Hakika Transport Services Ltd v Mwariwa & 3 others (Civil Appeal 125 of 2019) [2022] KECA 783 (KLR) (10 June 2022) (Judgment)

Neutral citation: [2022] KECA 783 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 125 OF 2019

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

JUNE 10, 2022

BETWEEN

HAKIKA TRANSPORT SERVICES LTD ..... APPELLANT

AND

SALIM NASSORO MWARIWA ..... 1ST RESPONDENT

MICHAEL M. MUNGA ..... 2ND RESPONDENT

EDWIN MADZUNGU LWAMBI ..... 3RD RESPONDENT

FRANCIS WAMBWIRE OTWANE ..... 4TH RESPONDENT

(An appeal from the judgment, decree and orders of the Employment and Labour Relations Court at Mombasa by O. Makau, J dated 11th May, 2018 and delivered by Lady Justice Ndolo, J on 28th May 2018 in ELRC Cause No. 673 of 2016 (Consolidated with ELRC 674, 675, & 676 2016)

JUDGMENT

1. This appeal emanates from the judgment, decree and orders of the Employment and Labour Relations Court [ELRC] dated 11th May 2018 and delivered on 28th May 2018, in the consolidated suits between each of the respondents as against the appellant. The respondents' filed their separate claims on 15th September, 2016 claiming terminal benefits plus compensation for unfair dismissal by the appellant on diverse dates between 3rd and 4th September, 2015. The 1st, 2nd and 4th respondents claimed that their respective services were terminated on 4th September, 2015; while the 3rd respondent claimed that his services were terminated on 3rd September, 2015. The respondents claimed that the appellant terminated their employment without valid reasons and without giving them the opportunity to be heard.

2. According to the respondents, the contention began during the period between 2nd and 3rd September 2015, when the appellant's Human Resource Manager (HRM) informed them that their verbal terms

of employment had been varied to formal contracts, and they were required to sign written contracts to formalize it. Each respondent claimed that when they declined to sign the contracts for varied reasons, including loss of previous period of service worked and unfair terms, the HRM referred them to Head Office.

3. What followed when the respondents went to the Head Office at Changamwe was that each of them was called into the Personnel Officer's (PO) office, one at a time. The PO issued the respondents with show cause letters for alleged insubordination and absenteeism. The respondents were given dates to attend disciplinary meetings at Jomvu. The 1st respondent testified that he found no one at the meeting venue, and so he returned to the Head Office. He however gave a written response to the show cause letter addressed to him. The 2nd respondent testified that he went for the disciplinary meeting but found no one at the venue. He had responded to the show cause letter in writing. The 3rd respondent testified that he responded to the show cause letter in writing, and that the disciplinary proceedings took place. He said that a shop steward accompanied him during the proceedings and that he was given a hearing. The 4th respondent testified that he returned to the Head Office when he found no one to hear him on the day scheduled for the disciplinary meeting.

4. The appellant's response to the respondents' claims was a denial of the alleged unfair dismissal. It contended that the respondents did not report to work, nor did they serve the appellant with any intention not to do so, and as a result absconded duty without notice, thus terminating their services without notice.

5. The appellant through its witness admitted that the respondents were its employees. It denied dismissing them from employment because of refusing to sign written contracts, and asserted that the respondents absconded and disobeyed instructions from their supervisors. That they were served with the show cause letters which also invited them to disciplinary proceedings. That when they absconded work, the appellant wrote to the Labour Office reporting their absence. The appellant's witness also contended that the respondents failed to attend disciplinary meetings that they had been invited to attend. The appellant's witness denied that there was any requirements that the respondents sign new contracts.

6. The issues for determination before the ELRC revolved around four areas, whether the respondents committed any acts of misconduct; whether the termination of employment of the respondents was fair and lawful; whether the respondents were entitled to any terminal dues sought; and, whether the claim was settled through conciliation.

7. The learned trial Judge found that based on the written statement by the appellant's witness RW1 it had dismissed the respondents. On the issue whether the termination was fair, the learned Judge found that the appellant failed to prove that the termination of the respondents was grounded on a valid and fair reason. The Judge found that the reason cited for the termination in the letters served on the respondents was insubordination and absenteeism. The court observed that the Supervisors to the respondents were not called as witnesses to confirm the appellant's claims of insubordination; nor did the appellant produce any attendance register or record to prove absenteeism. The court ruled that there was no evidence that conciliation ever took place between the parties.

