**Kimani v Gilanis Supermarket Ltd (Civil Appeal 169 of 2019)**
**[2023] KECA 1145 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KECA 1145 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAKURU**

**CIVIL APPEAL 169 OF 2019**

**F SICHALE, FA OCHIENG & WK KORIR, JJA**

**SEPTEMBER 22, 2023**

**BETWEEN**

**FRANCIS NGIGI KIMANI ..... APPELLANT**

**AND**

**GILANIS SUPERMARKET LTD ..... RESPONDENT**

***(An Appeal from the Judgment of the Employment and Labour Relations Court at Nakuru (M. Mbaru, J.) dated and delivered on 7th June 2018 in E&LRC Cause No. 362 of 2014)***

## JUDGMENT

1. Francis Ngigi Kimani, the appellant, is before this Court on a first appeal dissatisfied with the judgment of the Employment & Labour Relations Court (E&LRC) on two grounds, to wit, that the learned Judge erred in law by failing to award damages for unfair termination; and that the learned Judge erred in failing to award costs of the suit. The appellant's prayers in his memorandum of appeal dated 4th July 2019 are that the awards by the trial court be set aside and he be awarded general damages for unfair termination of employment. He also prays for costs of the proceedings before the trial court and for this appeal.

2. The claim by the appellant was originated vide a memorandum of claim wherein he alleged to have been summarily dismissed by the respondent, Gilanis Supermarket Ltd. The circumstances leading to the dismissal were that the appellant who had been employed as a driver by the respondent was in August 2013 sent to collect a sugar consignment from a sugar factory in Transmara and deliver the same to a trader in Kericho. Upon delivery, the client in Kericho declined to take possession of the consignment on the ground that some of the bags weighed less than the standard 50 kilograms. The appellant was then asked by his employer to deliver the goods to its warehouse in Nakuru where the consignment was once again weighed and it was established that the consignment had a deficit of 73 kilograms. The matter was reported to the police for further investigations. The appellant did not report to work for nine days and later alleged that he had been instructed by the police not to set foot at the respondent's

premises. He was subsequently summarily dismissed on the grounds of siphoning sugar and desertion from work.

3. The E&LRC in its judgment found that the appellant was unfairly dismissed as the respondent did not follow the right procedure hence the dismissal was unfair as per the provisions of Section 45 of the *Employment Act*. The Judge made an order for the award of one month's salary in lieu of notice as well as compensation for unlawful dismissal equivalent to one month's salary. The parties were directed to bear their own costs.

4. When the appeal came up for virtual hearing before us, the appellant was represented by Mr. Mboga while Mr. Makora appeared for the respondent. Counsel having filed their written submissions sought to rely on them but proceeded to make short oral highlights of the submissions. In the submissions dated 8th May 2023, Mr. Mboga set off by relying on the cases of *Kamal Jam Mursal & Another v Evelyn Nthangu Manase* [2022] KEHC 282 (KLR) and *Kenya Ports Authority vs. Kuston (Kenya) Ltd* [2009] 2 EA 212 to appreciate that the duty of a first appellate court is to subject the evidence to fresh analysis and reach its own independent decision. Relying on the pleadings and evidence on record, counsel submitted that the trial court erred in finding that the appellant had been offered an opportunity to collect his terminal dues upon clearance and that he ought to have informed his employer of his whereabouts for the nine days he was absent from work. Mr. Mboga asserted that the appellant was chased away from the respondent's premises and was therefore not able to clear. Counsel further submitted that the reason for the appellant's absence from work was not only well known to the respondent but was also orchestrated by the respondent. Counsel stated that in the circumstances, the award for unfair dismissal by the trial court was inadequate and this Court should therefore set aside the award and instead make a reasonable award. On the question of costs, counsel submitted that the trial court did not give reasons for departure from the general rule that costs follow the event. Counsel urged us to award the appellant the costs for the proceedings before the trial court and for this appeal.

5. On his part, Mr Makora relied on the submissions dated 26th May 2023 in which he identified two issues for our determination. On the issue as to whether the trial court erred in failing to award damages for unfair termination, counsel relied on the case of *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR to submit that general damages are not awardable under the Employment Act. According to counsel, the award of compensation for unfair dismissal was discretionary as per the provisions of Sections 49 and 50 of the *Employment Act* and the trial court cannot be faulted for awarding the appellant damages equivalent to one month's salary. Counsel argued that even if the appellant was dissatisfied with the quantum of the award, no case had been made to challenge the trial court's exercise of discretion.

6. On the issue of costs, Mr. Makora placed reliance on the case of *Farah Awad Gullet v CMC Motors Group Ltd* [2018] eKLR to submit that the award of costs is always at the discretion of the court but the discretion should be exercised judiciously. Counsel submitted that the trial court correctly exercised its discretion by taking into account the relevant factors before ordering the parties to meet their own costs. In the end, counsel urged us to dismiss the appeal with costs.

7. This being a first appeal, our mandate under Rule 31(1)(a) of the *Court of Appeal Rules*, 2022 is akin to a retrial as it traverses both issues of law and fact. In exercising that mandate we only need to be cautious of the fact that unlike the trial court, we did not have the benefit of seeing and hearing the witnesses testify so as to be in a position to gauge their demeanour. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, this Court expounded on the duty of the first appellate court thus:

> " This being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High

Court 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 though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect."

8. We have given due consideration to the record of appeal and the submissions by counsel. In our view, the appellant is not challenging the findings of fact by the trial court but rather the quantum of damages awarded. That being the case, this appeal then turns on the resolution of two issues, namely, whether the award of one month's salary as compensation for wrongful termination was reasonable; and whether the trial Judge erred in directing the parties to meet their own costs of the proceedings.

9. With regard to the first issue for determination, it is the appellant's contention that the award of one month's salary as compensation for wrongful dismissal was inadequate in the circumstances. The respondent on its part maintain that such an award is discretionary and the trial court judiciously exercised that discretion in making the award. We note that the appellant's submissions are geared towards an award for general damages. On this, we concur with the respondent's submission that general damages are not awardable in claims for unfair termination of employment. On this statement we advert to the decision of this Court in *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR that "it is trite law that general damages are not awardable for wrongful termination." Indeed, the awards for unfair termination are provided for under Section 49(1) of the *Employment Act* as follows:

> "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."

10. The Supreme Court addressed the import of Section 49 of the *Employment Act* in *Kenfreight (E.A) Limited v Benson K. Nguti* [2019] eKLR and stated as follows:

> "(38) What then should be the correct award on damages be based on? Having keenly perused the provisions of Section 49 of the *Employment Act*, we have no doubt that once a trial court finds that a termination of employment as wrongful or unfair, it is only left with one question to determine, namely, what is the appropriate remedy? The *Act* does provide for a number of remedies for unlawful or wrongful termination under Section 49 and it is up to the judge to exercise his discretion to determine whether to allow any or all of the remedies

provided thereunder. To us, it does not matter how the termination was done, provided the same was challenged in a Court of law, and where a Court found the same to be unfair or wrongful, Section 49 applies."

11. From the foregoing, it is clear that once a finding of wrongful termination has been made, the court then acquires the discretion to determine what remedies under Section 49 of the *Employment Act* are appropriate. This, however, as we have already stated, does not include an award for general damages. In the present case, the trial court made an award of one month's salary as compensation for unlawful termination. This award is in line with the provisions of Section 49(1) of the *Employment Act*.

12. The next question then is whether the appellant has made out a case for interfering with the discretion of the trial court in as far as the award is concerned. For an appellate court to interfere with the discretionary award of the trial court, an appellant is required to establish that the trial court acted upon some wrong principle of law, or that the amount awarded was so extremely high or so low as to make it an entirely erroneous estimate of the damage to which the plaintiff suffered. This principle was enunciated in *Butt v Khan* [1978] eKLR 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."

13. What then are the principles governing award of damages under Section 49 of the *Employment Act*? In *CMC Aviation Limited vs. Mohammed Noor* [2015] eKLR, this Court when considering an award arising out of circumstances similar to those in the appeal before us held that:

> "41. The respondent was serving a two year contract of employment which was terminable by one month's notice or one month's salary in lieu of notice. Had the appellant complied with the requirements of sections 41 and 45 of the *Employment Act*, the summary dismissal would have been a fair one. But to the extent that the appellant did not follow the statutory procedure the dismissal was found to be unfair, which we agree. Taking all this into consideration, we think that the respondent was not entitled to twelve months gross pay as compensation for wrongful dismissal. In our view, since the contract of employment was terminable by one month's notice, we believe that an award of one month's salary in lieu of notice would have been reasonable compensation." [Emphasis ours]

14. In *Ol Pejeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR this Court reiterated the factors to be taken into account in assessing the award for wrongful dismissal as follows:

> "Remedies for wrongful dismissal and unfair termination are provided for in section 49 of the *Act*. They include and which the learned Judge invoked, payment equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employees at the time of dismissal. In deciding whether to adopt some of the remedies, the court has to take into account a raft of considerations such as the wishes of the employee, circumstances in which the termination took place and the extent of the employee's contribution, practicability of reinstatement, employee's length of service, opportunity available to the employee, severance payable, right to press other claims or unpaid wages, expenses reasonably incurred by the employees as a consequence

of termination, conduct of the employee which to any extent caused or contributed to the termination, failure by the employee to reasonably mitigate the losses and any other compensation in respect of termination of employment paid by the employer and received by the employee.

The compensation awarded to the respondent under this head was the maximum awardable, that is to say, 12 months' pay. The trial judge did not at all attempt to justify or explain why the respondent was entitled to the maximum award. Yes, the trial Judge may have been exercising discretion in making the award. However, such exercise should not be capricious or whimsical. It should be exercised on some sound judicial principles. We would have expected the Judge to exercise such discretion based on the aforesaid parameters."

15. And, in *Kenya Broadcasting Corporation v Geoffrey Wakio* (*supra*), it was stated 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)."

16. The learned trial Judge in her judgment at paragraph 35 explicitly tendered the reasons and factors she took into consideration prior to arriving at the award of one month's salary as compensation for the termination of the appellant. Some of the considerations included the fact that the appellant deserted work without permission from the respondent, and that he had been asked to go and collect his terminal dues. Indeed, had the respondent followed the correct procedure when terminating the appellant, his termination may have been lawful. We therefore find no justification for our interference with the award by the trial court and we decline the invitation to interfere with the learned Judge's award.

17. The next issue for our determination is the question of costs. The trial court ordered each party to meet their own costs. The appellant on his part was of the view that costs ought to follow the event and therefore he ought to have been awarded the costs at the trial court. It is a legal norm that costs follow the event but the court may depart from this principle for good reason. In that regard, Section 27 of the *Civil Procedure Act* provides 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 who 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."

18. On the exercise of the trial court's discretion, this Court held in Supermarine *Handling Services Ltd v Kenya Revenue Authority* [2010] eKLR that:

> " 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 reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the rule."

19. Similarly, in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR, the Supreme Court stated that:

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation...
>
> (22) Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases."

20. From the foregoing, it is evident that even though costs ordinarily follow the event, a court seized of a matter retains the discretion, for good cause or reason, to depart from that norm. The award of costs being a discretionary issue, an appellate court must approach it with deference to the trial court's decision unless it is established that the decision was made whimsically and injudiciously. In this case, the trial court did not give reasons for departing from the ordinary rule. However, reading through the judgment, it is evident to us that certain factors outlined in paragraph 34 and 35 of the said judgment could have informed the decision of the trial court. Considering the conduct of the appellant prior to his dismissal and taking into account that none of the parties exhibited any untoward conduct at the hearing, we find the direction by the trial court that the parties meet their own costs reasonable. We therefore find no fault on the part of the trial court in as far as the award of costs is concerned.

21. The final question is with regard to the costs of this appeal. As can be gleaned from the discussion above, this appeal fails and is for dismissal. Ordinarily, the respondent would have the costs of this appeal. However, considering the conduct of both parties in this appeal and the plight of the appellant having been dismissed by the respondent, we find it just to let each party meet their own costs of the appeal.

22. In the end, we find that this appeal lacks merit and is hereby dismissed in entirety. Each party shall bear their own costs of the appeal.

23. It is so ordered.

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

**F. SICHALE**

**.....**

**JUDGE OF APPEAL**

**F. OCHIENG**

**.....**

**JUDGE OF APPEAL**

**W. KORIR**

**.....**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**