



**Shabani v Tea Warehouses Limited & another (Civil Appeal  
E030 of 2021) [2023] KECA 1296 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KECA 1296 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL E030 OF 2021  
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA  
OCTOBER 27, 2023**

**BETWEEN**

**HAMISI JUMA SHABANI ..... APPELLANT**

**AND**

**TEA WAREHOUSES LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal from the Judgment of the Employment and Labour Relations Court at Mombasa (L. Ndolo J.) dated 30th July 2020 in Mombasa ELRC No. 751 of 2017)*

**JUDGMENT**

1. Hamisi Juma Shabani, the Appellant herein, is aggrieved by the judgment delivered on 30<sup>th</sup> July 2020 by the Employment and Labour Relations Court (ELRC) at Mombasa (L. Ndolo J.) in Mombasa ELRC No. 751 of 2017, that allowed his claim for leave pay for 27 days and salary for seven (7) days but dismissed his claim for salary arrears, acting/responsibility allowance, gratuity and leave allowance and for malicious prosecution. The Appellant's claim in the ELRC was that he was employed by Tea Warehouses Ltd (the 1<sup>st</sup> Respondent herein) as a Warehouse Clerk from 1<sup>st</sup> January 2004 to 31<sup>st</sup> March 2006 and was laid off on 1<sup>st</sup> April 2006 due to reduction in business. The Appellant stated that on 4<sup>th</sup> January 2007, he was recalled back to work for a two (2) year contract until 4<sup>th</sup> January 2009 at the 1<sup>st</sup> Respondent's Shimanzi Warehouse. Upon the expiry of the 2<sup>nd</sup> contract, the contract was renewed for a further 2 years from 5<sup>th</sup> January 2009 to 4<sup>th</sup> January 2011. Thereafter the 1<sup>st</sup> Respondent did not terminate him but retained him as a Warehouse Clerk without a formal contract of employment and thus the terms of his contract was converted from a fixed term contract to a long term employment for an indefinite period of time.
2. On 31<sup>st</sup> May 2016 the Appellant was transferred to Jomvu Warehouse as a Warehouse Clerk and between 31<sup>st</sup> May 2016 and 27<sup>th</sup> August 2016, he was appointed the Acting Supervisor at the Jomvu



- Warehouse. While in this position, a discovery was made of several missing teas at the said warehouse and after stocktaking was done on 5<sup>th</sup> September 2016, it was noted the 200 packages/ bags of tea were missing. Further internal investigation by the 1<sup>st</sup> Respondent and Changamwe Police revealed that the warehouse doors had been tampered with. The Appellant averred that even though he worked during the day and was not responsible for the security arrangements at Jomvu Warehouse at night, he was suspended by the 1<sup>st</sup> Respondent pending investigation between 9<sup>th</sup> September 2016 and 26<sup>th</sup> September 2016.
3. Upon return to work the Appellant was asked on 19<sup>th</sup> October 2016, to report to Changamwe police station to record a statement regarding the loss of the 200 packages/ bags of teas, and on 20<sup>th</sup> October 2016, upon reporting to the said police station was arrested and charged in Mombasa Chief Magistrate Court Criminal Case No. 2033 of 2016 - Republic v Hamisi Juma Shabani & Another for the offence of stealing by servant. On 27<sup>th</sup> February 2017, the criminal case was terminated and on 9<sup>th</sup> March 2017, the Appellant wrote to the 1<sup>st</sup> Respondent to inquire about his return to work, whereupon he received a summary dismissal letter dated 7<sup>th</sup> October 2016. The Appellant further stated that on 30<sup>th</sup> October 2016, he attended the Disciplinary Committee and at which there was no determination or finding.
  4. The Appellant urged that the termination of his employment was unfair and or unlawful and did not follow the due process and, in any event, unjustifiable in the circumstances. The Appellant further avers that the 1<sup>st</sup> Respondent falsely accused him of having committed the offence of stealing by servant. The Appellant also sued the Attorney General, (the 2<sup>nd</sup> Respondent herein), on behalf of the Kenya Police Service and the Director of Public Prosecutions for maliciously and without reasonable cause prosecuting the said charge before the Chief Magistrate's Court, and enumerated the particulars of malice.
  5. The 1<sup>st</sup> Respondent in response denied the assertions of the Appellant and stated that 200 bags of tea went missing between 10<sup>th</sup> August 2016 and 27<sup>th</sup> August 2016 while the Appellant was in charge of the Jomvu Warehouse; that it reported the loss to the police on 7<sup>th</sup> September 2016 and conducted its own internal investigations, which revealed that the Appellant being the person in charge as a supervisor of the Jomvu Warehouse, had a case to answer; that the Appellant ought to have reported any deficit and/or shortage in tea count to the head office and instead told the clients that their bags of tea were missing but asked them not to report it as he would sort out the issue; and that on 8<sup>th</sup> September 2016, the Appellant was issued with a notice to show cause in respect of the loss of 200 bags of tea.
  6. According to the 1<sup>st</sup> Respondent, the Appellant responded to the show cause notice on the same day, and was subsequently suspended for 14 days from 9<sup>th</sup> September 2016 to pave way for investigations and was asked to report back on 26<sup>th</sup> September 2016. Upon reporting back on that day, that the Appellant was issued with a letter inviting him for a disciplinary hearing on 30<sup>th</sup> September 2016 and informed of his right to be accompanied by at least one independent witness at the hearing. The 1<sup>st</sup> Respondent stated that it never dealt with the Appellant after issuing him with the letter informing him of the disciplinary hearing until 7<sup>th</sup> October 2016, when the meeting actually took place as it was impossible to have it on 30<sup>th</sup> September 2016, which the Appellant was made aware of. The 1<sup>st</sup> Respondent further stated that the Appellant attended the disciplinary hearing of 7<sup>th</sup> October 2016 at which it was resolved he was negligent and therefore liable to face disciplinary action.
  7. The 1<sup>st</sup> Respondent averred that its investigations and disciplinary process were not bound by the outcome of the criminal case, that its internal disciplinary process was independent, and the decision to summarily dismiss the Appellant had nothing to do with the criminal case but was based on the disciplinary process wherein it was revealed that the Appellant was negligent in execution of his duties, and that the withdrawal of the criminal case against the Appellant did not absolve him from



responsibility. Further, that the Appellant was afforded a fair disciplinary process and he did not raise any issue during the hearing. Therefore, that the Appellant was lawfully dismissed as provided under the *Employment Act*, 2007. The 1<sup>st</sup> Respondent denied the allegations of malice and added that the decision to charge the Appellant was within the purview of the police, who conducted independent and separate investigations from those conducted by the 1<sup>st</sup> Respondent.

8. The 2<sup>nd</sup> Respondent's response was that it was a stranger to the allegation in the Appellant's claim and that it was not privy to the employer-employee relationship between the Appellant and the 1<sup>st</sup> Respondent. While confirming that the 2<sup>nd</sup> Respondent admitted that the 1<sup>st</sup> Respondent lodged a complaint at Chagamwe Police Station regarding the loss of 200 bags of tea, and that the Appellant was held in custody for purposes of being arraigned in court on 21<sup>st</sup> October 2016, the 2<sup>nd</sup> Respondent denied that the report by the 1<sup>st</sup> Respondent was made without malice unreasonableness or improbable cause. Further, the 2<sup>nd</sup> Respondent's case was that due process was followed when the Appellant was charged in court on 21<sup>st</sup> October 2016 in Mombasa Chief Magistrate's Court Criminal Case No. 2033 of 2016. The 2<sup>nd</sup> Respondent in conclusion stated that the reasons raised by the Appellants did not meet the threshold for proving malicious prosecution.
9. The Appellant reiterated his claim during his oral testimony during the hearing, while the 1<sup>st</sup> Respondent's called one witness, Shem Yakubal Mubaraki, who was its Administration Manager. The said witness also reiterated the averments by the 1<sup>st</sup> Respondent and indicated that the Appellant was responsible for receiving and weighing tea, and it was his responsibility to report any shortage. He also testified that the Appellant was not paid acting allowance when he was acting Warehouse Manager. The 2<sup>nd</sup> Respondent did not call any witness during the hearing.
10. The trial Judge, upon hearing the parties, held that the Appellant's dismissal was lawful and fair, and that the claim for compensation was without basis for the reasons that an acquittal in a criminal case does not automatically absolve an employee from administrative liability at the work place, and that a criminal trial and internal disciplinary proceedings initiated by an employer against an employee are two distinct processes, with different procedural and standard of proof requirements. Therefore, that going against the outcome of a criminal trial does not therefore make an employer's decision unlawful or unfair. The Court was satisfied after applying the 'reasonable responses test' that the 1<sup>st</sup> Respondent had a valid reason for dismissing the Appellant as required under Section 43 of the *Employment Act*, since the Appellant had confirmed that some tea disappeared from the 1<sup>st</sup> Respondent's Warehouse at Jomvu, where he served as Acting Supervisor at the material time.
11. Further, that the Appellant was availed procedural fairness safeguards under Section 41 of the *Act*, beginning with a show cause letter to which he duly responded and a personal hearing held on 7<sup>th</sup> October 2016. Lastly, the trial Judge held that in a cause of malicious prosecution, the burden of proving dishonesty and unreasonableness rested with the Appellants and that since there was a reasonable and probable cause for his arrest and prosecution, there was nothing to suggest that any of the Respondents acted either dishonestly or unreasonably, and the claim for malicious prosecution was therefore not proved.
12. On the reliefs sought, the trial Judge found that the claim for leave pay for 27 days and salary for seven (7) days in October 2016 was proved, but that no basis was laid for the claim for salary arrears, acting/responsibility allowance, gratuity, and leave allowance, and entered judgment in favour of the Appellant as against the 1<sup>st</sup> Respondent as follows:
  - a) Leave pay for 27 days (28,190/30\*27) Kshs. 25,371
  - b) Salary for 7 days in October 2017 Kshs 6,578 Total Kshs. 31,949