8. The trial Judge found that in the case of the 1st, 3rd and 4th respondents, the due process provided under Section 41 of the *Employment Act* (hereinafter the Act) was not followed, in that they were not informed of the reason for which the appellant was contemplating terminating their services in the presence of a fellow employee or shop floor representative. That thereafter, the appellant should have invited the respondents to air their defence, which the appellant failed to do. The Judge found that there was however no dispute that the 2nd respondent was heard on 10th September 2015. The

judge found that the termination of the respondents' employment was unfair and unlawful within the meaning of Section 45 of the *Employment Act*.

9. We have confirmed from the record of appeal that it is only the 3rd respondent who was given an opportunity to be heard in disciplinary proceedings, and that he attended the meeting accompanied by a shop steward. The rest of the respondents found no one at the venue on the dates slated for their disciplinary hearing.

10. In the end, the trial court entered judgment for the respondents awarding one month's salary in lieu of notice together with an equivalent of 10 months' salary as compensation in favour of each of the respondents. The respondents were also awarded certificates of service plus costs and interest at court rates from the date of the judgment till payment in full, subject to the relevant statutory deductions.

11. The appellant, aggrieved by the foregoing judgment set out 12 grounds in its memorandum of appeal. In the appellant's written submissions, these grounds were reduced into two broad areas. Firstly, that the learned trial judge erred to find that there was termination of employment by the appellant, and, secondly that the learned Judge erred when he made an award on compensation, failing to consider its legal meaning.

12. The appeal was heard virtually on the 21st February, 2022 with Mr. Onyango, learned counsel for the appellant, and Mr. Ngonze learned counsel for the respondents appearing for their respective clients. The counsels relied on their written submissions, which they briefly highlighted before us.

13. This being the first appeal, Rule 29 of the *Court of Appeal Rules* requires this Court to re-appraise the evidence and draw inferences from the facts. This principle was emphasized in the oft-cited case of *Selle & Another vs Associated Motor Boat Company Limited & Others* (1968) EA 123 as follows:

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. 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 th demeanour of a witness is inconsistent with the evidence in the case generally"

14. We are cognizant of our duty as a first appellant court and will only depart from the findings by the said court if they are not based on the evidence on record, or where the court is shown to have acted on wrong principles of law, as held in *Jabane vs Olenja* [1986] KLR 661.

15. Mr. Onyango for the appellant in written and oral submissions, on the issue of termination, posited that the learned trial judge framed two issues; whether the respondents committed any acts of misconduct to warrant termination; and, whether the termination of the respondents was fair and lawful. He urged that the court left out the issue whether the appellant terminated the respondents' employment, and that consequently the judge failed to take into account matters that he should have considered. Counsel relied on the case of *Samuel Osoro Nyamwaro and 2 others vs Boniface Kamau and another* [1995]eKLR for the proposition that failure by the court to consider and determine all issues pleaded amounts to a miscarriage of justice.

16. From the onset, the issues that the trial Judge considered were those agreed upon by the parties. Mr. Onyango has not disputed that there was ever such agreement on the issues. In fact, he was the counsel

for the appellant before the ELRC and in his filed written submissions at paragraph 1.3 acknowledged the issues he had raised were adopted by the respondents, stating, "By consent the Respondent's Pre-trial Lists of issues filed on February 9, 2017 were adopted as the parties Lists of Issues." Given those circumstances, counsel cannot turn around and complain that the Judge failed to consider the issues raised by the parties, when in fact, the Judge considered them as framed by the parties.

17. The issue "whether the appellant terminated the respondents' employment" is, in our view subsumed in the consideration of the issue "whether the termination of the respondents was fair and lawful" which the court considered. Thus contrary to Mr. Onyango's submission, the issue complained of was considered by the learned judge. Even if we may be wrong, and the issue was not considered, having agreed on the issues intended for consideration by the trial court, the appellant is estopped from raising on appeal any issues outside those placed before the court for determination.

