Omwaya v Hygenic Butchery Trading Limited (Civil Appeal 21 of 2019) [2023] KECA 1165 (KLR) (6 October 2023) (Judgment)

Neutral citation: [2023] KECA 1165 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 21 OF 2019

F SICHALE, FA OCHIENG & LA ACHODE, JJA

OCTOBER 6, 2023

BETWEEN

WELLINGTON MAERO OMWAYA ..... APPELLANT

AND

HYGENIC BUTCHERY TRADING LIMITED ..... RESPONDENT

(Being an appeal from the judgement and decree of the Employment and Labour relations Court at Nakuru (M. Mbaru, J.) dated and delivered on 29th November, 2018 at Nakuru in ELRC Cause No 114 of 2018)

JUDGMENT

1. This appeal emanates from the judgement of the Employment and Labour Relations Court in Nakuru, (M. Mbaru, J.) In the judgement, the court ordered that the appellant be paid the following: notice pay of Kshs.12,386.35; pay for 7 days worked in January, 2018 of Kshs.4,153.00; leave pay of Kshs.8,670.40; underpayments of Kshs.4,632.00; and pay for rest days of Kshs.21,469.00.

2. The appellant was awarded the compensation as the court determined that he had been unfairly dismissed from his employment, without notice, without a hearing, and without being given the reasons thereof.

3. The appellant was dissatisfied with the reliefs granted and lodged this appeal raising ten grounds of appeal as follows: that the learned Judge erred in law and in fact in; granting the appellant a sum of Kshs. 12,386.35 as payment in lieu of notice instead of Kshs. 14,243.15 as was pleaded despite establishing that indeed the appellant was terminated without lawful procedures being followed; failing to find that the house allowance was not factored into the basic pay, hence the house allowance, being 15% of basic salary totaled to Kshs. 14,243; in awarding Kshs. 4,632.00 as underpayment instead of Kshs. 17,944 despite the fact that the said amount was computed correctly in the memorandum of claim; failing to award a claim for overtime even after establishing that the respondent altered the records; the

hours when the appellant worked, were reflected in the exhibit which clearly showed that the appellant worked for two extra hours; awarding the appellant Kshs. 21,469.00 for rest days/off days despite the fact that the appellant had made the correct computation in the Memorandum of claim; failing to award gratuity or service pay despite the fact that it was clear the appellant had been a member of a retirement scheme or a related scheme prior to being registered with the NSSF; and failing to award compensation as provided for under Section 49(1)(c) of the Act despite finding that the termination was unprocedural and without notice; and also that the trial judge erred in law and in fact in failing to award costs yet the said court had subjected the compensation to tax.

4. The appellant commenced his claim vide a memorandum of claim dated 14th May, 2018. The appellant's claim was that, the respondent, without any justifiable

cause, dismissed him from employment without a valid reason, and without according him a hearing contrary to Section 41 of the *Employment Act*.

5. It was the appellant's claim that he was employed verbally on 5th January, 2017 as a cook in one of the respondent's branches near Eveready, in Nakuru County. He claimed that he was not issued with any employment documents, contrary to the provisions of the labour laws. He also claimed that the respondent would deduct Kshs. 200 from his salary to cater for NSSF but the same was not remitted to his account.

6. The appellant's further claim was that he earned Kshs. 12,000/- per month contrary to the prescribed minimum wages for a cook as stipulated in legal notice No. 112 of 1st May, 2017. He claimed that he used to work between 5:00 am 6:00 pm, a total of 13 hours. By his computation, each day he put in 5 hours of overtime. Therefore, he asked the court to compensate him for the overtime.

7. The appellant also claimed to have worked during public holidays but was not paid on a double hourly rate. Furthermore, he had served the respondent continuously for a period of one (1) year and prayed that he be awarded compensation for one annual leave as provided for under Section 28(i) of the *Employment Act*. It was also his claim that, since the respondent had only made one contribution towards his NSSF scheme, they should pay him gratuity for 1 year, together with his salary for the days he had worked for in the month of January, 2018.

8. The appellant claimed that he was dismissed by the respondent's director, one Mr.Musa Kimuge on 16th January, 2018. The director had informed him that his services had been terminated and ordered him to leave the premises immediately, to avert arrest by the police and so he left.