This amount was to attract interest at court rates from the date of judgment until payment in full, and each party was ordered to bear their own costs of the claim in the ELRC.

13. The Appellant has raised twenty (20) grounds of appeal in his Memorandum of Appeal dated 22<sup>nd</sup> April 2021 and lodged in this Court on 30<sup>th</sup> April 2021, and has challenging the ELRC's findings in three broad areas, namely on whether the termination was unlawful and unfair; whether the claim for malicious prosecution was proved, and whether the relief sought should have been granted. We heard the Appeal on 20<sup>th</sup> March 2023 on this Court's virtual platform and learned counsel Mr. Benjamin Njoroge appeared for the Appellant, while learned counsel Mr. Gakuo, appeared for the 1<sup>st</sup> Respondent, and learned counsel Mr. Mwandeje appeared for the 2<sup>nd</sup> Respondent. The said counsel made oral submissions and relied on written submissions dated 14<sup>th</sup> March 2022, 8<sup>th</sup> March 2023 and 6<sup>th</sup> May 2022 respectively. Learned counsel Mr. Mwandeje appeared for the 2<sup>nd</sup> Respondent.
14. This being a first appeal, the duty of this Court was set out in the decision of *Selle & another v Associated Motor Boat Co. Ltd & others* (1968) EA 123 which is to reconsider the evidence, evaluate it and draw our own conclusion of facts and Law. We will only depart from the finding by the Trial Court if they were not based on evidence on record; where the said Court is shown to have acted on the wrong principles of law as was held in *Jabane v Olenja* (1986) KLR 661, or where its discretion was exercised injudiciously as was held in *Mbogo & Another v Shah* (1968) EA 93.
15. On the first issue as to whether the termination was unlawful and unfair, Mr. Njoroge submitted that the trial Court applied the "reasonable responses test" wrongly and as the only test while ignoring merit review, and erred in finding that there was procedure fairness in termination merely because the processes had been followed. The counsel in this respect urged that there was no evidence lead to show how the teas got lost; the theft took place at night when all employees were away save for the night guards; that there was no evidence on which of the 89 days during which the Appellant was acting supervisor the 200 bags of teas got lost or went missing; or of the internal processes that the Appellant flaunted, ignored or breached, leading to the loss of the teas. On the tampered door stoppers, the Appellant was bound to point out the lax arrangement as well as weak work systems and structure to the employer. Lastly, that the trial Court failed to look at the Appellant's acquittal in the criminal case as a favourable factor in demonstrating the Appellant's case.
16. On whether there was justification for the summary dismissal for gross misconduct, the counsel submitted that the Notice to Show Cause letter dated 8<sup>th</sup> September 2016, the allegations/charge against him was that as a supervisor in charge of a warehouse nothing, should have left the warehouse without his consent or authority which was said to amount to gross misconduct as to warrant disciplinary action, yet there was no specified charge in the invitation letter to the disciplinary meeting dated 26<sup>th</sup> September 2016, which merely referred to the loss of the teas. The counsel submitted that it was for the employer to prove the employee's negligence by stating with specificity the particulars of negligence or breach of company code, rules and regulations. As a result, that there was no evidence to justify the summary dismissal other than that the teas were lost and the Appellant was acting warehouse supervisor. Reliance was placed on the decisions in *Judicial Service Commission & another v Lucy Muthoni Njora* [2012] eKLR and *Godfrey Ajuong Okumu & another v Engineers Board of Kenya* [2020] eKLR for the position that the trial Court elevated adherence to procedure above doing substantive justice.
17. Mr. Gakuo on his part submitted that the Appellant's dismissal satisfied both the procedural test under Section 41 and substantive test under Sections 43, 45(2)(4) and 47(5) of the *Employment Act*. On the procedural test, it is submitted that the Appellant was issued with a notice to show cause and a personal hearing held on 7<sup>th</sup> October, 2016. Regarding the substantive test, it is submitted that the 1<sup>st</sup>



Respondent genuinely believed that the Appellant as the Warehouse supervisor ought to have known how the missing tea disappeared. According to counsel, the letter of dismissal dated 7<sup>th</sup> October 2016 clearly indicated that the Appellant's services were summarily terminated under section 44(4) (c) of the *Employment Act*, and the learned trial Judge correctly found that the Appellant did not demonstrate that he was not negligent in the performance of his duties as acting warehouse supervisor. Therefore, that the dismissal of the Appellant was both fair and in tandem with justice and equity. Mr. Mwanjeje did not address us on this issue.

18. It is not in dispute that the Appellant was summarily dismissed, and the 1<sup>st</sup> Respondent urges that the dismissal was justified under section 44(4)(c) of the *Employment Act*, which provides as follows:

“Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—

- a. ...
- b. ...
- c. an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly...”

19. It is also notable that under section 43 of the *Employment Act*, the burden of proof is on an employer to demonstrate the reasons for termination as follows:

1. In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
2. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

20. The trial Judge in this respect found as follows:

“67. The Claimant himself told the court that some tea disappeared from the 1<sup>st</sup> Respondent's warehouse at Jomvu, where he served as acting supervisor at the material time.

68. In his response to the show calls letter as well as in his pleadings filed in court, the Claimant sought to exonerate himself from blame by pointing at what he perceived as weaknesses in the investigation process. In my considered view, the line taken by the climate on this issue did not prove that he was not negligent in the performance of his duties as acting warehouse supervisor.



69. The court is therefore satisfied that applying the “reasonable responses test” the Respondent had a valid reason for dismissing the claimant as required under section 43 of the *Employment Act*.”
21. According to the learned trial Judge, in applying this test, the Court asks whether in the particular circumstances of the case, the employer acted reasonably and fairly. Under section 43 of the *Employment Act* the employer is under a positive obligation to clearly demonstrate the reasons for dismissal, and the basis for these reasons, and the trial Court was therefore under a duty to undertake an inquiry and interrogate the grounds or basis for the reasons for the dismissal in order to determine if they were fair. The trial Court on the contrary appeared to have shifted the burden of proof to the Appellant, and in the process neglected to interrogate the reasons proffered by the 1<sup>st</sup> Respondent.
22. In this regard, the reasons given in the dismissal letter were that the Appellant gave an unsatisfactory explanation of the circumstances under which customers’ teas under his supervision were lost or could not be accounted for. In particular, that he was not able to explain “the whereabouts of some teas in the warehouse” that “the committee failed to understand his responsibilities as the supervisor in charge of the Jomvu warehouse” and that it was his “sole responsibility to make sure each and every consignment that comes in and leaves out the warehouse are well documented for but he never observed this”. It is notable that none of these responsibilities were in the letter of employment presented by the Appellant in evidence, and the 1<sup>st</sup> Respondent did not provide any contract of employment with these duties and responsibilities. The duties of the Appellant according to his letter of employment dated 6<sup>th</sup> October 2009 were to work diligently with minimum supervision under the instruction of a supervisor, loading and offloading of goods, preparing weight notes for shipment, posting out local deliveries, and loading containers in time as part shipping orders. The Respondent did not bring any evidence that it had changed the Appellant’s terms of employment from 6<sup>th</sup> October 2009, until the date it terminated his employment on 7<sup>th</sup> October 2016.
23. In addition, the reasons given for the termination were not supported by the conclusions of minutes of the disciplinary committee meeting, where all the members, save for one indicated that their conclusions that the Appellant had been a loyal employee, and ought to be given another chance despite his ignorance and laxity, and suspected another employee to be culpable. The ensuing criminal proceedings brought against the Appellant were also withdrawn, and no evidence was provided by the Respondents of the Appellant’s role in the theft of the tea, other than the fact that he was the acting supervisor of the warehouse where the tea was missing from.
24. As regards the finding of the trial Court that the Appellant was availed “the procedural fairness safeguards of Section 41 of the Act, beginning with a show cause letter to which a duly responded and a personal hearing held on 7<sup>th</sup> October 2016” , the requirements under the cited section are that “ 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”. The *Employment Act* does not contemplate generalized grounds or reasons for termination, and an employee facing disciplinary action is entitled to a clear statement of the exact offences for which the employer is considering disciplinary action in the form of properly framed charges.
25. The letter dated 26<sup>th</sup> September 2016 inviting the Appellant to the disciplinary committee meeting was indicated to in “reference to the loss of tea packages in our Jomvu Warehouse where you and Kennedy Muhenyé (Clerk) were the persons in charge and in control of the said Warehouse respectively”. Minute



1 of the minutes of the Disciplinary Committee meeting held on 7<sup>th</sup> October 2016 in this respect read as follows:

“Salim Joha started the meeting by first advising us the reason as to why we were called to assemble at the boardroom, since some of us had no clue on what it was all about. He ended up telling us that the meeting was set aside to come up with the hearing regarding the G6 theft. He then gave her Hamisi (the Appellant), who was one of the members who was operating from G6 chance to tell us what happened.”

26. At the very minimum, procedural fairness requires an employee to know the charges against him or her that may lead to termination of employment, so that he or she has a reasonable opportunity to consider the response and defence. In the present appeal we do agree with the Appellant that the disciplinary hearing was more or less a fact finding session, and was not a hearing on specific reasons why the Appellant’s employment was to be terminated, as required by section 41 of the *Employment Act*.

27. Our conclusion therefore is that the 1<sup>st</sup> Respondent did not demonstrate any valid reasons for the Appellant’s summary dismissal, either arising from its own internal disciplinary procedures nor the criminal proceedings against the Appellant as required by section 43 of the *Employment Act*, and the trial Court erred in its findings in this respect. The disciplinary process was also neither fair nor reasonable, and the resultant summary dismissal was unfair, as explained in *Janet Nyandiko v Kenya Commercial Bank Limited* (2017) eKLR: -

“Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee’s conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.”

28. On the second issue as to whether the claim for malicious prosecution was proved, Mr. Njoroge submitted that the trial Court failed to consider the 2<sup>nd</sup> Respondent did not call any witness and no record showed the loss of the teas including the stock taking report; that in the initial report 200 bags were recorded as lost but which morphed into 360 bags as per the charge sheet; and that there was neither an eye witness nor a confession as to the theft or recovery of the tea and therefore the Appellant was entitled to challenge the very foundation of the reason to charge him. In addition, that that no reasons were assigned by the trial Court for failure to follow the decision in *Stephen Gachau Githaiga & Another v Attorney General* [2015] eKLR that if the state failed to offer evidence on its decision to arrest and charge, the Court would find that there was no probable or reasonable course. He invited this Court to uphold the same principles as good law and find that the claim for malicious prosecution was not only proved but the same was not defended by the 2<sup>nd</sup> Respondent.

29. Mr. Gakuo’s position was that the Appellant was discharged under Section 87(a) of the *Criminal Procedure Code* and not acquitted hence not a subsequent bar to institution of fresh proceedings against the Appellant. Mr. Mwanje on his part relied on the decision in *Mbowa v East Mingo District Administration* (1972) EA 352 which set out the test for malicious prosecution, namely that where is no legal reason for instituting criminal proceedings. Counsel submitted that the Appellant’s arrest and prosecution was instigated by a complaint made by the 1<sup>st</sup> Respondent, which was investigated by the 2<sup>nd</sup> Respondent; that the 1<sup>st</sup> Respondent had a reasonable or probable cause and justification to make the complaint to the police arising from the missing tea, and which was founded on an honest belief based on the facts available at the time; that the police did not arrest the Appellant out of their



own volition, but relied on the complaint filed, did investigations and made their arrests; that there was no evidence of spite or ill will presented on the part of the 2<sup>nd</sup> Respondent; and lastly, the fact that a person has been acquitted of criminal charges does not necessarily connote malice on the part of the prosecution. The decision in *Nzoia Sugar Company Ltd v Fungutti* (1988) KLR 399 was cited in this respect.

30. Malicious prosecution is civil wrong, and the burden of proof was therefore on the Appellant to prove that he was prosecuted by the Respondents, that the criminal proceedings complained was terminated in his favour, that the prosecution was instituted against him without any just or reasonable cause, and with a malicious intention, that is, with an intention, which was wrongful in fact. All these elements must be present for an action for malicious prosecution to succeed, as explained by the East African Court of Appeal in *Mbowa v East Mengo District Administration (Supra)* that “the plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must

“unite” in order to create or establish a cause of action”. This Court also held in *James Karuga Kiiru v Joseph Mwamburi & 2 others* [2001] eKLR that “to prosecute a person is not prima facie tortious, but to do so dishonestly or unreasonably is. Malicious prosecution thus differs from wrongful arrest and detention, in that the onus of proving that the prosecutor did not act honestly or reasonably, lies on the person prosecuted.”

31. In the present appeal, it is not in dispute that there was a loss of tea from the 1<sup>st</sup> Respondent’s warehouse in which the Appellant was the acting supervisor, and there was therefore a reasonable and probable cause for the prosecution of the Appellant. In addition, since malice is the gist of an action for malicious prosecution, the Appellant had the burden of proving the presence of some other and improper motive for which the legal process was being employed, and did not provide any evidence of such improper purpose or motive, and instead employed considerable time and effort in trying to demonstrate that he was not responsible for the loss of the tea. We therefore find that the Appellant did not discharge his burden of proof, and that the threshold for malicious prosecution by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents was therefore not met. The trial Court did not err in finding that there was a reasonable and probable cause for the Appellant’s arrest and there was nothing to suggest that the Respondents either acted dishonestly.
32. On the last issue as whether the relief sought should have been granted, the Appellant’s counsel submitted that with regards to the salary for September 2016, section 74 of the *Employment Act* lay the duty to keep records upon the employer and the employer did not provide any record to prove this payment, therefore when it is the word of the employer as against the employee that the Court should find for the employee and thus the same should be awarded. Additionally, that there was no justification to deny the Appellant wages up to 19<sup>th</sup> October 2016. The Appellant dropped the claim for wages from 20<sup>th</sup> October 2016 to the period of summary dismissal, and instead pursued damages for unfair labour practice. With regards to the acting/responsibility allowance, the Appellant submitted that it was not disputed that he was acting warehouse supervisor from 31<sup>st</sup> May 2016 to 27<sup>th</sup> August 2016, a total of 89 days.
33. On the claim for gratuity, the Appellant submitted that this was in essence a service pay and it was for the period between the initial contract commencing 4<sup>th</sup> January 2007 to termination on 7<sup>th</sup> October 2016, a period on nine years. With regard to leave allowance, that the amount payable was Kshs 4,600/-, and on compensatory damages, that the 1<sup>st</sup> Respondent acted in a high handed manner and without justification in its dealings with the Appellant. The Appellant urged that this Court to make an award for the maximum twelve (12) months as compensatory damages or in the alternative remit the matter



back to the trial Court with appropriate directions to make an award in this head. On costs, he prayed for costs in the trial Court and in the appeal.

34. Mr Gakuo reiterated that the Appellant's dismissal was both procedurally and substantively fair and he therefore deserved no compensation. Mr. Mwanjeje submitted that the fact that a complaint was filed by the first respondent was never disputed by the appellant, who had therefore failed to prove that his arrest and prosecution was illegal, or that he suffered loss and damages from the arrest.
35. We have already found that the claim for malicious prosecution was not proved by the Appellant, and he is therefore not entitled to any general damages in this respect. The Appellant particularized the other outstanding reliefs as against the 1<sup>st</sup> Respondent as follows:
- a. Salary for September 2016 Kshs. 28,190.00/-
  - b. Unpaid salary from 1<sup>st</sup> October 2016 to 9<sup>th</sup> March 2017 Kshs. 178,898.00/-
  - c. Acting/responsibility allowance (31/5/2016-27/8/2016) Kshs 87,869.70/-
  - d. Gratuity for 10 years Kshs.140,950.00/-
  - e. Leave pay (27 days from 2015 to 2016) Kshs. 30,358.50/-
  - f. Leave allowance Kshs. 4,600.00/-
  - g. Compensation for unfair /unlawful dismissal Kshs 28,190 x 12 months' Kshs. 338,280.00/-  
Total Kshs. 809,146.20/-
36. The Appellant in his statement stated that he had not been paid a salary since 31<sup>st</sup> August 2016. His letter of suspension dated 9<sup>th</sup> September 2016 indicated that he was to be paid during the suspension. None of the Respondent's witness statements or documents controverted the statement by the Appellant that he was not paid his salary from September 2016 until the termination of his employment. Likewise, under his letter of employment the Appellant was entitled to leave travelling allowance of Kshs 4,000/= per annum, which was not controverted nor shown to have been paid for 2016 by the 1<sup>st</sup> Respondent. On the acting allowance, it is not in dispute that the Appellant was acting supervisor of Jomvu Warehouse from 31<sup>st</sup> May 2016 and 27<sup>th</sup> August 2016. The letter of employment indicated that his terms of employment were subject to change or alteration and /or change at the discretion of the employer, and while the *Employment Act* has no explicit provisions on acting allowance, this is an aspect of remuneration that is regulated by the Human Resource Policies of employers. The Appellant did not bring any such policy or other evidence entitling him to be paid acting allowance, and therefore did not provide any basis for this payment.
37. On the payment of gratuity, this Court (Makhandia, Ouko & M'Inoti JJA) in the case of *Bamburi Cement Limited v William Kilonzi* [2016] eKLR explained as follows:
- Turning to the award of gratuity, the first thing that we must emphasize is that gratuity, as the name implies, is a gratuitous payment for services rendered. It is paid to an employee or his estate by an employer either at the end of a contract or upon resignation or retirement or upon death of the employee, as a lump sum amount at the discretion of an employer. The employee does not contribute any sum or portion of his salary towards payment of gratuity. An employer may consider the option of gratuity in lieu of a pension scheme. Being a gratuitous payment, the contract of employment may provide that the employer shall not pay gratuity if the termination of employment is through dismissal arising from gross or



other misconduct. But where, like here, the dismissal is not justified and is wrongful the employee will be awarded gratuity if it is provided for in the contract of employment.”

38. In the present appeal, the letter of employment required the Appellant to register with the National Social Security Fund, and there was no provision for gratuity. There is therefore no basis for this relief.
39. Lastly, having found that the Appellant’s dismissal was unfair, he is entitled to compensation. Section 49(1) provides as follows as regards payments to be made to an employee by an employer in the event of unjustified termination:
- 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.
40. In this regard, the Appellant’s contract of employment required either party to terminate the employment by giving one month’s notice or one month’s pay in lieu of such notice. The Appellant is therefore entitled to 1 month’s pay in lieu of notice pursuant to section 49 of the Employment Act, in addition to his unpaid dues of September 2016 and October 2016, and to compensation for unfair dismissal, and we are of the view that 8 months gross monthly wages would be reasonable compensation that also takes into account the period that the Appellant was undergoing criminal prosecution. Having been largely successful in his claim against the 1<sup>st</sup> Respondent, the Appellant is also entitled to the costs of trial in the ELRC.
41. We accordingly set aside the findings made by the learned Judge to the extent indicated in this judgment, and vary the orders made in the judgment delivered on 30<sup>th</sup> July 2020 by the Employment and Labour Relations Court (ELRC) at Mombasa (L. Ndolo J.) in Mombasa ELRC No. 751 of 2017, by entering judgment for the Appellant as follows:
- a. Salary for September 2016 Kshs. 28,190.00/-
  - b. Salary for 7 days in October 2017 Kshs 6,578
  - c. One Month’s salary in lieu of notice Kshs. 28,190.00/-
  - d. Leave pay for 27 days Kshs. 25,371
  - e. Leave allowance Kshs. 4,000.00/-
  - f. Compensation for unfair dismissal - Kshs 28,190 x 8 months’ Kshs. 225,520.00/- Total Kshs. 317,849.00/-
42. The 1<sup>st</sup> Respondent shall also pay the Appellant’s costs of this appeal and of the suit in Mombasa ELRC No. 751 of 2017.
43. Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 27<sup>TH</sup> DAY OF OCTOBER, 2023.**



**P. NYAMWEYA**

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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**