18. We are aware of our jurisdiction as a first appellate court is to consider issues that were presented before the trial court. In the case of *Mary Kitsao Ngowa & 36 Others vs Krystalline Limited,*(2015) eKLR, this Court had occasion to deal with a similar issue and pronounced itself thus;

> "...we must also appreciate the fact that, this is not even an issue that was canvassed before the trial court. The issue regarding the interpretation, meaning and application of section 90 of the *Employment Act* was never placed or canvassed before the trial court for determination. The jurisdiction of the appellate court is to look into issues that were presented before the trial court. A court cannot be said to have erred on an issue that was never argued before it. This is what the appellants have sought to do in respect of this ground of appeal. Accordingly, the learned Judge cannot be faulted for not considering or appreciating the concept of continuing injury."

19. Mr. Onyango for the appellant urged that the respondents terminated their own services when they failed to report to work after the show-cause letters were served upon them. In that regard, we noted that the trial Judge observed that the appellant terminated the respondents' employment going by the statement of the appellant's witness. Rajab Yeri Kombe was the appellant's sole witness. He was the Personnel Officer of the appellant (PO). We have looked at his statement at page 22 in respect of the 1st respondent; page 139 in respect of the 2nd respondent; page 74 in respect of the 3rd respondent; and, page 194 in respect of the 4th respondent. In each of these statements, at paragraph 5 the witness states:

> "After failing to attend the disciplinary meeting the management decided to terminate (his) service since failure to attend a disciplinary meeting was by itself an act of gross insubordination"

20. The statement of Mr. Rajab Yeri Kombe, and his evidence in court to that effect was considered by the learned trial Judge as an admission of fact. We agree. In Section 17 and 18(1) of the *Evidence Act* it is rendered thus:

> "17. An admission is a statement, oral or documentary, which suggests any inference as to a fact in issue or relevant fact, and which is made by any of the persons and in the circumstances hereinafter mentioned.
>
> 18. Statements by party to suit or agent or interested person
>
> 1. Statements made by a party to the proceeding, or by an agent to any such party, whom the court regards in the circumstances of the case as expressly or impliedly authorized by him to make them, are admissions."

21. Mr. Rajab was an authorized agent of the appellant by virtue of his position in the appellant's company, and by virtue of being sent as the sole witness in the suit for the appellant. Having admitted in evidence and in the statement of this witness that the appellant terminated the employment of all the respondents, counsel for the appellant could not use submissions to contradict the admissions.

22. The question then is not whether the appellant terminated the employment of the respondents, rather whether in so doing it followed the due process as spelt out in the law, which will also include a consideration whether the respondents were accorded a fair hearing.

23. The issues commending themselves for determination by this court are

    a. whether the respondents' contract of service were unlawfully terminated, to justify their claim for terminal dues, and

    b. whether the awards made by the ELRC were reasonable and should stand.

        1. In respect of the first issue, the appellant's case is that the respondents voluntarily terminated their terms of service hence, they did not deserve a disciplinary procedure and the subsequent award in damages made by the trial court was unreasonable. On the other hand, the respondents' contention is that they were denied entry into the appellant's premise on 3rd September 2015 and ordered to execute new service contracts and upon declining to do so, the respondents were ordered to leave the appellant's premises and to report to the Head Office. At the Head Office the appellant proceeded to issue letters titled "absenteeism and insubordination" without any specific formal or specific charges levelled against any of the respondents and, save for the 3rd respondent, the rest of them were never subjected to any formal disciplinary procedure and the appellant never made payments of the respondents' terminal dues.

25. The appellant's position is that having walked out on their employer it was no longer material or relevant whether the disciplinary committee met or not since the respondents had by their own conduct ceased being employees of the appellant. That the respondents failed to give any reasons for not continuing with their duties and therefore terminated their own services without giving notice to the appellant. As a result, the appellant asserted, Sections 41, 43 and 45 of the *Employment Act* are not applicable to the facts and circumstances of the case.

26. Mr. Ngonze for the respondents opposed the appellant's contention and urged that the appellant's witness admitted that the respondents were not served with any notice, and neither were they given any reasons for the termination. Counsel urged that the terminations were by letters dated 3rd September, 2015, while the disciplinary proceedings were to take place between 10th and 11th September 2015.

27. The position taken by the appellant seems to suggest that the provisions of the *Employment Act* are capable of being waived. That argument is addressed under Section 3 of the Act which provides as follows:

> " 3.
>
> (1) This Act shall apply to all employees by any employer under a contract of service.
>
> (2) ...
>
> (3) This Act shall bind the Government."

28. It is clear that [subject to sub-section (2) which does not apply to this case] the Act is incapable of being waived, even the Government is bound by it. The appellant was bound to comply with the requirements of the Act, at the time it terminated the employment of the respondents and in particular to the processes set out in the Act. Section 41 of the Act provides for notification and hearing before termination and prescribes as follows:

> "41.
>
> (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.

29. The appellant terminated the respondents on grounds of misconduct. Section 41 spells out in mandatory terms how the appellant should have processed the termination. The section gives the employer the duty to explain to the employee the reason it is considering termination, the language to be used and who else should be present when that explanation is made. The second step is the duty placed upon the employer to hear and consider representation the employee may have. Both these steps are to be undertaken before the termination of employment.

30. Flowing from the above mandatory provisions of the law, termination of an employee's contract of service does not pass the test of fairness unless the employer establishes by evidence that it was done on the basis of valid and fair reason(s) and upon following a fair procedure. See the Court of Appeal case of *Pius Machafu Isindu vs Lavington Security Guards Limited* [2017] eKLR.

31. In *Janet Nyandiko vs Kenya Commercial Bank Limited* [2017] eKLR, the Court summarized procedures to be followed when terminating employment as follows:

> "Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.
>
> The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize 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. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, the previous practice of the employer in dealing with the type of circumstances which led to the termination and the existence of any warning letters issued by the employer to the employee.

Section 41 of the Act, enjoins the employer in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity to explain to the employee in a language that the employee understands the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice; and to hear and consider any representations which the employee may advance in response to allegations levelled against him by the employer."

32. We have scrutinized the procedure adopted by the appellant in reaching the decision to terminate the respondents' employment. The evidence adduced before the court shows that between the 2nd and 3rd September, 2015 the respondents reported to their places of work and were handed in written contracts to sign. Each respondent testified that the appellant's HRM explained to them that their terms of service had changed from oral to written contracts and that each was required to sign the new terms. Each respondent testified that they requested to have the new terms explained to them, which the HRM declined and instead referred them to Head Office the next day.

33. At the Head Office, Mr. Rajab Kombe, the Personnel Officer (PO), handled the matter. In the case of the 3rd respondent the PO called him on 1st September 2015 and asked to sign the contract. The 3rd respondent asked to be given time to study the contract as he noted it had oppressive terms. On 2nd September, 2015 the PO told the 3rd respondent that he had refused to sign the contract and his services will be terminated. He was served with a letter dated 2nd September, 2015 titled 'absenteeism and insubordination'. The letter is at page 90 in the respondents documents. The letter accused the 3rd respondent of insubordination by willingly refusing to obey lawful and proper command, and gross misconduct for absenting himself from work on the 2nd September, 2015. It required him to show cause why disciplinary action should not be taken against him, giving him until the next day to respond. His response is at page 91 of the appellant's document. It also gave him the date of 10th September, 2015 as the date his disciplinary meeting would take place. The 3rd respondent appeared for the disciplinary meeting with a shop floor union representative and was heard.

34. According to the 1st, 2nd and 4th respondents, similar action was taken against them as the 3rd respondent, except that in their case, they were served letters to show cause that were dated 2nd, 3rd and 5th September, 2015 accusing them of absenting themselves from work on varied days in September and giving them the dates for the disciplinary meetings. The 1st, 2nd and 4th respondents testified that each of them went for the disciplinary meeting but found no one at the venue.

35. We noted that the appellant, upon serving the 'show cause' letters to the respondents on 2nd 4th and 5th September, 2015 went ahead to write the letter addressed to the Labour Office dated 9th September, 2015. In that letter, the appellant informs the Labour Office that the respondents were involved in some misconduct, and upon being invited to the disciplinary committee they declined to receive the invitation letters and instead walked away. The appellant concludes the letter by stating that the respondents are assumed to have absconded from employment and to have terminated their employment with the appellant.

36. The appellant's letter to the Labour Office is contradicted by the fact that each of the respondents replied to the letters the appellant claimed they declined to receive. Those replies, as already shown, are contained in the appellant's own documents and were in the appellant's possession at the time the letter to the Labour office was written. They could not have responded if they did not receive the show cause letters. The other contradiction is the appellant's contention that the respondents failed to attend the disciplinary meeting, yet the disciplinary meetings were coming up few days after the date of the letter to the Labour office.

37. In regards to whether the disciplinary meetings were ever convened, except for the one in respect of the 3rd respondent, the others were contested. It was the appellant's burden to prove that the meetings were convened. Minutes of such meeting was the best way to establish this fact. No such minutes or any other evidence was adduced to establish this fact, and therefore we find that the contention by these respondents that they did not find any such meeting on the date and venue slated for them has not been controverted.

38. Having scrutinized the procedure adopted by the appellant in reaching its decision to terminate the employments of the respondents, we find that there was no compliance with the procedural law as spelt out under Section 41 of the Act. The respondents did not get any communication informing them the reasons for which the appellant was contemplating termination, in the presence of a person of their choice. Secondly, the respondents were not given an opportunity to be heard before the decision was made, which is advised by the reason the decision to terminate was reached days before the dates slated for the disciplinary hearings. This Court in the cases of *Standard Group Limited vs Jenny Luesby* [2018] eKLR and *CMC Aviation Limited vs Mohammed Noor,* Civil Appeal No. 199 of 2013 has emphasized the importance of according an employee their right to a hearing before dismissal and where none is given the termination is rendered unfair and unlawful.

39. The appellant having failed to adduce any evidence to prove that the foregoing mandatory procedure was followed before dismissing the respondents on the alleged misconduct, we find that the ELRC was right in concluding that the termination of the respondents' employment was procedurally unfair for failure to comply with the procedure set out under Section 41 of the *Employment Act*.

40. The ancillary issue that arises is whether the appellant proved on a balance of probability that there was a valid reason for dismissing the respondents. Section 45 of the *Employment Act* defines the parameters of unfair termination and the guiding principles in the following terms;

> " 45. Unfair termination
>
> (1) No employer shall terminate the employment of an employee unfairly. (2) A termination of employment by an employer is unfair if the employer fails to prove—
>
> a. that the reason for the termination is valid;
>
> b. that the reason for the termination is a fair reason—
>
> i. related to the employee's conduct, capacity or compatibility; or
>
> ii. based on the operational requirements of the employer; and
>
> a. that the employment was terminated in

accordance with fair procedure."

41. The reason for termination was given as insubordination and absenteeism. The circumstances leading up to the terminations in question had to do with the appellant's decision to change the terms of service for its employees from oral to written contracts. The respondents insisted on being given an opportunity to have the new terms explained to them before they signed. It is clear that when the respondents demanded to understand the terms first, they were referred to Head Office where PO served them with the impugned show cause letters. Although the appellant denied any relationship between the show cause letters and the refusal to sign new contracts of employment, there is every proof that they were interlinked. The letters to show cause were dated one day after the attempt at introducing the new terms of service. The date the respondents were alleged to have grossly misconducted themselves, failed to obey lawful and proper orders and absenteeism was the same day the change to new terms were introduced. The conduct of the respondents to obey directions to see the PO, which was the basis of claiming they walked out on their employment was manipulated by the appellant.

42. These facts indicate that the appellant set up the respondents by sending them to the PO when they demanded to have the terms explained to them. The trip to see the PO is the one the appellant regarded as absconding duty, yet it is the appellant's HRM who sent them to PO. The reasons the appellant based its actions on were therefore a creation of the appellant, precipitated by it and do not meet the validity test. There were no fair reasons for the termination, neither were the reasons valid. We find that this was constructive termination of the respondents' employment by the appellant.

43. This leads us to the second issue whether the court erred in awarding one- month salary in lieu of notice plus ten months' salary as compensation for unfair termination of the respondents' services. It was submitted by the appellant that the ELRC failed to justify by facts or evidence the 10 months' salary as compensation awarded to the respondents. Mr. Onyango urged that an award under Section 49 (1) (a) & (c) of the Act was only available had the respondents proved that their termination was unjustified. Thus the appellant submitted that in the present case there was neither termination nor summary dismissal by the employer. Learned Counsel relied on *Ol Pejeta Ranching Limited v. David Wanjau Muhoro* (2017) eKLR and *Ethics and Anti- Corruption Commission vs Nicholas Mwenda Mtwaruchiu & 8 Others* (2018) eKLR in support of the said proposition.

44. Learned counsel for the respondents Mr. Ngonze, in his submissions reiterated that the termination of the respondents was ispo facto unfair, unlawful, irregular and unprocedural; and that therefore the respondents are entitled to the entirety of the award made in their favour, which he urged was neither excessive nor grounded upon any wrong principles of law. Counsel relied on the decisions in *Victoria De Meo v. Abdullahi H. Khalil &Another* (1994) eKLR and *Jackson Muiruri Wathigo T/A Murtown Supermarket vs Lillian Mutune* (2021) eKLR urging that the two cases sets out the duty of the Court when determining issues involving award of damages.

45. Section 49(1) (a) of the *Employment Act* provides that:

> "(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—
>
> a. the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;

b. where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or

c. the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal."

46. It is trite law that the award of compensatory damages for unfair termination of contract of employment is discretionary and as such the court is obligated to exercise the said discretion judiciously and upon consideration of the factors set out under section 49(4) of the Act. In the case cited by the appellant of *Ol Pejeta Ranching Limited vs David Wanjau Muhoro* [2017] eKLR, the Court of Appeal held that:

> "Remedies for wrongful dismissal and unfair termination are provided for in section 49 of the Act. They include and which the learned Judge invoked, payment equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employees at the time of dismissal. In deciding whether to adopt some of the remedies, the court has to take into account a raft of considerations such as the wishes of the employee, circumstances in which the termination took place and the extent of the employee's contribution, practicability of reinstatement, employee's length of service, opportunity available to the employee, severance payable, right to press other claims or unpaid wages, expenses reasonably incurred by the employees as a consequence of termination, conduct of the employee which to any extent caused or contributed to the termination, failure by the employee to reasonably mitigate the losses and any other compensation in respect of termination of employment paid by the employer and received by the employee.
>
> The trial judge did not at all attempt to justify or explain why the respondent was entitled to the maximum award. Yes, the trial Judge may have been exercising discretion in making the award. However, such exercise should not be capricious or whimsical. It should be exercised on some sound judicial principles. We would have expected the Judge to exercise such discretion based on the aforesaid parameters. In the absence of any reasons justifying the maximum award, we are inclined to believe that the trial Judge in considering the award took into account irrelevant considerations and or failed to take into account relevant considerations, which act then invites our intervention..."

47. See also *National Social Security Fund vs Grace K. Kazungu & another* [2018] eKLR and *Freight In Time Limited vs Rosebell Wambui Munene* [2018] eKLR where the Court of Appeal confirmed its decision in *Ol Pejeta Ranching Limited vs David Wanjau Muhoro* (supra).

48. The ELRC awarded ten months' salary as compensation, and stated that what informed the award was the respondent's' long service and clean record devoid of indiscipline. Ten months is two months short of the maximum award allowed under Section 49 of the Act. The period of service the respondents

had with the appellant is not indicated in the judgment. Admittedly this is because as testified by the respondents, there was an oral contract of employment.

49. We have perused the record of appeal, and find that the respondents were employed in August 2009; September 2010; April 2008; and, October 2006, respectively. That means the respondents had between 5 and 9 years of service. We have also confirmed from the same record that there were no issues of indiscipline reported against any of them. We have also confirmed that the respondents did not contribute to the termination of their services. We also noted that some of the respondents had secured employment elsewhere by the time the Claim was heard.

50. Taking all these factors into consideration we find that the award of ten months' salary as compensation was very high and not justified by the relevant facts that we have highlighted. We are of the view that an award of the equivalent of four months will suffice as adequate compensation to the respondents. Guided by the proposition in the cases of *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR and *Jabane v Olenja* [1986] supra we are cognizant that interference with the findings of fact by the trial court is not to be based on flimsy grounds.

51. In conclusion, we uphold the finding by the ELRC that the respondents' contracts of service were unlawfully terminated. We uphold the awards for one month's salary in lieu of notice but set aside the awards of ten months' salary as compensation for wrongful termination of employment, and in substitution award each respondent an equivalent of four months' salary.

52. As the appeal has partially succeeded, each party will bear their own costs of this appeal.

53. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 10TH DAY OF JUNE, 2022.

S. GATEMBU KAIRU (FCI Arb)

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR