



**Airtel Networks Kenya Limited v Ogugo (Civil Appeal 387 of 2018)
[2023] KECA 1652 (KLR) (15 December 2023) (Judgment)**

Neutral citation: [2023] KECA 1652 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 387 OF 2018
MSA MAKHANDIA, S OLE KANTAI & PM GACHOKA, JJA
DECEMBER 15, 2023**

BETWEEN

AIRTEL NETWORKS KENYA LIMITED APPELLANT

AND

CHRISPO ZACHARIA OGUGO RESPONDENT

(Appeal from the Judgment and decree of the Employment and Labour Relations Court of Kenya at Nairobi (Wasilwa, J.) dated 5th February, 2018 in ELRC Cause No. 2254 of 2012)

JUDGMENT

1. By a letter of employment made on 27th March, 2006 the appellant’s predecessor Celtel Kenya Limited employed the respondent, Chrispo Zacharia Ogugo as its Corporate Sales Executive on terms and conditions contained in that letter. The respondent’s position and salary changed with the passage of time.
2. By a letter dated 10th June, 2011 the appellant (Airtel Networks Kenya Limited) suspended the respondent from office in accordance with “... the employee handbook and the Code of Conduct which you signed on 15th December, 2010 ...”. That suspension was with immediate effect to facilitate investigations into a case of fraud. It was stated that the fraud matter had been referred to police for investigations which process it was said would accord the respondent “... an opportunity to be heard ...”. The letter concluded by stating that:

Due course of action will be taken following the outcome of the investigation, and the same will be communicated to you

...”.
3. This was followed by a letter dated 6th June, 2011 (it was explained in the defence and in evidence at trial that the date was a typographical error – it should have read 6th July, 2011) titled “Summary Dismissal”.



It was explained in this letter that following investigations after the respondent's employment had been suspended as sufficient evidence had been found which established that he had been involved in fraud whilst in the employment of the appellant. It had thus been decided to summarily dismiss him from employment. Attached to the letter was a Certificate of Service. Those are the events that led to the action at the then Industrial Court of Kenya at Nairobi (today – Employment and Labour Relations Court) where it was claimed that the respondent was employed by the appellant from 27th March, 2006 to 6th July, 2011; that upon suspension from employment the respondent was arrested by police but was released on bail and that after police investigations the police did not prefer any charges against him. Further, that the appellant had been experiencing technical problems with its system which was erroneously loading unrequested airtime to clients from the system. On the issue of termination of employment the respondent stated that his salary had not been paid since suspension from employment; furthermore his wife Claire Atieno Owino who was covered under an insurance policy had delivered a baby during the said suspension but the appellant had refused to meet the attendant hospital bill of Ksh.98,043 forcing the respondent to pay. The respondent alleged various breaches of his rights and gave particulars of breach of contract; breach of statute; particulars of cruel and degrading treatment and because he was 31 years old at the time of dismissal from employment where he would have retired at 60 years he stated that he would have been paid a pension Ksh.5,696,189. He claimed special damages as follows:

“Particulars Of Special Damages Due As At 6th July 2011

- a. Notice pay (2 months' salary) - Kshs.223,578.00
- b. Unpaid salary for July 2011 - Kshs.21,636.60
- c. Unpaid leave - Kshs.196,060.70
- d. Unpaid retirement benefits/severance pay - Kshs.1,117,890.00
- e. Unpaid commissions - Kshs.19,200.00
- f. Unpaid bonuses earned as at March 2011 - Kshs.500,000.00
- g. Medical refund - Kshs.98,043.00 Total - Kshs.2,176,408.30”

4. He gave an “Estimate of General Damages” in Memorandum of Claim as follows:

Estimate Of General Damages

- a. Monthly salary for the period of pendency of the police case C from June 2011 to March 2012 - Kshs.1,006,101.00
 - b. Compensation for unfair dismissal equivalent to 12 months' salary - Kshs.1,341,468.00
 - c. Punitive and aggravated damages for cruel and degrading treatment equivalent to the pension benefits payable on the employee's retirement - Kshs.5,696,189.00
- Total - Kshs.8,043,758.00”

5. He concluded his Memorandum of Claim by stating that despite his lawyers having demanded payment of terminal dues the appellant had declined to pay and was also holding Ksh.106,000 which it had refused to pay unless the respondent executed a discharge voucher exonerating the appellant from any additional claims. The final claim was for special damages Ksh.2,176,408.30, general damages Ksh.8,043,758, and such other orders and directions as the Court may deem fit to meet the ends of justice and costs of the claim and interest.



6. The appellant filed a Memorandum of Reply and Counterclaim where it stated, amongst other things, that as its Account Manager in the Sales Division in Mombasa the respondent owed it fiduciary duties including a duty to act in good faith and in the best interests of the appellant but that in breach thereof the respondent had engaged in fraud leading to a loss by the appellant of airtime worth Ksh.19,969,348.90. The decision leading to the summary dismissal of the respondent was based on genuine belief that he had engaged in fraud as was established through an investigation report.
7. Those matters in the defence were repeated in the counter-claim where it was stated that the respondent on 23rd May, 2011 conspired with another named person to create false mobile user accounts in the appellant's mobile phone network and using this line, fraudulently misrepresented them as genuine accounts belonging to genuine customers of the appellant thereby withdrawing from the appellant huge amounts of mobile phone airtime without paying for the same which had led to loss of Ksh.19,969,348.90. When the fraud was uncovered a total of Ksh.18,997,867/90 had been recovered leaving a deficit loss of Ksh.97,485.98 which sum the appellant counter-claimed from the respondent. The appellant also prayed for damages for conspiracy and unlawful interference with its business, costs and interest. The case was heard by Wasilwa, J. who in a Judgment delivered on 5th February, 2018 found that the decision to dismiss the respondent was based on wrong premises; that the premise was not malicious because the appellant believed that the respondent was involved in the fraud when in actual fact he was not. The Judge found that the dismissal was unfair and unjustified and made the following awards:
 1. 2 months salary in lieu of notice = $111,789 \times 2 = 223,578/=$.
 2. Unpaid salary for July (7 days) = $7/30 \times 111,789 = 26,084.1/=$.
 3. Unpaid leave days = 19,060.70/=.
 4. Bonus earned as at March 2011 and as declared = 500,000/=.
 5. In view of the wrongful termination I also award Claimant 12 months salary as compensation = $12 \times 111,789 = 1,341,468/=$.
Total=2,287,190/=
 6. The claimant is not entitled to service pay because he was a member of the Airtel Staff Pensions Benefits Scheme.
 7. He is also not entitled to refund of the medical costs incurred on account of treatment for his wife as he had already been dismissed by the time the bill was incurred.
 8. The Respondent will pay costs of this suit plus interest with effect from the date of this Judgment.”
8. The appellant was dissatisfied with those findings and has filed this appeal through Memorandum of Appeal drawn by its lawyers M/S Ojiambo & Company Advocates where 11 grounds of appeal are taken. The trial Court is faulted for finding that the appellant did not have a probable cause to dismiss the respondent; that the Court erred by finding that the appellant did not have a valid reason to justify summary dismissal; that the Judge was wrong to rely on criminal investigations by police to make the finding that she made; that the Judge misconstrued the law on summary dismissal; that the Judge erred in finding that the appellant did not accord the respondent a hearing prior to summary dismissal; that the Judge erred in law and fact when she awarded the respondent Ksh.500,000 on account of bonus when such bonus had neither been declared by the appellant nor earned by the respondent; that the Judge erred in law and fact when she did not find that the respondent had actually participated in fraud



leading to a loss by the appellant of Ksh.18,000,000; that the Judge erred in law and fact in finding that the termination of the respondent was unfair in the circumstances. In the penultimate ground the appellant faults the Judge for awarding the respondent maximum 12 months gross salary in damages contrary to law and, finally, that the Judge erred in law and fact by dismissing the counter-claim. It is proposed that the appeal be allowed and the said Judgment be set aside; that the counter-claim be allowed and costs be awarded to the appellant.

9. There is a cross-appeal drawn by the respondent's lawyers M/S Mucheru Law LLP where the respondent faults the Judge for not finding that the appellant's actions were not premised on malice; that the Judge erred in not finding that the respondent was entitled to severance pay Ksh.1,117,890; that the Judge erred in not awarding the respondent medical refund Ksh.98,043; that the Judge erred in not awarding the respondent unpaid commission Ksh.19,200; that the Judge erred in failing to award the respondent punitive and aggravated damages and that the Judge erred in failing to award interest on its awards under various heads to the respondent. It is proposed that we order that the decision of the trial Court dismissing the appellant's counter-claim be affirmed; that the finding by the trial Court that the respondent's dismissal was unfair and unjustified be upheld; that the amounts awarded to the respondent be upheld; that further to affirming the decision of the trial Court, the award be varied to find that the appellant's actions in dismissing the respondent were based on malice; that further to affirming the decision of the trial Court the award be varied to further award the respondent the following additional awards:

- a. Severance pay of Kshs.1,117,890/-
- b. A refund of kshs.98,043/- being medical expenses
- c. Unpaid commissions of Kshs.19,200/-
- d. Salary for the period that the Respondent case was under investigation by the police from June 2011 to March 2012 amounting to Kshs.1,006,101/-
- e. Punitive and aggravated damages estimated at Kshs.5,696,189.00”

10. Further, that we award interest on the awards from 6th July, 2011 until payment in full and give the respondent costs of the appeal, the cross appeal and costs in the Court below.

11. When the appeal came up for hearing before us on a virtual platform on 26th September, 2023 the appellant was represented by learned counsel Dr. Omondi Owino while learned counsel Mr. Gad Gathu appeared for the respondent. Both sides had filed written submissions and in a highlight of the same counsel for the appellant submitted that the trial Judge had erred in finding that there was no proper cause laid for dismissing the respondent from employment. Counsel referred to the Fraud Investigations Report in the record of appeal which showed that the respondent made telephone calls to the place where the fraud happened leading to loss of money by the appellant. Counsel cited the case of Attorney-General & Another v Maina Githinji & Another [2016] eKLR where this Court held that:

“In the case of Kibe Vs Attorney General (Civil Appeal No 164 of 2000) the Court of Appeal held that acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer. The reason for this is straightforward; 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. While an employer may rely on the outcome of a criminal trial against an employee to make its decision on that employee, going against the outcome does not by itself render the employer's decision wrongful or unfair.”



12. Counsel submitted, on that score, that although an employer may rely on outcome of criminal proceedings absence of culpability does not mean that an employee cannot be dismissed.
13. According to counsel the award of 12 months salary compensation was excessive and unjustified in the circumstances and he faulted the Judge for not giving reasons why she gave that award. He cited the case of *Standard Group Limited v Jenny Luesby* [2018] eKLR where this Court substituted a 12 months salary compensation award with 2 months salary compensation.
14. Counsel concluded his submissions by faulting the Judge for awarding bonus Ksh.500,000 which, according to counsel, was an award made without any basis in law. We were asked to allow the appeal and dismiss cross-appeal.
15. Counsel for the respondent did not agree. According to him the respondent was not accorded any hearing at all and the decision to summarily dismiss the respondent was pre-meditated and the appellant acted with impunity. Counsel referred to the investigations report by the police department and submitted that those investigations were frustrated by the appellant which did not cooperate with the police and the respondent was cleared by those investigations which found that the respondent had not engaged in fraud. According to counsel the respondent was entitled to bonus as prayed for in Memorandum of Claim and was entitled to recover medical expenses incurred by his wife. On the claim for salary from June 2011 to March, 2012 it was counsel's submission that the respondent was entitled to recover that salary (money) when he was on suspension before dismissal. Counsel conceded that it was not the practice of our Courts to give punitive and/or aggravated damages in contractual matters but he still thought that we should make those awards which are not envisaged or provided for in the *Employment Act* or any other law. For all that we should dismiss the appeal and allow cross-appeal.
16. Dr. Omondi Owino, in reply, submitted that the letter of employment issued to the respondent by the appellant did not provide for payment of bonus. Counsel cited Section 35 of the *Employment Act* and submitted that the respondent being a member of a retirement benefits scheme was not entitled to claim retirement benefits or severance pay. He concluded by submitting that the respondent's baby was born after he (the respondent) had already been dismissed and therefore that claim could not lie; the claim for unpaid commission was also not available, submitted counsel.
17. This is a first appeal from a decision of the Employment and Labour Relations Court in first instance. Our duty in such an appeal is as was stated by this Court in the case of *Kenya Posts Authority v Kuston Kenya Limited* [2009] 2 EA 212:

On a first appeal from the High Court, the Court of Appeal should 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 allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

17. From the whole record and submissions made by the parties I think that the issues for consideration in this appeal can be condensed and be fully determined as follows:
 - a. Whether dismissal of the respondent from employment by the appellant was justified.
 - b. Whether the respondent was accorded a fair hearing before dismissal from employment.
 - c. Whether the respondent was entitled to the claims awarded by the Judge
 - d. The counter-claim.



- e. Whether the respondent is entitled to the prayers in the Cross-Appeal.
- f. Costs.

Let me address these issues seriatim.

a. Whether dismissal of the respondent from employment by the appellant was justified

- 18. I started this Judgment by stating the chain of events as they unfolded leading to termination of the respondent from employment by the appellant.
- 19. It was alleged in the letter dated 10th June, 2011 that the appellant was with immediate effect suspending the respondent from employment in accordance with an employee handbook and Code of Conduct which the respondent had executed upon taking up employment offered to him by the appellant. Further, that a fraud had been discovered that had led to loss of money by the appellant; the respondent was a suspect in the fraud and the matter had been referred to the police for investigations and further action would result from those investigations. There is a “Covering Report” at page 293 of the record of appeal signed by the police and it recommends as follows at paragraph 299 of the record:

In view of all the above, I am of the opinion that we close the investigations, since we don't have evidence to prefer criminal charges against any of the suspects. We however, regret the loss incurred by the complainant but investigations can never be infinite. This have (sic) been occasioned by the said complainant's failure to provide the police with evidence and views shared with the company in our letter marked J8 and J10 be put into consideration.

Kindly take note of E1's Counsel letter marked J11 of 22/2/2012 otherwise advice.

(Signed)

(n. Osuri Otieno) Investigating Officer.”

- 20. There are also internal investigations that were undertaken by the appellant. The police did not find any evidence to support a criminal charge against the respondent but having considered its own investigations and circumstances of the case the appellant decided to summarily dismiss the respondent from employment.
- 21. JesseKeigu Mwangi, the appellant's Business to Customer Manager testified before the trial Judge to the effect that his job entailed checking network to ensure that there were no fraudulent activities through telephone and transfer of mobile money. He had in the course of his work detected that on post paid services some lines were being added to corporate post paid accounts. When he liaised with the appellant's credit control department it was confirmed to him that the additional lines had not been requested by any customer; the said lines had exceptionally high usage where calls to expensive destinations were made from Ganjoni area of Mombasa. This trend continued for about 1 month where hybrid accounts were being created and loaded with Airtel airtime Ksh.99,350 each. According to him it was the respondent who was handling these accounts which were being used to send airtime to other numbers. It was proved through production of an “SMS” sent to the respondent that he was in communication with named persons in the said Ganjoni area where the fraud was taking place. According to the witness the fraud resulted in the appellant losing money and:

“The airtime was loaded by someone. The problem was an operational error. If an error is established a reversal is done. In case of Crispo we did reversal of 13m but approximately 971,485 had already been used and was not recovered. I reported Heradi to police. It is in my statement. Simon, Dicky and Ochieng were also reported to police Diana Njeru credentials



were used when she had left the company. One person cannot do the activation Crispo worked with other people in other departments. This was my report I have no concern over workings of police.”

22. Susan Onyancha, the appellant’s Human Relations Director testified that upon receiving a report of fraudulent activities taking place in Mombasa the respondent was suspended from employment and when the final investigations report implicated the respondent in the fraud it was found that he had engaged in gross misconduct against his employment contract and against the *Employment Act*. A decision was made to dismiss him from employment and he was paid salary up to 6th July, 2011 and that he was to be paid accrued leave up to that day but that he had declined to pick a cheque in that respect. According to this witness payment of bonus was discretionary on the part of the appellant as employer; the appellant was covered by a medical insurance policy but the appellant could not meet the respondent’s medical bills after he had left employment. Further, that the decision on whether to terminate was reached based on the appellant’s own investigations, not those of police.
23. The respondent had in testimony before the Judge denied being involved in fraud and his witnesses supported that position. The trial Judge considered the evidence and applying Section 43 of the *Employment Act* 2007 she found that the law required that there must be valid, tangible reasons before an employer terminates an employee’s employment which reasons must be proved. She found that there was no tangible evidence to connect the respondent to the fraud and “... He was also exonerated by the police for any alleged fraud ..”.
24. The “Final Fraud Examination Report” dated August, 2011 prepared by the appellant’s internal investigations department identified the respondent as the appellant’s Manager who was acquainted to the appellant’s customer who was a recipient and distributor of fraudulently acquired airtime from fraudulently activated SIMS. This was established through analysis of CDR’s for both the respondent and the customer.
25. The police investigations report produced before the trial Judge found that the appellant had lost a colossal sum of money. Investigations were closed because the appellant did not provide expert witnesses to prove the fraud that had occurred through use of technology. The recommendation to close the investigations was based on technical reasons.
26. There was evidence produced before the Judge that proved that the appellant had lost money through fraud in the appellant’s department where the respondent was deployed. The 2 witnesses called by the appellant proved to the required standard that the respondent had engaged in fraudulent activities that had led to loss of money. The fact that the police had recommended closure of investigations and non preferring of a criminal charge against the respondent had no place or standing in the matter. It was proved to the required standard that the respondent had breached his employment contract by engaging in fraud leading to loss of money by the appellant. The Judge was, with respect, wrong to hold that there were no valid, tangible reasons before dismissal of the respondent. There were valid, tangible reasons justifying dismissal of the respondent from employment after he had been found engaging in fraudulent activities that led to loss of money by the appellant.

b. Whether the respondent was accorded a fair hearing before dismissal from employment

27. It is not difficult to answer this question. As we have seen the appellant served the respondent with a suspension letter which stated, amongst other things, that police investigations which had commenced would give the respondent an opportunity to be heard. This was followed by the letter terminating the respondent’s services from employment summarily. I doubt that police investigations would accord



with what the law requires and I say this because Section 41 of the Employment Act 2007 provides an elaborate procedure on how to terminate an employee's employment as follows:

- (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
 - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make”.
28. The law requires that before terminating an employee from employment on grounds of gross misconduct the employer is duty bound to explain to the employee in a language that he understands the reason for termination. The employee is entitled at that meeting to be accompanied by a colleague or a union representative. The employer must hear and consider representations by the employee and his representative.
29. In the case before the trial Judge there was no form of any meeting having taken place for the appellant to explain to the respondent the reason why it was considering terminating his employment. All that the appellant did was to serve the respondent with a letter suspending him from employment. There were concurrent internal and police investigations and a decision was reached to terminate summarily the respondent from employment. There is no evidence at all that the respondent was accorded the rights donated to him by Section 41 of the Employment Act and in the absence of notification and hearing before termination the same was unfair.

c. Whether the respondent was entitled to the claims awarded by the Judge

30. As we have seen the trial Judge found that the dismissal was unfair. She awarded 2 months salary in lieu of notice; unpaid salary for July (7 days); unpaid leave; bonus as at March, 2011; 12 months salary compensation and costs. The Judge found that the respondent was not entitled to service pay because he was a member of the Airtel Staff Pensions Benefits Scheme; he was not entitled to a refund of medical expenses incurred on account of treatment for his wife as he had already been dismissed by the time the bill was incurred. The Judge dismissed the counter-claim.

There is also the cross-appeal.

31. It was submitted before us for the appellant that the award of 12 months salary compensation was excessive; that bonus was not applicable and medical claim and the claim on payment of a commission had not been proved.

i. Bonus

32. It was stated in Memorandum of Claim in “particulars of special damages due as at 6th July, 2011” that the respondent was entitled to unpaid bonuses earned as at March, 2011 at Ksh.500,000. The Judge gave that award.
33. Apart from an email correspondence that was not addressed to the respondent no evidence was given before the Judge to show that the respondent was entitled to any bonus. The same was not provided in the letter of employment.



34. Section 10 of the *Employment Act* provides that a written contract of service shall state the remuneration, scale or rate of remuneration, the method of calculating that remuneration and give details of any other benefits. In the case of *Karuga v Nairobi City Water and Sewerage Company Limited & Another* [2021] KECA it was stated on a claim for bonus by an employee:

With regards to the emoluments of Christmas Bonus, terminal golden handshake and salary difference, these are special damages which must be specifically pleaded and proved. We also note that nothing was tendered into evidence by the appellant to prove his entitlement to the same during suspension. It is also doubtful that an employee would be entitled to bonus or handshake as of right. We uphold the trial court's finding that the appellant was not entitled to the relief sought under these heads.

The court will also not re write agreements between parties as it is settled law that parties are free to negotiate and enter agreements.”

35. In *Nicholas Mbuya & 4 Others v Alice Gesare Monind* [2015] eKLR:

“Our labour laws are silent on the issue of bonus payment. It would then appear that where a bonus dispute arises, such dispute is left exclusively to the province of the agreement between the parties. As such, bonus liability (if any) must be construed within the meaning and intent accorded by the parties under their contract...Nonetheless it should be remembered that parties are bound by their contracts and a court can and should only award what is sought and proven within the confines of the law and the contract of employment.”

36. Without any statutory or contractual provision there was no basis for the award of bonus and the same is set aside.

ii. 2 months salary in lieu of notice

37. The trial Judge found that the appellant believed that the respondent was involved in fraud and for that reason the Judge converted the termination of employment to normal termination.
38. Neither of the parties produced letter of employment. It would have assisted the trial Court to reach a determination on whether the parties had provided in the contract how it could be terminated. In the absence of such a clause in an employment contract the court may make a reasonable provision on salary in lieu of notice. I have found in this Judgment that the termination of the respondent's employment was justified but also found that there were breaches of the law on how the employment was terminated. In those circumstances I am not persuaded that the Judge did not use her discretion reasonably in awarding 2 months salary in lieu of notice and I will not disturb that award.

iii. Unpaid salary 7 days in July, 2011

39. The respondent's contract was terminated by letter dated 6th July, 2011. The Judge awarded the respondent unpaid salary for that month upto termination of employment. The respondent was entitled to that award.

iv. Unpaid leave

40. Similarly the respondent was entitled to be paid for leave earned but not taken and there is no merit in the complaint by the appellant in that regard.



v. 12 months salary compensation

41. The trial Judge found that the respondent was not accorded an opportunity to state his case after the investigations by the appellant and for that reason she found that no due process was followed before dismissal. She found the dismissal to have been unfair and unjustified and awarded the respondent 12 months salary as compensation.
42. The *Employment Act* 2007 sets out the factors a Court should consider in determining the quantum to make. This is set out at Section 49(4) of the Act. The factors are:
- 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.”
43. This Court faced with a situation where the trial Court had given maximum compensation considered the said factors and reduced that compensation to 3 months salary compensation. This was in the case of *United States International University v Eric Rading Outa* [2016] eKLR where it was stated:
44. In the instant appeal the learned trial judge gave a maximum award of 12 months' salary without assigning any reason for doing so at all. We have noticed a trend by the Employment and Labour Relations Court where maximum awards are made without assigning any reasons for doing so and without carrying out any evaluation of the effect such awards have on employers and to the economy in general. Awards such as the one made by the trial judge in the judgment appealed from are made without any consideration of principles on assessment of damages and without assigning any reasons why a particular award is made.
45. Although we have found, like the learned judge, that the appellants' termination of the respondents' employment was wrongful, we find, on our own consideration of the matter, that the learned judge



erred in making a maximum award. He did not assign any reason for doing so and in the event he fell into error by not considering any or any relevant factor that should have guided him to make an award of compensation for wrongful termination of employment. To this extent, we agree with learned counsel for the appellant that the award of 12 months' salary as compensation for wrongful termination of employment was wrong in the circumstances of this case. The award was excessive and did not reflect a proper assessment of what should have been awarded. For these reasons we are entitled to interfere with the discretion of the learned judge and we do so by setting aside the award of 12 months' salary as compensation to the respondent and substitute therefor an award of 3 months' salary last earned by the respondent in the office he held with the appellant."

46. I found in this appeal that the appellant was entitled to dismiss the respondent for being involved in fraud. It is only that the appellant failed to accord the respondent due process as required by law that the respondent is entitled to compensation. Considering the relevant factors in the *Employment Act* 2007 and as applied by this Court in United States International (supra) case I think that an award of 3 months salary compensation is a fair award in the circumstances of the case.

d. Counter-Claim

47. The trial Judge dismissed the Counter-Claim. The appellant had prayed in the counter-claim that:
- a. an order that he compensates the Respondent in breach of his fiduciary duty;
 - b. damages for breach of contract.
 - c. Kshs.981,475.98 being the amount unrecovered from the proceeds of the Claimant fraud.
 - d. Damages for conspiracy and unlawful interference with the business of the Respondent.
 - e. Costs of the suit.
 - f. Interest on b), c) and d) above until payment in full.
48. The first prayer that the respondent compensates the appellant for breach of a fiduciary duty could not lie in an employer-employee relationship. The contractual relationship was governed by statute or contract or both and remedies for breach of such a relationship was governed in a way that breach by either side would lead to termination of contract. That is what happened here where the appellant terminated the respondent's employment by the letter dated 6th July, 2011.
49. On the claim for damages for breach of contract again the contract was governed by statute or contract terminable as so governed and there would be no case for damages for breach of contract.
50. The claim for Ksh.981,475.98 was a special damage claim. Apart from the oral testimony of the 2 witnesses called by the appellant (Jessekeigu Mwangi and Susan Onyancha) no attempt was made to prove that claim. The law is and has always been that a special damage claim must be specifically pleaded and strictly proved – *Moses Onchuri v Kenya Ports Authority & 4 Others* [2017] eKLR.
- The claim was not proved as required in law.
51. On the claim for damages for conspiracy and unlawful interference with the appellant's business – this claim was not proved at all and no evidence was led to support it. As in the other claims in the counter-claim (apart from special damage claim) I doubt that this claim would lie in an employment relationship governed by statute or contract. In sum I agree with the trial Judge that the counter-claim was not proved and the Judge was right to dismiss it.



d. Whether the respondent is entitled to the prayers in the cross-appeal

52. I have set out those prayers in this Judgment.
53. I have found in this Judgment that the appellant had good reason to terminate the respondent's employment having found that he was involved in fraud that had led to the appellant losing money. I have also found that the respondent is entitled to compensation because the appellant failed to adhere to the process set out in law to terminate an employee from employment. It follows therefore that the prayer in the cross-appeal faulting the Judge for not finding that the appellant's action in dismissing the respondent from employment was actuated by malice cannot lie. The appellant was justified to dismiss the respondent from employment for the reasons I have given.
54. I agree with the trial Judge that the respondent was not entitled to severance pay as he was a member of Airtel Staff Pensions Benefits Scheme. Section 35 of the [Employment Act](#) bars such a claim.
55. On the claim for refund of medical expenses I agree with the Judge that this was not available as the respondent's employment had already been terminated. The claim on alleged unpaid commission was a special damage claim and was not strictly proved as required – See Moses Onchiri (supra).
56. Punitive and aggravated damages claimed were not available in a breach of employment contract claim and the Judge was right to dismiss that claim. I would therefore dismiss the cross-appeal.

d. Costs

57. Costs would ordinarily follow the event (Section 27 [Civil Procedure Act](#)). The appellant has partially succeeded in the appeal. I would award the appellant 50% costs of the appeal and costs in the lower court.
58. I have dismissed the cross appeal. The appellant will have costs of the cross appeal.
59. For the avoidance of doubt I have found in sum that:
- a. Dismissal of the respondent from employment was justified
 - b. The respondent was not accorded a fair hearing before dismissal from employment
 - c.
 - (i) The award of bonus is set aside
 - ii. Award of 2 months salary in lieu of notice is upheld.
 - iii. Award of 7 days unpaid salary is upheld.
 - iv. Award for unpaid leave is upheld.
 - v. Award of 12 months salary compensation is set aside. I award 3 months salary compensation in that respect.
 - d. The counter-claim is dismissed.
 - e. The cross-appeal is dismissed.
 - f. The appellant will have 50% costs of the appeal, costs below and will have costs of the cross-appeal.



Judgment Of Asike-makhandia, J.A.

1. I have had the benefit of reading in draft, the judgment of my brother, S. ole Kantai, J.A. with which I entirely agree with the reasoning and have nothing useful to add.

Judgment Of M. Gachoka, J.A

1. I have had the advantage of reading in draft, the judgment of my learned brother S. ole Kantai, J.A. with which I entirely agree with the reasoning and have nothing useful to add.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER 2023.

S. OLE KANTAI

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JUDGE OF APPEAL

M. GACHOKA CIArb, FCIArb

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JUDGE OF APPEAL

