. The section reads:

> 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.

39. In rebuttal, learned counsel for the 1st respondent submited that, even though the 2nd respondent had authority under section 51(c) of the *SACCO Societies Act* to direct the suspension or removal of an officer from the service of a society, the law does not give it power to execute the removal by itself in view of the fact that there existed no employer-employee relationship with the 1st respondent. Counsel contended that the appellant failed to comply with the law on the procedural fairness test as it was obligated to initiate its independent internal disciplinary proceedings upon receipt of the 2nd respondent's directive.

40. Unfair termination denotes breach of due process on the part of an employer in terminating an employee's contract of employment. Conversely, the notion of fairness denotes a process that gives a fair hearing to the employee and the reasons for termination. Termination of employment is unfair if the employer fails to show that the reason, and the administrative procedure for termination, is valid and clothed in due process.

41. In this case, the 2nd respondent directed the appellant to suspend and, ultimately, remove the 1st respondent from office. It took over the process, leaving little or no room for the appellant to take over and conduct disciplinary proceedings against the 1st respondent before acting on the 2nd respondent's directive to remove him. Moreover, the 1st respondent was not obligated in law to submit to a process initiated and driven by the 2nd respondent so as to show cause and plead his case before it as contemplated in section 45(2) of the *Employment Act*, 2007 which reads:

42. Section 45(2) of the *Act* reads:

> 45(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 employees 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.

43. Section 45(4) (b) of the Act goes further and provides that a termination of employment shall be unfair where it is found out that 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. The appellant having failed to meet the requirements of section 45(2) of the Act, we find that the appellant did not act in accordance with justice and equity as contemplated in section 45(4) (b) of the Act. In the circumstances, the 1st respondent cannot be faulted for giving the process driven by the 2nd respondent a wide bath. As the learned Judge correctly observed –

> " 81. The 2nd Respondent never invoked any internal disciplinary processes against the claimant. The 2nd respondent should have invoked the processes envisaged under section 41 of the *Employment Act*. They never did so. All that the 2nd Respondent did was to effect the directive of the 1st Respondent and terminate the services of the claimant. The claimant was not invited to any oral disciplinary hearing. I therefore find that the claimant was terminated without following due process."

44. In view of the foregoing, we reach the inescapable conclusion that the process by which the 1st respondent was removed from office was not fair, and that the same amounts to unfair termination within the meaning of section 45(2) of the *Employment Act*, and for which the 1st respondent was entitled to compensation. That settles the 2nd issue.

45. On the 3rd issue as to whether, in reaching her decision, the learned Judge considered extraneous facts not pleaded or adduced in evidence at the trial, learned counsel for the 2nd respondent cited the case of *Dakianga Distributors K. Ltd v Kenya Seed Company Limited* [2015] eKLR where this Court affirmed the immutable principle that a trial Judge sits to hear and determine the issues raised by the parties, and not to conduct an investigation or examination. This principle distinguishes the adversarial justice system characteristic of common law jurisdictions from the inquisitorial approach adopted in other jurisdictions.

46. On the authority of *Standard Chartered Bank Kenya Ltd v Intercom Services Ltd & 4 Others* [2004] eKLR, counsel submitted that the Judge had not confined her judgment to what the 1st respondent had pleaded, but fell short of the need to point out exactly what factual components of the impugned judgment were drawn from sources outside the evidential material presented by the parties at the trial, and from which the court could rightfully draw reasonable conclusions.

47. Counsel's submission that the Judge's finding that the appellant failed to institute internal disciplinary proceedings against the 1st respondent before terminating his employment on the strength of the 2nd respondent's directive constituted extraneous circumstances does not stand. Moreover, no evidence was adduced to satisfy the trial court that the appellant complied with the requirements of section 45(2) of the *Act*. In the absence of such evidence, the learned Judge cannot be faulted for drawing the reasonable conclusion that internal disciplinary proceedings were not conducted. In the circumstances,

we find nothing on the record as put to us to suggest that the impugned judgment was founded on, inter alia, matters of fact introduced by the learned Judge of her own motion. Nothing more needs to be said of this, and that settles the 3rd issue raised for our determination.

48. We now turn to the 4th issue as to whether the awards given by the learned Judge were excessive, and whether she granted relief not sought in the 1st respondent's memorandum of claim. Our findings on this issue is reached in the backdrop of the principle that, in law, unfair or wrongful dismissal, also called wrongful termination or wrongful discharge, is a situation in which an employee's contract of employment is terminated by the employer, where the termination breaches one or more terms of the contract of employment, a statute provision or rule in employment law. Put differently, wrongful dismissal or wrongful termination goes to the root of the contract of employment the breach of which calls for redress under the Act and at common law.

49. In our considered view, termination of the 1st respondent's employment was not only unfair on account of breach of due process in contravention of section 45(2) and (4) of the *Act*, but also wrongful in that it resulted in breach of certain terms of his employment contained in the letter of appointment dated 4th April 2003, and which are highlighted in the opening paragraphs of our judgment. Suffice it for the moment to observe that the breaches aforesaid call for redress on such terms as are stipulated under the Act or otherwise recognised at common law.

50. On the 4th issue, the appellant's case is that the learned Judge granted certain reliefs not sought in the memorandum of claim; and that the awards given in the impugned judgment were excessive. A cursory look at the memorandum of claim as amended on 5th February 2016 reveals that the 1st respondent sought reinstatement; salary withheld during the period between November 2012 and May 2015 (which may be construed as salary payable up to the end of his contract as stated in the original memorandum of claim); gratuity at 31% of his basic salary; two (2) months' salary in lieu of notice; unpaid leave; severance pay for a period of one year; damages for unlawful termination ((12 months' salary); costs and interest; and a certificate of service.

51. In her judgment, the learned Judge awarded the 1st respondent compensation under the following heads, namely:2 months' salary in lieu of notice; salary withheld from November 2012 to November 2013 when the 2nd Respondent communicated the termination; gratuity for the contract expiring in May 2012;damages for unlawful termination;salary equivalent to the remainder of the contract unfairly terminated which was to expire in May 2015 for 2013 and May 2015; gratuity payable on the contract expiring in May 2015; costs of this suit plus interest at Court rates from the date of judgment.

52. Having carefully examined the 1st respondent's claims in the amended memorandum of claim and the corresponding awards in the impugned judgment, we find nothing to suggest that the learned Judge made awards not claimed and, accordingly, that ground of appeal fails. That leaves us with the issue as to whether the awards made in the impugned judgment were excessive or unmerited.

53. The first of the awards in the impugned judgment was Kshs 479,536 made on account of two (2) months' salary in lieu of notice. We hasten to observe that this award was in accord with one of the express terms of the 1st respondent's contract of employment in accordance with which either party was at liberty to terminate by giving to the other two (2) months' notice or paying two (2) months' salary in lieu thereof. At the time of termination on 22nd February 2013, the 1st respondent earned a monthly salary of Kshs 239,768. Accordingly, the learned Judge was correct in awarding him two months' salary in lieu of notice in the sum of Kshs 479,536 as claimed, and which was by no means excessive.

54. With regard to the salary allegedly withheld by the appellant, the 1st respondent claimed a whopping Kshs 8,631,648 on account of salary allegedly withheld during the period between 28th November 2012

(when he was suspended by the appellant) and May 2015 (presumably when his 3- years contract were to end). Viewed against what was prayed in the 1st respondent's memorandum of claim and what the learned Judge awarded on account of withheld salary, we are satisfied that the learned Judge was not in any way at fault. However, the contract having been cut short on 15th November 2013, the learned Judge was correct in awarding him Kshs 2,877,216 on account of "salary withheld from November 2012 to November 2013 when the [2nd respondent] communicated the termination".

55. With regard to gratuity, which the 1st respondent claimed at 31% of his basic salary, it is clear from his letter of appointment that the same was payable at 30% of his basic salary that stood at Kshs 164,568 monthly as at the date of termination. In view of the fact that gratuity became due and payable at the end of each term of the renewable contract, the amount due under this head is 30% of the total basic salary earned during the period served under the last contract cycle to wit the period between the date of the last renewal and the date of termination, and for good reason.

56. We take to mind this Court's decision in *Ben Panhill Sifuna v Kenya Urban Roads Authority* [2014] eKLR in which the trial court observed that gratuity ought to be paid only when there is completion of the contract of service. What this means is that failure on the employee's part to complete the contract, say by resignation with or without notice, would result in forfeiture of his or her gratuity usually payable on completion of the contract of service. To our mind, gratuity cannot be withheld where the contract is unfairly terminated by the employer before maturity. In such cases, it would only be fair and just that pro-rated gratuity accrues for the period served before termination. To hold otherwise would be to sanction double jeopardy to the prejudice of an employee who is unfairly terminated with loss of gratuity commensurate with the period served.

57. It is common ground that the 1st respondent's first three-years renewable contract of service commenced on 15th May 2003 when he accepted the appointment. That contract was renewable at the end of every three years cycle, and was indeed renewed on four occasions, the last of such renewal being on 16th May 2012. That term was anticipated to run until 14th May 2015, but that was not to be. He was terminated on 22nd February 2013, having served for a period of nine (9) months and six (6) days. Taking the basic salary of Kshs 164,568 multiplied by 30% for the 9.2 months served during his last contract term amounts to Kshs 454,207/70, the only amount recoverable on account of gratuity earned.

58. The question remains as to whether the learned Judge was correct in awarding an additional sum of Kshs 1,432,608 on account of gratuity on the contract expiring in May 2015. To our mind, gratuity is payable only for the duration of the term of contract served. Those were the express terms of the 1st respondent's contract of employment. To hold otherwise would be tantamount to rewriting the contract between him and the appellant, introducing a term not contemplated by the parties. Accordingly, we find that the learned Judge erred in making the additional award in the sum of Kshs 1,432,608. That amount was unmerited and is hereby set aside.

59. Turning to the award of Kshs 2,877,216 on account of "damages for unlawful termination equivalent to 12 months' salary," we hasten to observe that it is trite law that general damages are not awardable for wrongful termination as of right. However, considering the circumstances under which the termination of employment was carried out, and other factors stipulated in section 49(4) of the Act, we form the view that it would only be fair and just to award the 1st respondent the equivalent of three (3) months' salary as compensation for wrongful termination.

60. We form this view taking to mind this Court's decision in *Joseph Mwaura Njau v Barclays Bank of Kenya Ltd* [2001] eKLR where the Court had this to say on the matter:

> "In simple contracts of employment courts have tended to award employees what is due to them under the terms of such contracts when termination thereof have been declared unlawful. These payments include notice period, leave pay days worked or such other remuneration, otherwise general damages are not normally awardable."

61. A trail of authorities, including those cited above demonstrate this Court's consistency in holding that general damages for unfair termination shall be equivalent to the salary the claimant would have earned for the period of notice. However, account must be taken of the circumstances of the termination and the factors laid down in section 49(4) of the *Act*, which call for reasonable compensation in appropriate cases. In this case, we reach the conclusion that the 1st respondent was entitled to Kshs 479,536 being two (2) months' salary in lieu of notice together with any accrued pay for leave earned but not taken, salary arrears (if any), and other benefits due and payable under the contract, including gratuity or pension benefits as the case may be and, in addition thereto, three (3) months' salary would suffice as compensation for wrongful termination.

62. In view of the foregoing, we agree with the appellant that the additional award of Kshs 4,315,824 on account of salary equivalent to the remainder of the contract unfairly terminated, and which was to expire in May 2015, was made in error. Consequently, that award cannot stand and is hereby set aside. The only issue on which we needed to pronounce ourselves is whether additional compensation is recoverable pursuant to section 49(1)(c)of the *Employment Act*, namely "the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary" of the respondent at the time of dismissal despite payment of two months' salary in lieu of notice in discharge of the appellant's contractual obligation in that regard. Our award of 3 months' salary in compensation pursuant to section 49 of the Act settles the matter.

63. We are also mindful of this Court's decision in the *Kenya Broadcasting Corporation case* (*supra*) where the learned Judges observed that –

> "29. One of the guiding principles for the remedies under section 49 is that they are awarded to compensate the claimant, not as punishment to the employer (See *Jephtar & Sons Construction & Engineering Works Ltd v The Attorney General* HCT-00-CV-CS-0699-2006; *Mosisili v Editor Miller Newspapers* CIV/T/275/2001)) This is based on the principle of "restitutio in integrum" which means that the injured party has to be restored as nearly as possible to *a position he or she would have been in had the injury not occurred. (See Mawenzi Investments Ltd v Top Finance Co. Ltd & Another* HCCS No. 02 OF 2013).
>
> 30. It is our view that the respondent's legal entitlement for unla wful termination of employment was six (6) months' salary in lieu of notice. We find that in awarding the respondent the sum of Kshs3 million as general damages, the trial Judge acted contrary to the principles concerning wrongful dismissal as set down in *Central Bank of Kenya v Julius Nkonge* (supra) and *CMC Aviation v Mohamed Noor* (supra) and contrary to provisions of section 49 of the *Employment Act*."

64. We also share the view that section 49 of the Act is, in principle, designed to compensate an employee who does not enjoy any protection under the terms of his or her contract of employment. The fact that

the terms of the 1st respondent's contract was unequivocal in terms as to termination either way. Unfair termination by dismissal without notice availed him compensation in addition to salary in lieu thereof equivalent to two (2) months' salary, which is what he bargained for. However, that lawful entitlement does not deprive him of compensation under section 49(4). In view of the foregoing, the additional award in the sum of Kshs 2,877,216 on account of "damages for unlawful termination equivalent to 12 months' salary" is hereby set aside and substituted therefor a sum of Kshs 719,304, the equivalent of 3 months salary as compensation.

65. Having examined the record of appeal, the impugned Judgment, the written and oral submissions of learned counsel for the appellant and for the respondents, and having considered the relevant statute and case law, we find that the appellant's appeal and the 2nd respondent's cross-appeal partially succeed. Accordingly, we hereby order and direct that:

    a. The Judgment and Decree of the Employment and Labour Relations Court of Kenya at Nairobi (H. Wasilwa, J.) delivered on 30th November 2017 in ELRC Cause No. 789 of 2013 be and is hereby set aside and substituted therefor the following awards to the 1st respondent as against the appellant:

        i. Kshs 479,536 – two (2) months' salary in lieu of notice;

        ii. Kshs 2,877,232 – salary withheld for the period between 15th November 2012 and 15th November 2013;

        ii. Kshs 454,207/70 – gratuity for the period actually served before termination of the last term of contract (16th May 2012 to 22nd February 2013); and

        iii. Kshs 719,304 (the equivalent of 3 months' salary) as damages for wrongful termination.

        Total: Kshs4,050,743/70.

    b. The sum of Kshs 4,050,743/70 shall bear interest thereon at court rates with effect from 30th November 2017 until payment in full, less all sums (if any) paid on account of the impugned decree.

    c. Each party do bear their own costs of the appeal and of the 2nd respondent's cross-appeal.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY, 2023.

D. K. MUSINGA (P)

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR