



REPUBLIC OF KENYA



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**Adera v Sukari Industries (Civil Appeal 88 of 2019)
[2023] KECA 1086 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KECA 1086 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 88 OF 2019
PO KIAGE, M NGUGI & JM NGUGI, JJA
SEPTEMBER 22, 2023**

BETWEEN

SAMUEL OMONDI ADERA APPELLANT

AND

SUKARI INDUSTRIES RESPONDENT

(Being an appeal from the judgment of the Employment and Labour Relations Court at Kisumu (Rika J.) dated 6th December, 2018 in ELRC Cause No. 295 of 2013))

JUDGMENT

Judgement of Mumbi Ngugi, JA

1. The appellant sued his erstwhile employer, Sukari Industries Limited, for unfair termination of his employment. In its judgment dated 6th December, 2018, the trial court (Rika J) found in favour of the appellant, declared the termination of his employment unfair, and awarded him a sum of Kshs 227,152 being two months' salary in compensation for unfair termination. The amount was to attract interest at 14% per annum from the date of judgment till payment in full.
2. The trial court considered and determined the appellant's claim under Rule 21 of the *Employment and Labour Relations Court (Procedure) Rules, 2016*. Titled 'Determination by documentary evidence', it provides that:
 21. The Court may, either by an agreement by all parties, or on its own motion, proceed to determine a suit before it on the basis of pleadings, affidavits, documents filed and submissions made by the parties.
3. The facts presented before the trial court by the appellant in his statement of claim were that he had been employed by the respondent as a Human Resource Manager by a letter dated 31st January, 2012.



- The employment was to commence on 3rd March 2012. The appellant worked for the first 6 months on probation. On 22nd May 2013, the respondent terminated his contract without reason or notice.
4. According to the appellant, he was called by the General Manager on the material day and told to vacate the respondent's house as his successor was on his way to the respondent's premises. He was not given any explanation for the termination of his contract. He was advised to see the Financial Controller who paid him a net amount of Kshs 212,459, which was indicated to include notice pay, 24 days of annual leave, gratuity and housing benefit. He was directed to accept this amount and leave, which he did.
 5. The appellant was aggrieved by the termination of his employment and he filed a statement of claim before the trial court in which he sought:
 - a. Declaration that termination was unfair and unlawful.
 - b. General, exemplary, and aggravated damages for unfair and wrongful termination.
 - c. Cumulative pay and interest of loss of salary in gross compounded monthly occasioned by unfair termination together with 40 days' unpaid salary in lieu of leave out of one year and four months' service. (sic).
 - d. Interest at 14% per annum from the date of filing this Claim until conclusion.
 - e. Costs of this suit and interest thereon party and party as well as client and advocate.
 6. The respondent filed a response dated 31st July, 2014 in which it admitted having employed the appellant on the terms and conditions of service captured in the letter of appointment dated 31st January 2012. It denied, however, compelling the appellant to receive the terminal dues. It was its case that the appellant's contract was lawfully terminated after he was given several warnings by the respondent.
 7. In its decision, the trial court found that the termination of the appellant's employment was unfair. It was its finding further that the payment of terminal dues and the execution by the appellant of the acknowledgment of receipt and discharge while clearly under pressure to vacate office for the new Human Resources Manager could not absolve the respondent from liability.
 8. The trial court, however, found that the appellant was promptly paid, that he had received his terminal dues, albeit under pressure, which mitigated his economic injury. It considered the appellant's length of service and took the view that compensation equivalent to 2 months' salary, amounting to Kshs 227,152 would be adequate in redressing his economic injury.
 9. The trial court found, however, that the appellant's prayers for general, exemplary and aggravated damages had no merit. Further, that his prayer for 'cumulative pay and interest...' was unclear and added no value to the claim.
 10. The appellant was dissatisfied with the decision of the trial court. He has filed a memorandum of appeal dated 15th March in which he raises some nine grounds of appeal which are not only prolix but contain arguments that are inappropriate in a memorandum of appeal. It is worth reiterating what is required in a memorandum of appeal under Rule 88 of this [Court's Rules, 2022](#) (Rule 86 of the 2010 Rules) in this regard. The Rule provides that:

88.



- (1) A memorandum of appeal shall concisely set forth under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying—
 - a. the points which are alleged to have been wrongly decided; and
 - b. the nature of the order which it is proposed to ask the Court to make. (Emphasis added).
11. Summarising the grounds as best I can, they are that the trial court erred in fact and in law in:
 - i. not applying Employment and Labour laws and denying the appellant general, exemplary and aggravated damages for wrongful termination of his employment; as well as ‘cumulative salary’, interest thereon and the costs of the suit;
 - ii. not dealing with all issues conclusively and in leaving out important issues raised by the appellant;
 - iii. failing to consider the appellant’s submissions and case law cited, relying on the respondent’s submissions, and thus arriving at a wrong decision;
 - iv. turning a blind eye to sections 45 and 49 of the *Employment Act* 2007 that give direction on the minimal compensation for unfair termination of employment.
12. The appellant, who appeared in person, filed written submissions dated 15th March, 2023 in support of his appeal. It is his submission that based on section 41 of the *Employment Act*, 2007, the termination of his employment was unfair and was not procedural, and was done without justifiable reasons contrary to the provisions of the *Employment Act*.
13. The appellant submits further that since the respondent failed to follow the laid down procedures in terminating his employment, it is only fair that adequate compensation is provided for. He relies in support of this submission on the case of *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR.
14. The respondent, which was not represented at the hearing of the appeal, filed submissions dated 28th November 2019. The respondent makes reference in its submissions to ‘Grounds for Affirming the Trial Judge’s Decision’ which it states were filed under Rule 84 and 104(a) of the *Court of Appeal Rules 2010* and filed in Court on 12th September 2019. I observe, however, that these grounds were not placed before the Court at the time of hearing of the appeal, nor did I have sight of them at the time of writing of this judgment.
15. In response to the appellant’s contentions, the respondent submits that the impugned judgment conformed with Rule 28(2) of the *Employment and Labour Relations Court (Procedure) Rules 2016* and Order 21 Rule 4 of the *Civil Procedure Rules (2010)*. It submits that though the appellant complains that the impugned judgment did not deal with all the issues he raised, he does not state which particular issue was not dealt with by the trial court.
16. The respondent submits, with regard to the appellant’s claim for general, exemplary and aggravated damages, that the trial court had found this claim to be without merit. It is its submission further that the jurisprudence from various decisions cited is that section 49 of the *Employment Act* is clear on what remedies are available to a claimant for wrongful dismissal and unfair termination.
17. It is the respondent’s submission further that an appellate court may only interfere with the trial court’s exercise of discretion if it is persuaded that the trial court acted on wrong principles of law or that



- the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled, support for this submission being placed on the decision of this Court in *Ken Odondi & 2 others v James Okoth Omburah T/A Okoth Omburah & Company Advocates* (2013) eKLR.
18. The respondent further submits that under section 49(1)(c) as read with section 50 of the *Employment Act* the maximum compensation that can be awarded is 12 months' gross salary, and the court can award less. Its submission therefore was that the appellant was entitled to the least compensation of the 12 months' salary as stipulated in the Act, support for this submission being sought in the case of *Sarah Wanyanga v Henry Kathii & another* (2014) eKLR in which the Court, after considering the provisions of section 49, made an award of six months' pay as compensation for unfair termination of employment. Support is also sought in the case of *Kadenge Karisa Konde v Coast Clay Works Limited* [2016] eKLR in which the Court awarded two months' salary in compensation for unfair dismissal.
 19. The respondent submits that the appellant was not entitled to an award of exemplary and aggravated damages, relying in support on, among other decisions, the case of *The Nairobi Star Publication Limited v Elizabeth Atieno Oyoo* (2018) eKLR in which the Court held that such damages should be awarded in cases of oppressive, arbitrary or unconstitutional actions by government servants, where the impugned conduct is calculated to make the defendant a profit, or where a statute authorises the payment of such damages.
 20. The respondent asks this Court not to disturb the finding of the trial court that the appellant's claim for 'cumulative pay and interest on loss of salary' was unclear.
 21. I have considered the pleadings and proceedings before the trial court. I have also considered its judgment, the appellant's memorandum of appeal, and the submissions of the parties. Though the appellant asks this Court to make a declaration that the termination (of his employment) was unfair and dedicates a substantial part of his submissions to this issue, I note that this order was already issued by the trial court. Further, I note that the trial court made an award in damages of two months' gross salary as compensation for the unfair termination of his employment. The unfairness or otherwise of the termination of his employment is therefore not at issue before this Court.
 22. What falls for determination is whether the trial court erred in its assessment of the compensation due to the appellant for the unfair dismissal; in not awarding him general, exemplary and aggravated damages; in not awarding him 'cumulative pay and interest of loss of salary in gross compounded monthly occasioned by unfair termination together with 40 days unpaid salary in lieu of leave out of one year and four months service' (sic); and for not awarding him interest and costs of the suit.
 23. I will begin with the statutory provisions on compensation for unfair termination of employment. Section 49 of the *Employment Act* titled 'Remedies for wrongful dismissal and unfair termination' 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 —
 - 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. (Emphasis added).

24. In its decision, the trial court noted that the appellant received his terminal dues, albeit under pressure, at the time of termination of his employment on 22nd May 2013, which mitigated his economic injury. Included in the payment was his notice pay, annual leave pay, gratuity and housing benefit. In awarding compensation at two months' gross pay, amounting to Kshs 227,152 which it considered adequate compensation for unfair termination, the trial court considered the appellant's length of service, which was a year and four months.
25. The question of what compensation should be awarded to a claimant upon a finding that the termination of employment was unfair was the subject of determination by the Supreme Court in *Kenfreight (E.A) Limited v Benson K Nguti* [2019] eKLR. In its decision, the apex court of this land noted that the *Employment Act* makes provision for the remedies for unfair dismissal in section 49 of the Act. It then held, at paragraphs 32 and 33 of its decision, that:
- “(32) When giving an award under Section 49 of the *Employment Act*, a court of law is expected to exercise judicial discretion on what is fair in the circumstances. ...
- (33) On an award on damages, the Act limits the award a court of law can make to a maximum of 12 months' salary. In as much as the trial Court therefore does have a discretion in the quantum of damages to award for unfair or wrongful termination of employment, it must be guided by the principles and parameters set under sub- Section 4 of Section 49 of the *Employment Act*.”
26. What emerges from this decision is that the remedy for unlawful termination of employment is prescribed by statute. The compensation under section 49 is limited to no more than 12 months' gross salary. Whether to award the 12 months' gross pay or less is an exercise of the court's discretion, and as is now trite, an appellate court will not interfere with the exercise of discretion unless it is shown that the trial court acted on wrong principles, or that the award was so high or so low as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled.
27. In reaching its decision, the trial court in this matter took into account the fact that the appellant had worked for the respondent for 14 months only. He had received his terminal dues immediately upon the termination of his employment. The trial court therefore considered 2 months' gross pay fair in the circumstances. I am satisfied that the trial court properly exercised its discretion, and so I see no basis for interfering with its award.
28. The appellant is aggrieved that the trial court did not award him general, exemplary and aggravated damages, as well as what he refers to as 'Cumulative pay and interest of loss of salary in gross compounded monthly occasioned by unfair termination together with 40 days' unpaid salary in lieu of leave out of one year and four months' service.' Dealing with this latter claim first, I must express some sympathy with the trial court: it is not possible to figure out what exactly the appellant means by this prayer. In any event, as noted from the Supreme Court decision in *Kenfreight* (supra), the remedies for unfair dismissal are set out in the *Employment Act*. Whatever the appellant means by this prayer, it is not among the remedies provided for by statute.



29. The claim for general, exemplary, and aggravated damages against the respondent is also untenable. Aside from the fact that these remedies are not provided for in the Employment Act, the circumstances under which the last two can be awarded are limited to situations in which there has been oppressive, arbitrary or unconstitutional action by servants of government, or conduct calculated by the defendant to make him a profit, or cases in which the payment of exemplary damages is authorised by statute-see The Nairobi Star Publication Limited v Elizabeth Atieno Oyoo (supra); Godfrey Julius Ndumba Mbogori & another v Nairobi City County [2018] eKLR and Abdul Hamid Ebrahim Ahmed v Municipal Council of Mombasa HCCC No 290 of 2000.
30. The appellant was, understandably, quite upset by the termination of his employment and the manner in which it was executed by the respondent. He has submitted at some length about the embarrassment and mental anguish that he suffered as a result, for which he seeks to be ‘ventilated’-possibly meaning ‘vindicated’. However, in the statutory regime set up by the Employment Act and from the jurisprudence of our courts, he is not entitled to damages under these heads.
31. Finally, the appellant is unhappy that the trial court did not award him the costs of the suit. The award of costs is also within the discretion of the court, and an appellate court can only interfere on the same principles as it would with respect to the exercise of other discretionary powers.
32. The appellant also complains that the trial court did not award him interest, but I note that at prayer d) of its final orders, the trial court makes an award of 14% per annum from the date of judgment until payment in full.
33. In the circumstances, I find no basis for interfering with any aspect of the decision of the trial court. I would therefore dismiss the appeal, but with no order as to costs.

Judgment of Kiage, JA

34. I have had the advantage of reading in draft the judgment of Mumbi Ngugi, JA. I entirely agree with it and have nothing useful to add.
35. As Joel Ngugi, JA is in agreement, the appeal shall be disposed of as proposed by Mumbi Ngugi, JA.

Judgment Of Joel Ngugi, JA

36. I have had the advantage of reading in draft the judgment of Mumbi Ngugi, JA. I am in full agreement with it and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF SEPTEMBER, 2023.

MUMBI NGUGI

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL



I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

