



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Bomas of Kenya v Thiriku (Civil Appeal 379 of 2019)
[2022] KECA 795 (KLR) (24 June 2022) (Judgment)**

Neutral citation: [2022] KECA 795 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 379 OF 2019
W KARANJA, F SICHALE & A MBOGHOLI-MSAGHA, JJA
JUNE 24, 2022**

BETWEEN

BOMAS OF KENYA APPELLANT

AND

MIRIAM WAMBUI THIRIKU RESPONDENT

*(An appeal from the Judgment of the Employment and Labour
Relations Court at Nairobi (Wasilwa, J.) delivered on 17th July 2017
In Cause No. 1652 of 2013 consolidated with Petition No. 26 of 2015)*

JUDGMENT

1. In Cause No. 1652 of 2013, the respondent herein filed suit against her employer, the appellant herein, vide a Statement of Claim dated 11th October 2013, citing unfair administrative process/action and gender discrimination, harassment, bias and unfair treatment by her employer. The respondent averred that she was employed by the appellant on or about 5th September 2007 as a Marketing Officer for a salary of Kshs. 27,486 per month subject to statutory deductions. She served the appellant with loyalty and diligence until sometime in 2012 when the appellant began to discriminate, harass and intimidate her in the conduct of her duties.
2. The appellant went ahead to advertise her job in the local dailies whilst she was still employed and had not resigned or been dismissed. That the appellant issued her with a letter to show cause falsely accusing her of having been absent from duty without permission for 3 days and threatened her with summary dismissal. The respondent wrote a letter in response to show cause and explained her reasons for being absent. In response to the letter, the appellant issued summons to the respondent to appear before the Staff Advisory Committee to explain why Management could not take disciplinary action against her which included termination or dismissal from employment. The respondent responded to the said summons giving reasons for her absence to be that she was attending to her sick husband admitted in hospital and even attached supporting medical documents in support of her explanation.



3. The respondent averred that the appellant's action to issue her with summons was contrary to the Bomas of Kenya Manual which clearly stipulated that summary dismissal can only be instigated when an employee has been absent from work for 10 days without a plausible reason. That the appellant would not accord her a fair administrative action given that the members of the Committee were the same persons who had been discriminating, harassing and intimidating her. Despite writing various letters to the appellant pleading with them to afford her fair treatment and complaining of the acts of discrimination, the appellant continued to discriminate, harass and intimidate her in the course of her employment.
4. The respondent therefore prayed for the following orders:
 - a. A permanent injunction or extension of any existing injunction to restrain the appellant from proceeding with the summons, the disciplinary action and process, and the envisaged or any termination or dismissal from employment against the appellant.
 - b. A permanent injunction or extension of any existing injunction to restrain the appellant from recruiting, filing appointing and/or employing any person to replace the respondent or with the same job description as those of the Marketing Officer/Head of Marketing Department of the appellant.
 - c. A declaration that the appellant has harassed intimidated, threatened and has been biased and gender discriminated against the respondent and is in breach of her constitutional rights.
 - d. A declaration that the appellant's actions to summon the respondent to show cause for being absent from duty is illegal and unlawful, actuated by malice and intended to sack her or form a basis for sacking her. A declaration that the conduct of the appellant to advertise for the respondent's job while she is still employed was flawed in procedure as neither the guidelines under the Bomas of Kenya Manual or the Employment Act were followed and is also unconstitutional and unlawful.
 - e. An order of compensation for gender discrimination, harassment, bias, intimidation and damages for breach of contract.
 - f. Costs and interest of the suit at court rates.
 - g. Any other further relief as the Honourable Court will deem fit to grant.
5. The appellant responded by way of a Statement of Defence dated 2nd May 2014. The appellant's position was that the respondent was employed as a Marketing Officer with effect from 5th September 2007 up to 15th October 2013 when her services were terminated. The termination was based on the respondent's absencing herself from duty without any reasonable cause or informing the appellant of her whereabouts.
6. The appellant commenced the normal disciplinary process by issuing the respondent with a show cause letter to explain her absence but the respondent declined to acknowledge receipt of the same insisting that she had to be told the contents of the letter. The appellant then issued another show cause notice regarding her refusal to accept the initial letter which amounted to insubordination and therefore a gross misconduct. The respondent finally responded to the second show cause letter and admitted refusing to sign the delivery note of the first show cause letter and went as far as demanding that the management withdraws the show cause letter which according to her was tantamount to a threat.
7. On 7th October 2013 the respondent was invited to appear before a disciplinary committee on 14th October 2013 which she attended. At the sitting of the disciplinary committee, the respondent was



charged with being absent without permission and insubordination arising out of her refusal to receive a show cause letter issued by the person placed in her authority. After hearing the respondent's representations, the committee deliberated and on 15th October 2013 it recommended that it had found the respondent guilty as charged and management proceeded to issue the respondent with a termination letter and she was informed accordingly.

8. On 14th October 2013 the respondent rushed to court seeking orders to stop the disciplinary hearing process, which orders were granted, notwithstanding she had already attended the meeting in the morning hours of the same date. The orders obtained also directed the appellant not to recruit or employ any person with the job description as that of the Marketing Manager. The respondent failed to disclose to the court that she had already appeared before the disciplinary committee as per Section 41 of the *Employment Act*, and therefore the court did not have jurisdiction to issue orders as though it was sitting as an appellate body of the appellant's disciplinary committee.
9. The appellant averred that the respondent had been previously warned on several occasions to stop maligning the name of the appellant and blackmailing the management by writing letters to various constitutional officers which letters contained false and misleading information.
10. The respondent later filed Petition No. 26 of 2015 dated 10th March 2015 in which she averred that on 1st December 2014, while Cause 1652 of 2013 was still pending in court, the appellant's CEO unilaterally wrote her a letter indicating that she had been sent on compulsory leave on the basis of insubordination, awaiting the ruling of a case filed against the appellant. That the alleged insubordination arose from the respondent's actions in the course of performing her duties in planning and preparation of meetings for events dubbed Kenya UNESCO @ 50 and Kenya Week in Paris. That the appellant demonstrated unfairness and unreasonableness towards her by denying her clearance/recommendation for her travel to Kenya Week in Paris celebrations, and appointing another person to represent the organization, despite the integral role she played in planning for the same. Believing that the clearance was withheld unreasonably and that she had an implied clearance from the PS Ministry of EA Affairs, Commerce and Tourism, the respondent travelled to Paris without the appellant's clearance and participated in the event. That it was after the event and the respondent reported to work on 1st December 2014 that she was served with the letter.
11. The respondent averred that the appellant's decision to send her on compulsory leave through the letter violated her fundamental rights under Article 41 of the *Constitution*, Articles 6 and 7 of the *International Covenant on Economic, Social and Cultural Rights*, as well as the express provisions of the appellant's Rules and Regulations as provided in Clause 10.13, 10.14, and 10.15. That she was denied access to her work station on 2nd December 2014 and the appellant withheld her salaries from December 2014. The respondent therefore sought orders that the decision to send her on compulsory leave was a violation of the principles of natural justice and her fundamental rights; an order declaring the letter a nullity and void before the law; orders for the release and payment of her salary arrears from December 2014; orders allowing her to access her workstation and resume her duties; and orders restraining the appellant from any further or future harassment, bias or oppressive tactics upon the respondent and her employment.
12. Through a Notice of Motion application filed with the petition, the respondent obtained orders on 11th March 2015 suspending the compulsory leave, allowing her access to her workstation and to resume her duties pending the outcome of the petition; and orders that the appellant release and pay the respondent her monthly salary arrears starting from December 2014. Cause No. 1652 of 2013 and Petition No. 26 of 2015 were later consolidated and heard together.



13. The appellant's response to the petition was vide a Replying Affidavit sworn by Jimmy Okidiang' dated 23rd March 2015. The appellant's position was that the respondent and one Bernard O. Ongeru were initially nominated by the appellant to interchangeably represent it in the Planning Committee of the Kenya Week in Paris. Later on in the advanced stages, Mr Ongeru was authorized to represent the appellant at the planning and to travel with the appellant's performance to Paris. That this was purely an administrative action.
14. At the hearing, the respondent testified as CW1. She chronicled her rise up the ranks of the appellant organization from her employment as a stores clerk from 15th April 1986 to her appointment as Marketing Officer on 5th September 2007. She was also appointed as Chairperson of the Bomas Procurement Committee later in 2007. According to the respondent, her problems began when she began pointing out certain improper procurement practices through memos and letters to the General Manager and the Finance Manager. She later began receiving harassment from the General Manager after resigning from chairing the Procurement Committee. The respondent highlighted several instances of harassment and frustration from being interviewed by CID and NSIS officers after taking clients around Bomas, deletion of email correspondence before it reached her, inconclusive complaints filed against her by certain staff, not being paid travel allowances due to her, to not getting any responses from the General Manager and Finance Manager to queries raised by her.
15. Regarding her absence from duty between 16th and 18th September 2013, the respondent testified that her husband had been admitted in hospital and it was an emergency. In addition, she had been detained in the afternoon of 17th September at Kilimani Police Station and was in court on 18th September. She called the General Manager and Finance Manager to inform them but they did not pick the calls. That she called a colleague and told her to inform the General Manager but the General Manager was not there. That she received a letter to show cause for her absence from duty and misconduct being refusal to receive an earlier letter sent to her. She was expected to provide her explanation within 7 days yet according to the Bomas Rules and Regulations she was supposed to be given 14 days to respond. The Human Resource never gave her the opportunity to explain verbally. After being issued with summons to appear before the Advisory Committee, the respondent wrote a response to the General Manager informing him of reasons for her absence and that she did not believe that the Committee would give her a fair hearing as they were the colleagues who had been harassing her.
16. The respondent's testimony was that she filed her case on 14th October 2013 and appeared before the Committee in the afternoon of the same date. The order to stop the disciplinary proceedings was served on the appellant on 16th October 2013 but the appellant proceeded to serve her with a termination letter on 29th October 2013. On the advice of her advocates, the respondent declined service of the letter and she later resumed her duties, until she received a letter from the CEO dated 1st December 2014 citing her for insubordination arising from her attendance of the Kenya Week in Paris celebrations.
17. The respondent testified that after the CEO declined to give her clearance to travel to Paris, she consulted with the Administrator who directed her to the Principal Secretary. The Principal Secretary later told her that he had discussed the issue with the CEO and there should be no problem. After failing to reach the CEO, the respondent travelled to Paris and returned on 29th November 2014. The respondent contended that the CEO's refusal to grant her clearance was invalid, unreasonable, unfair, and meant to frustrate her and deny her the opportunity to perform her duties. That a Memo from the Ministry to all parastatals dated 5th September 2014 indicated that permission for international travel should come from the Principal Secretary.
18. For the appellant, the Human Resource Officer Okidiang' Jimmy John testified as RW1. His testimony was that the respondent was employed as a marketing officer with effect from 5th July 2007. The



respondent reported to the General Manager as they did not have a manager in place. She was the senior most in the department and her role was coordinating marketing activities. In early September 2013, the appellant put out an advertisement for a Marketing and Product Development Manager but the recruitment was stopped by a court order. That there were previous attempts to recruit for the position which the respondent was interviewed for and was not successful, but the candidate chosen did not accept the terms and conditions of service.

19. Mr Okidiang’ testified that as early as May 2013, the respondent was threatening staff with suspension or dismissal. That a lot of complaints were raised by staff in her department and other departments. As for the disciplinary process against the respondent, Mr Okidiang’ testified that the respondent refused to receive the first show cause letter for her absence. That her response did not address the contents of the show cause letter she received. The respondent was invited to attend an Advisory Committee meeting where she was explained what happened on the material date. The Committee made recommendations to the CEO that the respondent be terminated. She was issued a termination letter on 15th October 2013 but she was not in the office. That the termination letter was never served upon the respondent.
20. On cross-examination Mr Okidiang’ stated that the respondent was absent between 17th and 19th September 2013 but they had not produced the record of attendance in Court. He admitted that the show cause letter gave her 4 days to respond, yet the manual required response in 14 days, and that this was not fair. That the respondent was not reprimanded orally as stipulated in the manual. He was the one who wrote the show cause letter yet the manual stipulated that it was the General Manager to write the letter. In the show cause letter and the summons, there was no mention of the issues of insubordination and threatening members of staff that she was charged with in the Committee meeting. There was no record of her response to these charges in the minutes of the meeting. The letter of compulsory leave did not spell out the terms of the leave and the details of the pending ruling upon which the compulsory leave was based. Mr Okidiang’ contended that the respondent did not have official permission to represent the appellant at the Paris event.
21. In her judgment, the learned judge first considered whether the appellant had valid reasons to subject the respondent to a disciplinary process. The learned judge observed that the Bomas HR Manual at bullet 10.11 stated that the period of absence from duty that would be regarded as absconding was 10 days, yet the respondent was only absent between 17th and 19th September 2013. The learned judge held that though there was absence, institution of a disciplinary process was premature.
22. The learned judge also held that due process was not followed in this disciplinary process as the appellant failed to adhere to its own HR Policy. That the Bomas HR Manual showed that the time required to reply to the show cause letter shall be 14 days yet the respondent was given 7 days to respond. That the manual expected the letter to be written by the Head of Department and where the HOD is not satisfied with the employee’s explanation, he shall write a letter reprimanding the employee with a copy to the General Manager. That the Committee was at the time chaired by the Finance Manager yet the manual stated that the Committee shall be chaired by the General Manager. The learned judge found that this procedure was not followed.
23. Having found that the disciplinary process was flawed, the learned judge concluded that the court order of 14th October 2013 injuncting the appellant from proceeding with the process was merited to prevent a breach of the law and the constitution, as well as the appellant’s own laid down disciplinary process.
24. Turning to the appellant’s action of sending the respondent on compulsory leave, the learned judge found that the decision was not justified. The compulsory leave letter was pegged on the outcome of a “ruling of the case filed against the Organization” yet there was no case filed by the respondent awaiting



- a ruling. That, in fact, there was an order in force in Cause 1652 of 2013 barring the appellant from instituting disciplinary proceedings against the respondent. That there was no reason allowing the appellant to send the respondent on compulsory leave, and the appellant's HR Manual never envisaged such a punishment, and the conditions for the compulsory leave were not stated.
25. The learned judge also faulted the appellant's action of advertising for a position of Marketing and Product Development Manager with duties were overlapping with those of the respondent as indicated in her appointment letter. That the decision was done hastily and without proper procedures in a manner that would be counterproductive to the respondent.
26. Overall, the learned judge found that though the respondent was treated unfairly and unjustifiably, there was no clear basis for her claim of discrimination. The learned judge held that the actions or omission of the appellant amounted to unfair labour practices. The learned judge made the following orders: A Permanent Injunction against the appellant restraining the appellant its servants and agents from continuing with any disciplinary action against the respondent on issues prosecuted upon in the Petition/Claim; a declaration that the appellant actions against the respondent amounted to unfair labour practices and were in breach of her constitutional rights; that the appellant should pay the respondent damages amounting to Kshs.500,000/= for the breach complained; and that the appellant will pay costs of the suit.
27. The appellant was dissatisfied with the judgment and filed the present appeal seeking to set aside the entire judgment on the grounds that the learned judge erred in law by:
- a. Considering extraneous circumstances and facts that were not pleaded or even contested by the parties hence arriving at a wrong decision.
 - b. Disregarding the evidence adduced in court to an extent that the respondent admitted of having attended a disciplinary hearing and a termination letter issued and therefore there was no employment relationship by the time the claim was being heard in court.
 - c. Failing to address issues raised by parties in their pleadings and submissions and the claimant/ respondent had already been terminated and therefore the issues raised in the claim and petition were already overtaken by events and the court had nothing substantive to address.
 - d. Awarding damages that were not pleaded and no evidence was led to warrant an award of Kshs. 500,000 as damages for unfair labour practice when the court had not made a finding that there was discrimination against the respondent which could have been the basis for the award of damages.
28. In written submissions, Counsel for the appellant submitted that the learned judge was precluded from framing and determining an issue that was not specifically pleaded by the respondent and either denied or admitted by the appellant. That the learned judge erred by consolidating the petition with the claim as both were addressing and seeking different remedies. That in a ruling on an application filed by the respondent on contempt of court orders, it was found that the court order stopping the disciplinary process was served on the appellant long after the respondent's employment was terminated and that the respondent was guilty of material non-disclosure to the court at the time she obtained the court order. Counsel submitted that the respondent then filed a petition with the aim of abandoning the claim and to litigate through the petition.
29. On the issue of discrimination, Counsel submitted that apart from being mentioned in the prayers of the claim, there were no particulars of discrimination. That the appellant was therefore denied a chance to defend the case under Section 5 of the *Employment Act* on discrimination. That there was no basis for the award of Kshs. 500,000 and no evidence led on discrimination.



30. Regarding the employment status of the respondent and whether she had actually been terminated through the disciplinary process, Counsel submitted that the respondent had appeared before the disciplinary committee and received a termination letter before the court order stopping the process was served. This was confirmed in the ruling of Hon. Justice Nduma on 11th December 2014. That the learned judge failed to make any finding on the issue and that the facts were uncontested. That it was upon the learned judge to find if indeed the claim for unfair termination had been made out, and her failure to do so meted injustice upon the appellant. The learned judge in her analysis admitted to the fact that there was a disciplinary process and termination letter issued, confirming that she misdirected her mind to the fresh disciplinary and award of damages when it was obvious that the respondent was no longer an employee of the appellant.
31. Counsel urged the Court to set aside the entire judgment and substitute it with orders that the dismissal of the respondent by the appellant was procedurally fair and the reason was valid; as well as orders awarding the appellant costs of the appeal and the matter before the Employment and Labour Relations Court.
32. Counsel for the respondent in the written submissions pointed out that the appellant was attempting to sneak in the issue of whether the learned judge erred by consolidating the petition with the claim through its submissions. The issue was not raised in the memorandum of appeal, and the advocates for both parties were present and did not object to the consolidation of the matters at trial. Counsel made reference to Order 11 Rule 3 (1) (h) of the *Civil Procedure Rules* which mandates the court to consider consolidation of suits with a view of furthering expeditious disposal. That the matters met the threshold for consolidation in that they involved the same parties, raised common questions of law and fact, and the rights and reliefs claimed in them arose from a series of the same transactions.
33. Regarding whether the respondent had already been terminated, Counsel submitted that the court order issued on 14th October 2013 restraining the appellant from proceeding with the summons, disciplinary action, or any termination or dismissal from employment against the respondent was served on 16th October 2013 before the termination letter was served. That the termination letter was never delivered to the respondent as the process had been stopped. That this was confirmed by the testimony of RW1 and the admission of counsel for the appellant on 28th October 2015.
34. On the issue of whether the disciplinary process commenced by the appellant against the respondent was fair, Counsel submitted that Section 45 (2) (c) of the *Employment Act* terms as unfair termination any termination in which fair procedure was not observed. That appellant was guided by the Bomas Manual for its disciplinary procedures. That under Clause 10.15.1 (i) of the Manual, that the respondent ought to have been given a chance to explain herself verbally after being absent for two days but was instead issued with a show cause letter. That the disciplinary process was premature and would only have applied if the respondent was absent from duty for more than 10 days. That the respondent was given 4 and 7 days respectively to respond to the first and second show cause letters yet the manual provided for 14 days to respond to such letters. That the show cause letter was issued by the HR Officer yet it was only the General Manager who had the authority to issue a show cause letter. That the staff advisory committee was chaired by the Finance Manager instead of the General Manager and the respondent was ambushed with charges that she had not been made aware of in the show cause letter. That the disciplinary process commenced through compulsory leave which was not provided for in the manual, rendering the process flawed.
35. Regarding the award of Kshs. 500,000/= as damages for unfair labour practices, Counsel contended that the same was pleaded and the respondent laid out her case for violation of labour practices in her testimony. That in submissions in the superior court, the respondent quantified her claim for damages,



pleading for the court to award her Kshs. 5,000,000 as compensation for violation of her rights. That even though the learned judge did not award damages for discrimination, the appellant was still found to be in violation of other rights which the learned judge collectively termed as unfair labour practices which warranted compensation. Counsel submitted that the learned judge exercised her discretion judiciously and was within the law in considering and awarding compensation for subjecting the respondent to unfair labour practices.

36. The duty of this Court in a first appeal is set out in *Selle and another v Associated Motor Boat Company Limited and others* [1968] 1 EA 123 as follows:

“Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

37. From the material set out above we consider the following three issues as standing out for our determination.

- a. Whether the issue of consolidation was properly raised on appeal
- b. Whether the learned judge erred by failing to find that there was no employment relationship when the claim was heard
- c. Whether the learned judge erred by awarding damages for unfair labour practices

38. The appellant has raised the issue of the propriety of consolidating the cause and the petition in submissions. The issue was not set out in the memorandum of appeal and was not canvassed in the first instance at the trial. The appellant’s attempt to tie the issue to the ground that the learned judge considered facts that were not pleaded or contested is not clear, as the ruling of Hon Justice Nduma merely confirmed that the appellant was in compliance with the orders of the court. The appellant did not contest the court’s decision of 15th June 2015 to consolidate the two matters for the purpose of determining them together. It would be improper to consider this issue yet it was not put to the trial court for consideration and determination.

39. In *Republic v Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & others Ex-Parte Tom Mbaluto* [2018] eKLR, this Court held that:

“Rule 104 of the Court of Appeal Rules, among others, prohibits an appellant from arguing, without leave of the Court, grounds of appeal other than those set out in the memorandum of appeal. The appellant did not seek leave of the Court to raise the new ground of appeal but rather belatedly, and literally from the blue, raised it in the written submissions. It needs no emphasis that submissions must be founded on the issues before the court and the evidence on record regarding the issue. A party is not at liberty to change the nature of his case surreptitiously at the submissions stage.

It is in the discretion of the Court to allow a party to raise a new point on appeal, depending on the circumstances of the case. (See also *George Owen Nandy v. Ruth Watiri Kibe*, CA No. 39 of 2015 and *Openda v. Ahn* [1983] KLR 165). In this case we have stated that the appellant never raised the issue in his judicial review application, neither party addressed the



issue in the High Court, the learned judge, quite properly did not address the issue and, to make the matters worse, the appellant did not raise the issue in his memorandum of appeal in this Court... As has been stated time and again, there is a philosophy and logical reason behind our appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the appellate court to consideration of the issues that were canvassed before and decided by the trial court. If that were not the case, the appellate court would become a trial court in disguise and make decisions without the benefit of the input of the court of first instance. (See *North Staffordshire Railway Co. v. Edge* [1920] AC 254).”

40. It is not disputed that both the termination letter and the court order stopping further disciplinary action were issued on 15th October 2013. The question of whether termination was effected is to be determined by the chain of events surrounding the service of the two documents. RW1, the Human Resource Officer admitted in his testimony that the court order was received on 16th October 2013 while the termination letter was never served upon the respondent at all. The effect of the appellant’s non-service of the termination letter and receipt of the court order was that the appellant was restrained from proceeding with any further disciplinary action or process; as the learned judge correctly found in her judgment. Based on the turn of events, the termination letter had no legal effect at that stage and the respondent’s employment status was still intact throughout the trial at the superior court.
41. The appellant has attempted to point to the ruling of Hon Justice Nduma of 11th December 2014 which appears to intimate that the court had determined that the claimant’s employment had been terminated by the letter dated 15th October 2013. However, this was still a contested issue of fact at that stage and the court only went as far as finding that contempt had not been proved on the part of the appellant, and that the appellant and its General Manager “were ready and willing to obey the Court order and did so when the Claimant/ Applicant presented herself at the work place in March 2014.” The court order remained in effect throughout the trial as the appellant failed to have the order reviewed or set aside. Therefore, the respondent was still employed by the appellant when the claim was heard. This ground of appeal holds no merit.
42. Article 41 of *the Constitution* enshrines the right of fair labour practices, a violation of which may attract, among other reliefs listed under Article 23 (3), compensation in the form of damages. There is no exhaustive list or definition of conduct that constitutes unfair labour practices offered by the Constitution or the *Employment Act*. The provisions of the Constitution, employment and labour relations legislation, common law practices, treaties and conventions, comparable foreign instruments, as well as the employer’s code of conduct where available form a collective basis for determining whether particular conduct constitutes unfair labour practices.
43. South Africa’s Constitutional Court in *National Education Health & Allied Workers Union (NEHAWU) v University of Cape Town and Others* [2002] ZACC 27 observed that:

“The concept of fair labour practice is incapable of precise definition. This problem is compounded by the tension between the interests of the workers and the interests of the employers that is inherent in labour relations. Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgment. It is therefore neither necessary nor desirable to define this concept.”
44. It should also be noted that conduct which is lawful may nevertheless constitute an unfair labour practice – see (*Council of Mining Unions v Chamber of Mines of SA* (1985) 6 ILJ 293 (IC). The Supreme Court of South Africa in *Media Workers Association of South Africa and Others v Press*



Corporation of South Africa Ltd. [1992] ZASCA 149 suggests that the question of whether a labour practice is unfair is ultimately a question of discretion and judgment of the learned trial judge than a question of law or fact:

“The position then is that the definition of an unfair labour practice entails a determination of the effects or possible effects of certain practices, and of the fairness of such effects. And, when applying the definition, the Labour Appeal Court is again expressly enjoined to have regard not only to law but also to fairness. In my view a decision of the Court pursuant to these provisions is not a decision on a question of law in the strict sense of the term. It is the passing of a moral judgment on a combination of findings of fact and opinions.”

45. The view of Mbaru, J. in *Elizabeth Washeke And 62 Others V Airtel Networks (k) Ltd & another* [2013] eKLR is also persuasive:

“Whether conduct is fair or not necessarily involves a degree of subjective judgement. However, this is not to suggest that the assessment of fairness is unfettered or a matter of whim. Rather, regard must be had to the residual unfair labour practice; the employment relationship would still exist. But due to the unfair labour practice the employee is left unprotected. The unfair conduct of the employer relating to a particular employee or employees can then be termed as unfair labour practice. Thus, any understanding of fairness must involve weighing up the respective interests of the parties – as well as the interests of the public”

46. In the present case, the basis for the learned judge making a determination that the respondent was subjected to unfair labour practices was not a finding of discrimination, but a finding that the respondent was subjected to a procedurally flawed disciplinary process and advertising for a position of Marketing and Product Manager whose duties substantially overlapped with those carried out by the respondent.

47. Regarding the disciplinary process, the evidence on record lays bare the various instances in which the appellant’s disciplinary mechanism was activated unfairly against the respondent. After apparently being absent from work for 2 days, the respondent was not reprimanded, in accordance with the appellant’s manual, but was instead issued a show cause letter which amounted to disciplinary overkill. The respondent was given 7 days instead of the prescribed 14 days to respond to the show cause letter. The Finance Manager chaired the Advisory Committee that heard the disciplinary case, a position that was purely the preserve of the General Manager. The respondent was sent on compulsory leave, a disciplinary measure not contemplated in the manual, contrary to the court order barring the appellant from constituting disciplinary proceedings against her. The learned judge cannot be faulted for reaching the conclusion that the conduct of the appellant against the respondent constituted unfair labour practices that were in breach of her constitutional rights.

48. Regarding the assessment of damages at Kshs. 500,000, the Court is guided by the principles reiterated in *Butt vs Khan* (1981) KLR 349 when considering whether to interfere with such an award on appeal:

“The assessment of damages is more like an exercise of discretion by the trial judge and an appellate court should be slow to reverse the trial judge unless he has acted on wrong principles or awarded so excessive or so little damages that no reasonable court would; or he has taken into consideration matters he ought not to have considered, or not taken into consideration matters he ought to have considered and, in the result, arrived at a wrong decision.”



49. In *Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others* [2018] eKLR, this Court agreed with the following view of Rika, J. regarding the nature of compensatory damages arising out of the employment relationship in the case of *Abraham Gumba vs Kenya Medical Supplies Authority* [2014] eKLR:

“The employment relationship is not a commercial relationship, but a special relationship, which must be insulated from the greed associated with the profit-making motives, inherent in commercial contracts. This has been the historical justification of capping compensatory damages since the era of the Trade Disputes Act Cap 234 the Laws of Kenya, to a maximum of 12 months' salary. The Industrial Court traditionally functioned in the manner of the English Employment Tribunal, and in addition to capped compensatory awards, or as alternative to such awards, could order for the reinstatement or re-engagement of the Employee. The Civil Courts on the other hand had no capping on the amount of damages they could award for breach of the contract of employment, but were conversely deprived of the power of reinstatement or re-engagement. The rationale for capping was explained in the House of Lords cases of *Eastwood & Another vs Magnox Electric PLC*; *McCabe vs Cornwall County Council & Others* [2004] UKHL 35, where the Court stated:

'In fixing these limits on the amount of compensatory awards, Parliament expressed its view on how the interests of

the Employers and the Employees, and the socio-economic interests of the country as a whole, can best be balanced in cases of unfair termination. It is not for the Courts to extend further a common law implied term, when this could depart significantly from the balance set by legislature. To treat the legislature as creating the floor, and not the ceiling, would do just that....it would be inconsistent with the purpose Parliament sought to achieve by imposing compensatory awards payable in respect of unfair dismissal.'

This Court is of the view that in general, judicial restraint must be exercised in exceeding the capping of 12 months' salary, in compensating Employees for the wrongful acts of their Employers. The proliferation of monetary damages above the equivalent of 12 months' salary will only disturb the equilibrium intended to be achieved by Parliament, in placing the capping...

This is not to say that the Court cannot grant damages beyond the 12 months' capping for instance where the employment wrong cuts across Constitutional, Contractual and Statutory violations of the Employee's rights under the various regimes. Rather than grant different sums under the different regimes, the Court could make one coalesced award of damages, which may exceed the statutory capping, without being overly above that capping.”

50. Keeping in mind, the above guidelines and principles, the learned judge's award of Kshs. 500,000 as damages for unfair labour practices cannot be seen as excessive in the circumstances.
51. In view of the above, we have come to the conclusion that the appeal is lacking in merit and therefore dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JUNE, 2022

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

Signed



DEPUTY REGISTRAR

W. KARANJA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

