



**Gisemba v Tausi Assurance Company (Civil Appeal 405 of 2018)
[2022] KECA 380 (KLR) (4 March 2022) (Judgment)**

Neutral citation: [2022] KECA 380 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 405 OF 2018
RN NAMBUYE, W KARANJA & PO KIAGE, JJA
MARCH 4, 2022**

BETWEEN

CHRISPUS MOGONCHI GISEMBA APPELLANT

AND

TAUSI ASSURANCE COMPANY RESPONDENT

(Being an appeal from the judgment and decree of the Employment & Labour Relations Court at Nairobi (M. Mbaru, J.) dated 19th October, 2017 in ELRC Cause No. 2264 of 2014)

JUDGMENT

1. Chrispus Mogonchi Gisemba (the appellant) was an employee of Tausi Assurance Company (the respondent), an insurance company, between October, 1996 and 24th October, 2014. He was employed as a junior clerk and rose through the ranks to senior underwriting manager. It was his evidence that on 24th October, 2014 he was unlawfully suspended from work and terminated from his employment on 10th November, 2014 when he refused to resign from his position, as some of his colleagues had done. By then he was earning a gross salary of Ksh. 400,000.00 per month. It was his claim that he had diligently worked for the respondent over the years earning promotions; he was congratulated on 11th January, 2010 for his work and promised that he would retire at 60 years. In February 2014 he was awarded special merit increment for exceptional performance and was therefore surprised when one month later he was accused of non-performance vide a letter dated 10th February, 2014.
2. According to the appellant, on 24th October, 2014 he was issued with a disciplinary notice for alleged incompetence in his work, followed by verbal abuses by the respondent's chief executive officer, which prompted him to write to the labour officer to investigate, but before the matter could be investigated, he was terminated from work. He consequently moved to the Employment and Labour Relations Court (ELRC) seeking, inter alia, a declaration that the termination of his employment was malicious, illegal and unfair; a declaration that his fundamental rights in *the Constitution* had been violated; a



declaration that the respondent was in breach of the contract of employment executed between them and that he be paid his salary to his retirement age of 60 years; general damages for breach of contract, loss of income, illegal and unfair termination of employment and mental anguish and psychological torture; exemplary damages for loss of property on loan and mortgage which the appellant said he had to sell at Ksh. 4,000,000 after he was terminated and interest on the due amounts with costs.

3. In response to the appellant's amended memorandum of claim dated 31st March 2016, the respondent denied the claims and averred that due process as stipulated by Section 45 of the Employment Act was duly followed before the appellant was terminated. Further that the appellant was afforded an opportunity to be heard and that the termination was fair. The respondent denied the claim of Ksh. 62,400,000 as pleaded by the appellant, and that he was to retire at the age of 60 years. Further that if the breach of contract was merited the same should be pegged on 55 years as the retirement age as contained in the contract of employment dated 8th January, 1997. The respondent also denied that the loss of Ksh. 4,000,000 allegedly suffered by the appellant due to loss of property it had charged on property L.R No. Ngong/Ngong 29053 was separate and distinct from employment.
4. The appellant testified in support of his claim. It was his evidence that upon his employment he worked diligently and got promoted and was assigned positions of responsibility in the absence of his bosses and he performed exemplarily well earning bonuses and commendations from the respondent. This upward movement was nonetheless short lived as in February 2014, the respondent's CEO called a Board meeting where he asked six managers including him to resign. In October 2014, a suspension letter was written to him and he was asked to respond to it and hearing was slated for 3rd November, 2014. He was accused of various allegations such as charging the wrong premium rate at 2.85% instead of 12.5% yet the risk included inflammables which was high risk; accepting grossly under-declared policies thus exposing the respondent to a big risk; on 14th August, 2008 he had taken policy covers without a survey or report especially with Barot Agencies, Textplast Industries and Tokyo Cars which mistake was noted on 5th June, 2014; issuing motor insurance for cars at reduced rates of 3.8% instead of 4.5% on or about the 19th March, 2014. He denied these allegations and stated that all policies which were issued by him were all approved by the CEO. On 10th November, 2014 he was called for a meeting and when he refused to resign he was served with a dismissal letter.
5. He asked the court to grant him exemplary damages and damages for discrimination against him since his juniors started doing his work and received instructions over him through the CEO. He said that following his termination he was forced to sell his property at a loss to avoid attachment. Testifying in support of the appellant's case, Oliver Onjenjo (CW2) stated that he witnessed the CEO shout at the appellant in the presence of junior employees and several employees were forced to leave employment due to the CEO's frustrations. Peter Njoroge (CW3) corroborated the appellant's testimony and stated that he worked with the respondent and closely worked with the appellant. He testified that the work environment was poor and he was ordered to resign and when he refused he was victimized and dismissed.
6. In its defence the respondent through its managing director Ms. Rita Thathi testified that the appellant was employed as the senior underwriting manager and his duties included negotiating with brokers drawing contracts, writing policies and keeping detailed and accurate records of policies and underwriting decisions. She testified that although the appellant climbed up the ladder as he stated, his tenure was marked with immense underperformance and negligence. The accusations levelled against the appellant included signing a letter to Mcriarens Safety Surveyors dated 4th July, 2007 without authority; negligence in managing accounts with brokers; providing scanty reports and exposing the respondents' brokers; carrying out underwriting duties without qualifications; giving conflicting information on labour insurance covers and causing the respondents embarrassment; abdicating



- delegated duties; attaching the wrong policy documents to policy documents; making unauthorized adjustments to client quotations contrary to IRA regulations and approving premium refunds over and above the allowed limits.
7. She maintained that due process was followed before the appellant was terminated for poor performance and the respondent followed the procedure prescribed in Section 45 of the *Employment Act* by issuing the appellant notice and giving him an opportunity to be heard. She denied the appellant's claim of Ksh. 64.4 million saying the same was not justified. She stated that the appellant had admitted to negligence and poor performance and had made apologies in various instances. The appellant had also failed to produce his academic certificates when asked to do so.
 8. Ann Mbuve George (DW2), the respondent's Human Resource Officer testified that she worked with the appellant and from the records it showed the appellant was asked to get qualifications in line with his duties but he failed to obtain the same. Denying the appellant's claim that he had been discriminated against, the witness testified that the appellant was even sent to Rwanda to study but he declined the offer. She emphasized that given the nature of allegations against the appellant he was for summary dismissal but the Board opted to terminate his employment and pay him for the notice as provided for under the employment contract. In addition, the appellant was aware that members of staff were given a loan at 8% interest and upon exit from the respondent the balance had to be recovered. This applied to every employee who took a loan and was not applied to the appellant only.
 9. The parties filed submissions and the trial court framed up issues as follows: whether there was unfair termination of employment; whether there is a violation of the fundamental rights of the claimant; whether there is a case of discrimination against the appellant by the respondent and whether the remedies sought were available to the appellant. Having considered the evidence adduced before the court vis a vis the issues identified for determination, the trial court held in its judgment dated 19th October, 2017 that the only remedy available was in regard to unfair termination of employment. The court considered the provisions of Section 45(5) of the *Employment Act* 2007, the work record of the appellant where he admitted committing work related errors, submitted letters of apology due to negligence at work and noting his long years of service, compensation for unfair termination of employment was assessed at three (3) months gross salary amounting to Ksh. 1,200,000 with each party to bear its own costs.
 10. Aggrieved by the above decision, the appellant filed the Notice of Appeal dated 25th October, 2018 after his application for extension of time to file the appeal out of time was allowed by the Court. The appellant's grounds of appeal contain a narrative of the evidence adduced before the court, in contravention to Rule 86(1) of the *Court of Appeal Rules*. The said grounds can, nonetheless, be summarized as follows: that the learned Judge erred in law and in fact in failing; to appreciate that the respondent varied the terms of employment to the substantial detriment of the appellant; to give due regard to the terms of the contract between the appellant and the respondent; by not putting into consideration the appellant's promotions based on merit which were recognized by the respondent leading to the erroneous computation of the award; by not giving keen and attentive consideration to the evidence submitted in regard to Land Parcel No. Ngong/Ngong/29503, (the suit property) which property is encumbered with a charge of Ksh. 7,200, 200 by the respondent; failing to consider the fact that the appellant was never given a hearing by the disciplinary committee.
 11. It was his prayer that the award by the trial court be enhanced due to his long years of service and that the court having found that he was dismissed wrongfully, the Court do order the parties to renegotiate on the loan terms and period of security on the suit property since repayment issues occurred when he was fired from his employment. He also prays for costs of the appeal.



12. The respondent filed its Notice of cross-appeal dated 9th September, 2019 under Rule 93 of this Court's Rules. In the cross appeal, the respondent faults the learned Judge for, inter alia,: finding that the respondents termination of the appellant's employment was unfair, which finding was not supported by the evidence on record; finding that the respondent was liable to pay the appellant compensation for unfair termination and assessing the same at Ksh. 1,200,000; failing to place sufficient weight on and properly appreciate the admissions by the appellant that he had been negligent at work, was reprimanded for and gave apologies for the negligence on several occasions; failing to appreciate the evidence by the respondent that the appellant was given sufficient time to improve his performance. The respondent entreats this Court to vary the trial court's judgment with costs and costs of this appeal.
13. The appeal was canvassed by way of submissions without any oral highlights. Learned counsel Muthoni h/b for Gitobu Imanyara for the appellant relied on his written submissions dated 24th April, 2019 while the learned counsel Miss Nziuki for the respondent also relied on its submissions dated 28th May, 2021.
14. The appellant framed the issues for determination and which we fully adopt as issues for determination in the disposal of the appeal are as follows:-
 - i. Whether the award given in the employment and labour relations court for unfair termination of employment ought to be enhanced
 - ii. Whether the trial court had jurisdiction to deal with the matter of property no. Ngong/Ngong/29503.
 - iii. Who bears the costs of this suit.
15. We have carefully considered the rival submissions by learned counsel along with the evidence on record in its entirety and the law. This being a first appeal, we have a duty to reappraise, re-evaluate and reconsider the evidence on record as commanded by Rule 29(1)a of the Rules of this Court and amplified in the locus classicus case of *Selle vs Associated Motor Boat Co. [1968] EA*. See also *Peters vs Sunday Post Ltd [1958] EA 424*.
16. The appellant's claim was in regard to an employment relationship between him and the respondent which he alleged was unlawfully terminated. It is not his dispute that the appellant was employed by the respondent and served in several capacities for about 18 years. At times he received commendations for jobs well done, but on other occasions he was admonished for some shortcomings. It is also on record that on some occasions he admitted allegations levelled against him and tendered apologies, promising that he would improve. His contention is that after serving for 18 years he was unlawfully terminated from employment and the court only awarded him 3 months gross salary. He has come before this Court seeking, inter alia, enhancement of that award. The respondents on the other hand oppose enhancement of the Award maintaining that it had proved the appellant's termination was lawful.
17. The procedure to be followed when terminating employment is provided for under section 41 of the [Employment Act](#). The same provides that:-
 - "(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. (Emphasis supplied).

The above implies that before an employer terminates an employee's employment valid reasons that touch on the grounds of misconduct, poor performance or physical incapacity have to be given. It was the appellant's evidence that he had assured the respondent he would improve vide the emails produced in court. For instance, by an email dated 4th June, 2014, the appellant acknowledged he failed to respond to the CEO's question on motor-vehicles rates and he accepted that the rates were charged below the accepted minimum rates and he promised to charge the appropriate rates. The same day, he acknowledged having blindly followed the risk notes from the broker with warranties, which were not applicable.

18. All the above are scenarios where the appellant acknowledged being at fault. The law is clear that an employer has to state the reasons for the suspension and the reasons given by the respondent are supported by the emails by the appellant acknowledging his mistakes. The appellant was being terminated because of his poor work performance. There was also the issue regarding the appellant's academic and professional achievement which the appellant opted not to pursue. The court in arriving at its holding referred to Section 45(5) of the Employment Act which provides that:-

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- (a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;
- b. the conduct and capability of the employee up to the date of termination;
- c. the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;
- d. the previous practice of the employer in dealing with the type of circumstances which led to the termination; and
- e. the existence of any previous warning letters issued to the employee.

19. Having considered the evidence on record, considering the provisions of Section 41 of the Employment Act, the learned Judge found that an employee is entitled to receive or to be given reasons for his dismissal in the presence of another employee of his own choice. This according to the court was not done. The court further outlined the procedure to be followed when an employer intends to terminate an employee on the basis of poor performance as was set out in the case of Jane Samba Mukalla vs Ol Tukai Lodge Limited [2013] eKLR. The court also found that the appellant had requested the employer for time within which to do his examinations but the respondent had not responded to that request. Additionally, the learned Judge found that the employer had failed to demonstrate the effort it had put in place to support the appellant improve his academic credentials given the number of years he had served the respondent with no drop in his performance. Ultimately the learned Judge found that the appellant's termination was not justified and the same was unfair and awarded him 3 months' salary as compensation for unlawful dismissal.

20. We have addressed our mind to the said award. The learned Judge considered all the evidence placed before the court, the circumstances preceding the appellant's dismissal and having done so, arrived at that award. We are not persuaded that the award was inordinately low as to call for our intervention.



We have no reason to interfere with that award as we find it fair and justified in the circumstances of the case.

21. On the claim that the appellant was discriminated against by the respondent, the court found no discrimination as the things complained of by the appellant, like going for trips overseas and allocation of duties were not accrued rights but lay at the discretion of the employer. The vexing issue of the appellant being given instructions through junior officers could have been distasteful and unprocedural, but in our view it did not amount to discrimination. Discrimination had therefore not been proved. The claim for exemplary damages was not consequently proved.
22. Turning to the question on the suit property, the appellant while an employee of the respondent took out a mortgage loan and bought the suit property with the respondent being the chargee. The mortgage was for Ksh. 7,200,000 with an interest rate chargeable on the sum advanced at 8% per annum. On 12th February, 2014, the appellant obtained a top up loan with the respondent for a sum of Ksh. 500,000.00. As at the time he was being dismissed, the appellant's liabilities were computed as hereunder:
 - i. Soft loan of Ksh.100,000 balance outstanding Ksh. 26,235.
 - ii. Mortgage loan of Ksh. 7,200,000 balance Ksh. 6,807,545.

The appellant urged that the trial court did not have jurisdiction to determine the issues in relation to this suit property. The respondent urged that it was a commercial transaction and not a land case per se as urged by the appellant thus faulting the court. Interestingly, the appellant who is now raising the jurisdiction flag is the same person who lodged the claim in respect of the property in question before the trial court. That notwithstanding, however, the issue has been raised and it behooves us to determine it.

23. The appellant during tenure of his employment took a mortgage predicated on his relationship with the respondent. The trial court, therefore, had the jurisdiction to determine that which arose out of his employment. The respondent had the power to convert the interest rate from its staff rate to the commercial rates pursuant to the contract. The privilege as expressly stated in the charge document ends upon the employee's departure from employment because that privilege is inextricably intertwined with the appellant's employment. The departure had a bearing on the interest rate payable to the respondent.
24. It was the appellant's evidence that upon termination he received a letter dated 18th March, 2015 from the respondent informing him that he had defaulted in his loan repayment and, therefore, from the month of March 2015, the loan would attract an increased interest rate. In the letter of offer dated 11th December, 2012 addressed by the respondent to the appellant in regard to mortgage facility application for Ksh. 7,200,000 there was a clause on interest rate which reads as follows:-

“Interest will be charged at the fringe benefit circulated from time to time by the Central bank of Kenya to minimum limit of 10% per annum. In the event that employment contract is terminated by either the company or yourself before the loan is fully repaid, interest on the outstanding balance shall be charged at the prevailing market commercial rate.” (Emphasis ours)

The appellant cannot feign ignorance on this clause yet he had accepted the offer and had even topped up further loan. Therefore, by virtue of his termination from employment the interest rate would revert to commercial rate.



- 25. The trial court was right when it stated that there was a close nexus between employment and the employment benefits, and the mortgage was one of the benefits the appellant received through financing. The transaction cannot therefore be said to have been a commercial transaction per se, but one that could not be extricated from the parties' employer/employee relationship. The issue fell squarely within the trial court's jurisdiction. We find that the court had jurisdiction to deal with the matter and further that from the evidence placed before the trial court, that claim was not proved and the same was properly dismissed.
- 26. On costs we note that the issue though raised in the parties' submissions is not a ground of appeal. We are in the circumstances disinclined to entertain the issue as the same is not properly before us. Accordingly, for the reasons given above, we find no merit in the appeal and cross-appeal and they are both hereby dismissed with each party to bear its own costs of the appeal and cross appeal.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH, 2022.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