9. The appellant informed the court that he had not only been dismissed without notice; but that he had not been paid in lieu of notice which amounted to a violation of Section 35(1) c and 36 of the *Employment Act*.

10. The respondent refuted the appellant's claims. The respondent's case was that the appellant was not unfairly terminated, but that he had deserted his work after a disciplinary process had been initiated by the respondent. The appellant was issued with a show cause letter dated 15th January, 2018 on charges of theft and threats. The appellant was expected to respond to the show cause letter on 16th January, 2018. However, the appellant did not report to work on the said date and any attempts by the respondent to convene a disciplinary meeting failed.

11. The respondent claimed that it engaged the services of the appellant on the 1st October, 2017 as a cook on a casual basis at a monthly salary of Kshs. 12,000/-. As the appellant readily agreed to be paid that amount, it was the respondent's view that the issue of underpayment did not arise, as the appellant had

a choice to reject that offer before engagement but he opted to accept the same. The respondent also pointed out that the appellant did not raise the issue of underpayment in the course of his engagement.

12. The respondent further claimed that the appellant worked from 6.00 am to 4.00 pm daily; and that between 2.00 pm to 3.00 pm he had a lunch break. The respondent alleged that the appellant enjoyed 10 off days at the end of every month, and as such the issue of overtime and leave did not arise. The respondent explained that during the period when the appellant worked for them, there were only three public holidays, which he recovered from the 10 off days.

13. The respondent maintained that it did not dismiss the appellant as alleged, but it was the appellant who absconded duty or failed to report to duty after he was served with a show cause letter dated 15th January, 2018 hence frustrating the respondent's initiation of the disciplinary process. The respondent stated that the appellant was not entitled to leave for 1 year as prayed as he barely worked for 2 months and 15 days. Furthermore, the appellant was not entitled to severance pay as all his contributions were paid to NSSF.

14. At the hearing of the appeal, on 28th March 2023 the parties relied on their respective written submissions.

15. It was the appellant's submission that he proved his claim; and that pursuant to Section 10(7) of the *Employment Act*, hereinafter, the Act, the onus of proof vested on the respondent, to disprove the claim. As the respondent did not disprove the terms of employment, as laid out by the appellant, it was the considered opinion of the appellant that the court ought to have granted the reliefs sought.

16. The appellant faulted the learned Judge for failing to make a determination with regard to when the appellant was employed by the respondent. The appellant informed the court that he was employed on 5th January, 2017 while the respondent claimed that the appellant was employed in October 2017. He urged the court to re-tabulate the reliefs accordingly.

17. The appellant submitted that he was dismissed from employment in January 2018.

    His claim was that legal notice No. 112 of 2017 on basic minimum monthly wage of Kshs. 12,386.35 was applicable to him. The appellant further pointed out that he was entitled to a house allowance at the rate of 15% of the basic salary as provided for under Section 31(1) of the Act and Section 4 of the *Regulation of Wages (General) Order* respectively.

18. The appellant submitted out that by his calculations, the 15% of the basic salary was Kshs. 1,401.86 per month. Based on that contention, the sum of Kshs. 12,385.35, which was awarded by the trial court was less than what he was entitled to.

19. As regards underpayment, the appellant submitted that he computed the amount payable from January 2017 to 30th April, 2017; a period of 4 months based on legal notice No. 112 of 2015; and that he also computed the off days and the total sum requested from the awards the court granted less than required was Kshs. 77,616.23.

20. On whether the court ought to have awarded the rejected reliefs, the appellant submitted that the trial court properly established that the appellant was terminated without notice, but overlooked Section 49(1)(c) of the *Employment Act* which provides; that an employee shall be paid an equivalent of a number of months' wages or salary not exceeding twelve months based on the gross monthly salary of the employee at the time of dismissal.

21. According to the appellant, his right to dignity under Article 28 of *the Constitution* was violated, when he was falsely accused of stealing foodstuffs yet no police action was taken against him, and neither were

any internal disciplinary hearings conducted. The appellant was of the view that the court ironically believed the work schedule filed by the respondent despite the same not indicating the date on which it was made or showing any break between 6.00 am to 4.00 pm in calculating the award of overtime at Kshs. 141,651.45.

22. Citing Section 4 of the *Public Holidays Act*, the appellant's view was that he was entitled to an extra day's pay for the Sundays he worked, when such Sundays fell on a public holiday. To this end, he computed the amount at Kshs. 16,010.57.

23. It was the appellant's further submission that the court wrongly rejected his claim for gratuity based on the presumption that gratuity is only awarded where there is a private treaty or agreement. He urged that the trial court's order be set aside and that this court awards him Kshs. 413,210.80, being the amount the trial court awarded lesser than what is legally provided.

24. Opposing the appeal, the respondent maintained that, the appellant was engaged as a cook on casual basis and as such he was not entitled to a house allowance even though the court made a finding to the effect that the appellant was a protected employee under Section 37 of the *Employment Act*.

25. The respondent was of the view that it had discharged its burden of proof and produced a copy of the duty roster that indicated the appellant worked from 6.00 am to 4.00 pm with a break at 2.00 pm to 3.00 pm and therefore, the claim for overtime could not stand. The respondent also submitted that it opened at 6.00 am and not at 5.00 am as the appellant alleged.

26. It was the respondent's further submission that the appellant was entitled to 52 days of rest as was observed by the trial court, and that the due wage for rest days could only be calculated against the monthly salary of Kshs. 12,386.35. On the issue of public holidays, the respondent shared in the decision of the trial court on the grounds that the appellant did not set out how the 9 public holidays arose.

27. The respondent submitted that the appellant's claim for gratuity and service pay was not premised on any law or agreement and that no Collective Bargaining Agreement was produced. The respondent in addition pointed out that the appellant's NSSF contributions were remitted and therefore, the appellant was not entitled to service pay.

28. On whether the learned Judge erred in failing to award compensation under Section 49(1)(c) of the Act, it was the respondent's view that an award of compensation under the said section was discretionary. The appellant relied on the case of *Co-operative Bank of Kenya Ltd v Banking Insurance & Finance Union*, where the court explained the nature of the power that vested in the trial court when determining the appropriate remedy.

29. The respondent also relied on the case of *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A 898, where the court expounded on the principles that should guide the court on whether or not to interfere with an award by a trial court in the exercise of its discretion.

30. On the issue of costs, the appellant submitted that the same was at the discretion of the court, but argued that the court does not need to interfere with the trial court's decision on the award of costs.

31. We have carefully considered the record, submissions by counsel, the authorities cited, and the law. The issue for determination is whether the appellant was awarded lesser reliefs than he was entitled to.

32. This is a first appeal. Rule 31(1)(a) of the *Court of Appeal Rules*, 2022 mandates us to independently reappraise the evidence and arrive at our own conclusions. In the case of *S. M. v E. N. B.* [2015] eKLR the Court held thus:

> "We shall however bear in mind that this Court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. Should we however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions."

33. It is not in dispute that the appellant was unfairly terminated. What is in dispute is the award by the trial court, which the appellant claims was a lesser sum than what he was entitled to in law on the following; notice in lieu, underpayment,public holidays, leave/off days, overtime and compensation for unfair dismissal from employment.

34. It was the respondent's contention that the appellant was a casual employee and as such he was not entitled to the reliefs he was seeking. The appellant was not employed under a collective bargaining agreement. He was engaged on personal terms by the respondent. He was therefore entitled to a salary under the basic minimum wage. Section 43(2) of the *Labour Institutions Act* provides that:

> 2. The Minister may, after consultation with the Board, in addition to the General Wages Council established under subsection (1), establish a Sectoral Wages Council if the Minister is of the opinion that—
>
> a. the remuneration and other conditions of employment of any category of employees in any sector is not adequately regulated by collective agreements; and
>
> b. it may be expedient to set minimum wages and other conditions of employment in respect of employees in those sectors.

35. Section 48 of the *Labour Institutions Act* provides as follows:

> "48. Wages Order to constitute minimum terms of conditions of employment.
>
> 1. Notwithstanding anything contained in this Act or any other written law—
>
> a. the minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order applies and may not be varied by agreement;
>
> b. if the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms.
>
> 2. An employer who fails to—
>
> a. pay to an employee to whom a wages regulation order applies at least the statutory minimum remuneration; or

b. provide an employee with the conditions of employment prescribed in the order, commits an offence.

3. If an employer is found guilty of an offence under subsection (2), the Court may in addition to any other penalty order the employer to pay the employee the difference between the amount which ought to have been paid in terms of the wages order and the amount which was actually paid.

4. Where proceedings are brought under subsection (2) in respect of an offence consisting of a failure to pay remuneration at the statutory minimum remuneration or to provide an employee with the conditions of employment prescribed in the order, then—

a. if an employer is found guilty of the offence, evidence may be given of any like contravention on the part of the employer in respect of any period during the twelve months immediately preceding the date of the offence; and

b. on proof of such contravention, the Court may order the employer to pay the difference between the amount which ought to have been paid during that period to the employee by way of remuneration and the amount actually paid:

Provided that evidence shall not be given under paragraph

(a) unless notice of intention to give such evidence has been served upon the employer together with the summons, warrant, information or complaint.

5. The powers given by this section for the recovery of sums due from an employer to an employee shall be in addition to and not in derogation of any right to recover such sums by civil proceedings:

Provided that no person shall be liable to pay twice in respect of the same cause of action."

36. It is common ground that the appellant was employed by the respondent on an oral contract for a monthly wage of Kshs. 12,000/-. This in itself is sufficient proof that the appellant was not a casual employee, having been engaged on a contract for a monthly salary. Section 2 of the Act defines casual employee as follows:

> " casual employee" means a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time;

37. This was not the case in the circumstances of this case. We are of the considered view that the appellant was protected from unfair termination by the employer by dint of Section 45 of the Act which provides that:

1. No employer shall terminate the employment of an employee unfairly.

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.

38. In the result, the appellant was entitled to the rights and reliefs provided for under the Act. In awarding the reliefs sought, we remind ourselves of the purpose of awarding any form of compensation in a dispute relating to unfair termination. The Labour Court of South Africa in *Le Monde Luggage cc t/ a Pakwells Petze*

v Commissioner G. Dun and Others, Appeal Case No. JA 65/205 held that:

> "The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This Court has been careful to ensure that the purpose of the compensation is to make good the employee's loss and not to punish the employer."

39. The law allows the court to make any other order that is necessary in the interests of justice, and as was stated by this Court in that appeal, "the peculiar circumstances of each case should have a bearing on the nature and quantum of relief that should be awarded." The trial court could only award what the appellant had claimed in this regard.

40. Before we determine the issue of the reliefs sought, the appellant pointed out that the trial court failed to make a determination with regard to when he was employed by the respondent. It was the appellant's claim that his contract with the respondent was entered into in January 2017 while the respondent's contention was that it engaged the services of the appellant in October 2017.

41. Section 10(7) of the Act provides that:

> "If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer."

42. In the circumstances of this case, we hold that the appellant was employed in January 2017, the respondent having failed to adduce any proof to the contrary.

43. It is our considered view that the appellant was entitled to be issued with a termination notice under Section 35 of the Act, which states that:

1. A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be —

    a. where the contract is to pay wages daily, a contract terminable by either party at the close of any day without notice; (b) where the contract is to pay wages periodically at intervals of less than one month, a contract terminable by either party at the end of the period next following the giving of notice in writing; or

    (c) where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.

44. The failure by the respondent to issue the appellant with a termination notice entitled the appellant to a payment in lieu of notice by dint of Section 36 of the Act. The section provides: -

> " Either of the parties to a contract of service to which section 35(5) applies, may terminate the contract without notice upon payment to the other party of the remuneration which would have been earned by that other party, or paid by him as the case may be in respect of the period of notice required to be given under the corresponding provisions of that section."

45. In this regard, we hold that, the appellant having been terminated at the time when Legal Notice No. 112 of 2017 was in force, he was entitled to a minimum wage of Kshs.12,386.35 as his basic minimum pay. In the result, the appellant's claim for Kshs.14,243.15 was unjustified, and we hereby uphold the trial court's finding on the same.

46. The appellant worked for the respondent for a period of 12 months and 7 days.

During this period, he was paid a salary of Kshs.12,000/-. Having determined that the appellant was entitled to a monthly salary of Kshs.12,386.35, we hold the considered view that he was entitled to Kshs.4,636.20 as underpayment for the 12 months he worked for the respondent. The appellant's claim for Kshs.17,944/- under this head has not been justified and as such we uphold the finding by the trial court on the same.

47. It is trite that payment of house allowance is a statutory requirement couched in mandatory terms. Employers are bound by Section 31(1) of the Act, to either provide an employee reasonable housing accommodation or pay the employee sufficient housing allowance, in addition to the basic salary. Section 31 of the Act provides as follows:

> " 31.
>
> (1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

2. This section shall not apply to an employee whose contract of service-

a. contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

b. is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a)."

48. Section 4 of the *Regulation of wages (General) Order* provides that:

> " An employee on a monthly contract who is not provided with free housing accommodation by his employer shall, in addition to the basic minimum wage prescribed in the first schedule, be paid housing allowance equal to fifteen percent of his basic minimum wage."

49. In the circumstances of this case, we find that the appellant was entitled to a house allowance at 15% of his basic minimum wage of Kshs. 12,386.35, which amounted to Kshs. 22,295.43. However, the appellant claimed for Kshs. 1,401.86 under this head and therefore, we award him what was claimed.

50. The trial court observed from the master rolls, that the appellant worked without taking a rest day or public holiday. Therefore, the court found that for each week the appellant worked for 7 days, he was entitled to a day of rest. The appellant worked for 52 weeks, the due wage calculated was Kshs. 21,469. We find no plausible reason to interfere with the said computation.

51. As regards overtime, the trial court held that; "On the claim of overtime, the claimant (appellant) by his testimony stated that there were two cooks working in shifts. From the schedule he would start early and leave before the other cook. Upon cross examination the claimant could not coherently explain why he was required to work at 5:00 am whereas the respondent would only be open at 6am.

> The defence in this regard and the filed work schedule is found correct that the claimant worked from 6:00 am to 4:00 pm and the claim for overtime is lost."

52. The appellant claimed that he used to work for 5 hours overtime each day. The respondent on the other hand produced the work shift manuals which indicated that the appellant and others worked in shifts and also that the appellant would take a one hour break each day. From the foregoing, we find that the claim for overtime pay while the appellant worked in shifts would be to seek unjust enrichment.

53. The trial court observed that the claim for gratuity for 1 year as claimed by the appellant was not premised on any law. In *H. Young & Company EA Limited v Javan Were Mbango* [2016] eKLR the Court of Appeal expressed itself thus;

> " This Court in *Central Bank of Kenya vs. Davies Kivieko Muteti* [2009] eKLR emphasized that there is a difference between severance pay and gratuity. Gratuity as correctly enunciated by this Court in Bamburi Cement Ltd vs Farid Aboud Mohammed [2016] eKLR denotes a gratis payment by an employer in appreciation of service. There is no express provision for gratuity in the *Employment Act*. It is usually payable under terms set out in a contract of service or collective bargaining agreement. Severance pay on the other hand, is only payable under Section 40(g) of the *Employment Act* where an employee is terminated on account of redundancy. In the current appeal before us the respondent was entitled to severance pay at the rate of not less than fifteen days' pay for each completed year of service."

54. We are persuaded by the above reasoning and would further add that, the appellant was not employed on a fixed term contract so as to be entitled to gratuity or service pay. Section 35(5) of the *Employment Act* provides that:

> 5. An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.

55. It is also evident from the record that the respondent used to contribute towards the appellant's National Social Security Fund (NSSF). The evidence produced indicated that there was a monthly deduction of Kshs. 400/- towards the said fund in respect of each of the respondent's employees, including the appellant. In light thereof, the appellant fell within the ambit of the exclusions stipulated under Section 35(6)(d) of the Act. The Section provides thus:

5. This section shall not apply where an employee is a member of—

> a. a registered pension or provident fund scheme under the *Retirement Benefits Act*;

b. a gratuity or service pay scheme established under a collective agreement;

c. any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and

d. the National Social Security Fund. (Emphasis added).

56. We uphold the trial court's finding, that the appellant was not entitled to gratuity.

57. On the claim for public holidays, the appellant sought payment for work done during public holidays. Such a right is based on the provisions of Section 10 of the Act. The claim requires that the appellant must outline as to how such public holidays arose as each year has a different schedule of both known and religious public holidays some of which are dependent on gazettement. These are not matters for automatic application and must be specifically singled out as to how they arise. The appellant did not did not particularize the specific dates he worked on public holidays. There was no proof that the appellant worked during any particular public holidays. The decision of the trial court on the same upheld.

58. The trial court observed that even though the appellant had been unlawfully terminated from employment by the respondent, he only claimed for compensation for 7 days worked in January 2018. The appellant's Statement indicated that he was dismissed on 16th January, 2018. However, he only opted to claim for 7 days' pay. We find no reason to interfere with this finding as the appellant was awarded that which he claimed.

59. Where leave is due and not taken pursuant to the provisions of Section 28 of the Act, payment in lieu becomes due. The appellant worked for 12 months and he was therefore entitled to 21 days' leave with full pay. By our calculations, the sum of Kshs. 8,670.43/- which was awarded by the trial court constitutes the exact amount which the appellant was entitled to.

60. The appellant claimed for a further Kshs. 60,374.02 as compensation for rest days. The trial court had awarded the appellant Kshs. 21,469/- under this head. On their part, the respondent did not present any record to discount the appellant's claim. Accordingly, we are of the considered view that the appellant was entitled to 52 rest days comprising of one rest day a week. Payment for rest days was calculable based on the appellant's monthly salary of Kshs. 12,386.35. by our calculations, he was entitled to Kshs. 21,469/-. Therefore, we find no reason to interfere with the finding by the trial court under this head.

61. As regards compensation for unfair termination, Section 49 of the Act grants various remedies which may be awarded in singular or multiple terms, and which are discretionary rather than mandatory. The remedies are to be granted on the basis of the peculiar facts of each case. The Section provides thus:

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.

2. Any payments made by the employer under this section shall be subject to statutory deductions.

3. Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to —

a. reinstate the employee and treat the employee in all respects as if the employee's employment had not been terminated; or

b. re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage.

4. A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following—

a. the wishes of the employee;

b. the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and

c. the practicability of recommending reinstatement or re-engagement;

d. the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;

e. the employee's length of service with the employer;

f. the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;

g. the opportunities available to the employee for securing comparable or suitable employment with another employer;

h. the value of any severance payable by law;

i. the right to press claims or any unpaid wages, expenses or other claims owing to the employee; (j) any expenses reasonably incurred by the employee as a consequence of the termination; (k) any conduct of the employee which to any extent caused or contributed to the termination; (l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and

(m) any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee.

62. 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.

63. The trial court in this case did not make an award for compensation for unfair termination. Section 49(1)(c) provides that such an award is discretionary. In the case of *Co-operative Bank of Kenya Ltd v Banking Insurance & Finance Union* [2016] eKLR this court observed as follows:

> " Our understanding of the Act is that the prescribed remedies, including reinstatement are discretionary rather than mandatory remedies, to be granted on the basis of the peculiar facts of each case. This is made absolutely clear by the use of the word "may", which in the context of the provision imports a discretionary rather than a mandatory meaning. That the remedies, including reinstatement are not a mandatory remedies, is made even clearer by section 49(4) which sets out some 13 considerations which the court must take into account before determining what remedy is appropriate in each case."

64. The court went on further to state that:

> " What all the above means, is that before exercising the discretion to determine which remedy to award, the court must be guided by the above comprehensive list of considerations. With respect, in this appeal, the learned judge did not advert to any of those considerations before deciding on reinstatement as a remedy. The principles on which this Court acts when it is called upon to interfere with exercise of discretion by a trial court are well settled. The Court will not interfere unless it is satisfied that the decision in question was clearly wrong because the learned judge misdirected himself or because he considered matters which he should not have considered or failed to consider matters he should have considered. (See *Mbogo & Another v. Shah* [1968] EA 93). There must be a very valid reason why the statute has set out such a
>
> comprehensive catalogue of considerations to be borne in mind before determining the appropriate remedy to award in cases of unfair summary dismissal or termination of employment."

65. The appellant has not demonstrated to us that the learned Judge had misdirected herself; or had taken into consideration matters which ought not to have been considered; or had failed to take into account any particular relevant factors; or was otherwise plainly wrong. In the result, we find no reason to interfere with the discretion of the trial court on the issue.

66. Accordingly, the appeal herein partially succeeds to the extent that the appellant was entitled to a house allowance in the sum of Kshs.1,401.86/- as set out in paragraph 49 of this judgment. Each party to bear their own costs.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 6TH DAY OF OCTOBER, 2023.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR