Cooperative Bank of Kenya Limited v Yator (Civil Appeal 87 of 2018) [2021] KECA 95 (KLR) (22 October 2021) (Judgment)

Neutral citation: [2021] KECA 95 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 87 OF 2018

HA OMONDI, MSA MAKHANDIA & M NGUGI, JJA

OCTOBER 22, 2021

BETWEEN

COOPERATIVE BANK OF KENYA LIMITED ..... APPELLANT

AND

SAMMY KIMELI YATOR ..... RESPONDENT

(An appeal from the judgment and decree of the Employment & Labour Relations Court at Nairobi (Nduma Nderi, J.) dated 18th December, 2015 in ELRC No. 1359 of 2011)

An employer cannot revive a complaint which had been resolved and use it as a basis for summary dismissal of an employee

Reported by Kakai Toili

Labour Law *– employment – termination of an employment contract – summary dismissal of employees - whether an employer could revive a complaint which had been resolved and use it as a basis for summary dismissal of an employee - what was the effect of summarily dismissing an employee without giving him/her an opportunity to be heard.*

Statutes *– interpretation of statutes – interpretation of section 93 of the Employment Act, 2007 - where section 93 provided for the transitional provisions – claim that the provision of the Employment Act, 2007, could be applied retrospectively - whether the Employment Act, 2007, which provided for transitional provisions could be applied retrospectively – Employment Act, 2007, section 93.*

Jurisdiction *– jurisdiction of the Court of Appeal – jurisdiction to interfere with the Employment and Labor Relations Court's discretionary power to make awards - when could the Court of Appeal interfere with the Employment and Labor Relations Court's discretionary power to make an award in line with section 49 of the Employment Act – Employment Act, 2007, section 49.*

Brief facts

The respondent was employed by the appellant as the operations manager in the appellant's Nakuru branch (branch). As the operations manager, the respondent was in charge of the branch's inventory, cash services and

strong room. It was claimed that a sum of Kshs. 30,000,000 was collected from Oriental Commercial Bank Limited by the branch's manager and a cash officer and the money was entrusted to the respondent as the in-charge of the strong room. When the cashier later disbursed the amount, it was discovered that there were some anomalies and discrepancies in the bundles of notes.

Since the respondent was in charge of the strong room where the money had been kept prior to disbursement he was regarded as a key suspect. Following the conclusion of the investigations, the respondent was served with a first warning letter. However, on September 11, 2007, the respondent was served with a letter summarily dismissing him from employment for the loss of Kshs. 1,796,300. The respondent lodged an appeal against the decision but upon hearing, the decision was not reversed which then prompted the respondent to file a claim at the Industrial Court at Nairobi (Employment and Labour Relations Court).

The respondent claimed that his summary dismissal was unlawful for the reasons that it was without proper reasons, that he was not informed how he was involved in the loss of the amount, that he was dismissed after being reinstated, and that the employment contract had been breached. The Employment and Labour Relations Court found that the appellant had violated section 45(2)(a) and (c) of the , 2007, in that the summary dismissal of the respondent was not based on valid reason and that it was not carried out in a fair manner. Aggrieved, the appellant filed the instant appeal.

Issues

i. Whether an employer could revive a complaint that had been resolved and use it as a basis for summary dismissal of an employee.
ii. Whether section 93 of the Employment Act, 2007 which provided for transitional provisions could be applied retrospectively.
iii. What was the effect of summarily dismissing an employee without giving him/her an opportunity to be heard?
iv. When could the Court of Appeal interfere with the Employment and Labor Relations Court's discretionary power to make an award in line with section 49 of the Employment Act?

Relevant provisions of the Law

Employment Act, 2007

Section 93 - Transitional provisions

A valid contract of service, and foreign contract of service to which Part XI applies, entered into in accordance with the Employment Act (now repealed) shall continue in force to the extent that the terms and conditions thereof are not inconsistent with the provisions of this Act, and subject to the foregoing every such contract shall be read and construed as if it were a contract made in accordance with and subject to the provisions of this Act, and the parties thereto shall be subject to those provisions accordingly.

Held

1. As the first appellate court, it was the court's duty to reconsider the evidence adduced before the trial court and re-evaluate it so as to draw its own independent conclusions and to satisfy itself that the conclusions reached by the trial court were consistent with the evidence.
2. The , 2007, came into force on June 2, 2008 *vide* Legal Notice No. 61 dated May 23, 2008 thus repealing the previous (repealed Employment Act). While the court was alive to the principle of retrospectivity, the previous had been repealed and the only thing the legislators had to consider was the methodology of transiting from the repealed Act to the current Act and in so doing, they had to save what they saw was of importance. Hence, they inserted section 93 in the , 2007.
3. Section 93 in the , 2007 demonstrated that there was a clear intention by the legislators whilst enacting the , 2007, that it would apply retrospectively. The respondent's contract of employment could be construed under the , 2007. The trial court was thus right in making the decision based on the 2007.
4. From the record, the respondent's employment was terminated without according him a fair hearing. Even under the repealed legislation, that was a necessary prerequisite. Indeed, the appellant's own

witness conceded that much. Having been resolved, the complaint was as good as buried forever and the appellant could not revive it later and use it as a basis for summary dismissal of the respondent as it happened in the instant case. That amounted to double punishment over the same complaint which was unfair and unconscionable.

5. Even where an employee had committed gross acts of misconduct, which acts warranted summary dismissal, the law required that before such sanction was undertaken, an employer had to ensure procedural fairness to the employee by allowing the employee to give his defence. Where the employer was unable to hear the employee in defence, such had to only be in exceptional circumstances which the employer had to demonstrate.
6. The court considered the appellant's disciplinary policy and procedure manual to ascertain the disciplinary procedure adopted in the case of the respondent and had not been able to find any, considering that the earlier complaint had been dealt with exhaustively. If another complaint arose after the earlier one, then the appellant was obligated to commence the termination procedure in accordance with its manual. As that did not happen the summary dismissal of the respondent was unfair, unprocedural and illegal. Therefore, there was no basis for interfering with the trial court's finding to that effect.
7. The act of summarily dismissing the respondent without giving him an opportunity to be heard as was the case with the first complaint amounted to unfair termination. The burden was on the appellant to prove that the employment was terminated in accordance with fair procedure. The appellant did not discharge that burden at all.
8. One of the guiding principles for the remedies under section 49 of the Employment Act, 2007 was that damages were awarded to compensate the claimant, not as punishment to the employer but to make good the employee's loss. The remedies for wrongful dismissal and unfair termination were provided for in section 49 as read with section 50 of the Act. Among them was an award of 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. That was what the trial court based its award on. Section 49(4) of the Employment Act set out 14 considerations that should be taken into account in deciding the appropriate remedy under section 49(1). It had not been demonstrated to the court's satisfaction that the trial court did not take into account any of those considerations. In any event, the remedies were discretionary.
9. Section 50 of the , 2007, as well as section 12(3)(vi) and (vii) of the Employment and Labor Relations Court Act gave the Employment and Labor Relations Court power to make an award in line with section 49 of the Employment Act, 2007. The power to grant the remedies provided for under section 49 was discretionary. Such discretion had to however be exercised judiciously. The court ought not to have interfered with the exercise of such discretion unless it was satisfied that the Employment and Labor Relations Court misdirected itself in some matter and as a result arrived at a wrong decision, or that it was manifest from the case as a whole that the Employment and Labor Relations Court was clearly wrong in the exercise of discretion and occasioned injustice.

Appeal dismissed.

Orders

Costs to the respondent.

Citations

Cases

1. Co-operative Bank of Kenya Ltd v Banking Insurance & Finance Union — Explained
2. Hema Hospital v Wilson Makongo Marwa — Followed
3. Kenneth Karisa Kasemo v Kenya Bureau of Standards [2013] eKLR — Cited
4. Kenya Revenue Authority & 2 others v Darasa Investments Limited — Explained

5. National Social Security Fund Board Trustees & Others vs. Central Organization of Trade Union (K) [2015] eKLR — Explained
6. Peter Otieno Opollo v Board of GovernorsKisumu Polytechnic College & another — Explained
7. SamuelKamau Macharia and Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR — Explained
8. Sanitam Service (EA)Ltd vs. Rentokil — Explained
9. Sotik Highlands Tea Estates Limited v Kenya Plantation and Agricultural Workers Union — Explained
10. Le Monde Luggage cc t/a Pakwells Petze vs. Commissioner G. Dun & Others, — Explained

Statutes

1. Employment Act,2007 — section 4(21) ,;12(3)(vi)(vii);17(C);45(2)(a)(C) (5) ;49(1)(C)(4)5;50;1;93 — Interpreted

Advocates

None mentioned

JUDGMENT

1. This appeal arises from the judgment and decree of the Employment and Labour Relations Court "ELRC" at Nairobi by N Nderi, J delivered on 18th December 2016 in ELRC No 1359 of 2011. In the said suit, the respondent had sued the appellant claiming;

    1. Declaration that his summary dismissal from employment by the appellant on 11th September 2007 was wrongful and contravened section 4(21) of the *Employment Act*, 2007.
    2. Declaration that the appellant unfairly terminated the respondent from employment on 11th September 2007 and contravened sections 45(2)(a) and 45(5) of the *Employment Act* 2007.
    3. Declaration that without a certificate of service under section 51 of the *Employment Act*, 2007, the appellant wrongfully, illegally and contrary to the law and the appellant's company policy terminated the respondent's employment.
    4. Damages for wrongful summary dismissal of the respondent and unfair termination of the respondent's employment by the appellant on 11th September 2007.
    5. Claim against the appellant for settlement in his final dues as follows:-
        a. 2 months' salary in lieu of notice, Kshs 98,141 x 2 = Kshs. 196,282/-
        b. Severance pay for 15 years worked, Kshs 98,141 x ½ x 15 years =Kshs 736,057.50
        c. House allowance for two month, Kshs 98,141x 2 =Kshs 196,282/-

        Total Kshs 956,339.50/- and an order for issuance of certificate of service to the respondent.

2. According to the pleadings the respondent was employed by the appellant in 1994 and posted at Cooperative House branch as a support staff. He however rose through the ranks attaining the position of supervisor in 2002 and was thereafter transferred to Meru branch, then to Nakuru branch where he worked until the termination of his services by the respondent. Whilst at Nakuru branch, he had been appointed to the position of the operations manager albeit in acting capacity and was reporting to the branch manager, one, Cyrus Mwangi. As the operations manager, the respondent was in charge of the branch's inventory, cash services and strong room. His monthly salary was then Kshs 98,141/= plus other allowances. The respondent was however surprised to receive a show cause letter dated 31st May 2007 following an incident in which the appellant lost Kshs 1,796,300/=.

3. It would appear that a sum of Kshs 30,000,000/= was collected from Oriental Commercial Bank Limited by Cyrus Mwangi and Leonard Surmeti, a cash officer which money was entrusted to the respondent as the in charge of the strong room. When the cashier later disbursed the amount, it was discovered that there were some anomalies and discrepancies in the bundles of notes. It was noted that some notes in one thousand bundles had been substituted with notes of one hundred and sealed. Since the respondent was in charge of the strong room where the money had been kept prior to disbursement he was regarded as a key suspect. Subsequently on, 4th June 2007, the respondent received a suspension to pave way for thorough investigations.

4. On 6th July 2007, following conclusion of investigations, the respondent was served with a first warning letter.

5. However, on 11th September 2007 the respondent was served with a letter summarily dismissing him from employment for the loss of Kshs. 1,796,300/-. The letter stated that despite his appearance before the disciplinary committee on 15th August 2007, his explanation could not exonerate him from the charges of loss of money from the strong room that had been preferred against him and that the appellant had therefore made a decision to dismiss him from service in accordance with the provisions of the staff manual. The respondent lodged an appeal as required against the decision vide letter on 13th September 2007 but upon hearing, the decision was not reversed which then prompted the respondent to file a claim at the Industrial Court at Nairobi, now ELRC.

6. In his memorandum of claim dated 5th August 2011, the respondent maintained that his summary dismissal was illegal, unlawful, unprocedural and untenable in law for the reasons that it was without proper reasons, not being informed as to how he was involved in the loss of the amount, dismissing him even after reinstating him and lastly, breaching the employment agreement between them. The respondent therefore claimed Kshs 956,339.50/= as already stated.

7. The appellant filed a statement in response in which all the respondent's allegations were denied. The appellant admitted though to having suspended the respondent from employment owing to the loss of Kshs 1,796,300/= which had occurred whilst he was the operations manager and whose duties included being the custodian of the strong room, that the respondent had been given a letter to show cause whose response was found unsatisfactory. That the respondent was nonetheless reinstated on 6th July 2007, and served with the first warning letter which was in accordance with the staff manual for flouting cash and cash movement procedures. The appellant further pleaded that the respondent was reinstated to his duties pending the conclusion of investigations and at that time, he had already been found to have breached the cash and movement procedures thus the respondent's summary dismissal was justified.

8. That the procedure laid down in the staff manual was strictly followed. That the respondent was not entitled to any payment of severance pay as his termination from employment was not as a result

of redundancy but that of summary dismissal. That even if the summary dismissal was wrong and unlawful then the entitlement of the respondent was a one-month salary in lieu of notice as stipulated in the staff manual.

9. On house allowance, the appellant stated that the payable allowance was Kshs 12,607/= per month and not Kshs 98,141/=. The appellant maintained that the appellant was not entitled to general damages.

10. After considering the pleadings, evidence, submissions from both parties and the law, the trial court found that the appellant had violated sections 45(2)(a) & (c) of the *Employment Act*, in that the summary dismissal of the respondent was not based on valid reason and that it was not carried out in a fair manner. The trial court then awarded the respondent the following as compensation:

    a. Kshs 981,410 being ten months' salary as compensation for the unlawful and unfair summary dismissal.

    b. Kshs 98,141 being one months' salary in lieu of notice.

    c. Kshs 25,214 being two months house allowance.

    d. The appellant was directed to provide the respondent with a certificate of service within thirty days from date of judgment.

    e. The award to attract interest at court rates from date of filing suit till payment in full.

    f. The appellant to pay the costs of the suit.

11. It is that judgment that prompted the appellant to file this appeal on grounds that the trial court misdirected itself; by entering judgment in favour of the respondent whereas there was no evidence in support thereof; in holding that the appellant was in violation of section 45(2)(a) and (c) of the *Employment Act*, 2007 whereas the said Act was not in operation at the time the respondent's cause of action arose; by holding that the appellant acted unlawfully and unfairly in placing the blame on the respondent and not his superior; in making a finding that the appellant acted unlawfully in punishing the respondent twice in respect of the same offence; and by entering judgment in favour of the respondent for a sum of Kshs 981,410 as compensation for unlawful and unfair termination in total disregard and or consideration of the appellant's submissions that the damages payable to the respondent was 1 month salary (ie Kshs 98,141/-) being the equivalent of the notice period provided for in the respondent's contract of employment; by relying on the provisions of section 49(1)(c)of the Employment Act, 2007 whereas the said Act was not in operation at the time the respondents cause of action accrued; and failing to consider adequately and or at all the appellants evidence to the effect that the respondent's termination of his employment was justified in the circumstances of the case; lastly, the appellant asked for costs of the appeal.

12. The appeal was canvassed by way of written submissions with limited oral highlights. The appellant in his submissions clustered the nine grounds of appeal into four thematic areas to wit; responsibilities of the respondent; the applicable law; whether the dismissal was justified and the damages awarded.

13. Without reiterating the summarized facts of the claim, the appellant submissions through Mr Kimondo, learned counsel on the 1st thematic area is that the respondent was under duty to verify the correctness and the accuracy of the amount he received from the Oriental Commercial bank, as it was his duty to do so being the custodian of the branch's assets including cash in the strong room. There was cash and cash movement operating manual which guided the manner in which the respondent was to deal with money received from another bank which the respondent failed to follow and he could

not therefore the apportion blame on the acting manager Mr Cyrus Mwangi or Mr Leonard Surmeti who collected the money from Oriental Commercial Bank. Having failed to abide by the dictates of the manual the respondent was negligent and as a result the appellant lost the amount. The act was serious enough to entitle the appellant to summarily dismiss the respondent.

14. On the 2nd cluster, the appellant faulted the trial court for basing its judgment on a law that did not exist at the time the respondents' services were terminated and especially the finding that the appellant was in violation of section 45(2)(a) and (c) of the *Employment Act* 2007. That the said Act came into force on 2nd June 2008 while the respondent had been summarily dismissed on 11th September 2007. Fortifying this limb, the appellant relied on the supreme court case of *Samuel Kamau Macharia and Another vs Kenya Commercial Bank Limited & 2 Others [2012] eKLR* on the retrospective application of statutes and maintained that the said Act was not meant to apply retrospectively.

15. On the 3rd cluster, the appellant submits that the respondent was governed by the Staff Manual which contains terms and conditions of employment including termination and the procedure thereof and that summary dismissal was an option available to the appellant. That the respondent's conduct constituted gross misconduct as per the provisions of Section 17(c) of the *Employment Act*, cap 226 (now repealed) hence the summary dismissal was lawful. That even if the current provisions of the current *Employment Act* 2007 were to apply the same result would obtain.

16. The appellant urged this court to rely on the case of *Sotik Highlands Tea Estates Limited vs. Kenya Plantation & Agricultural Workers Union [2017] eKLR* to find that indeed the appellant was entitled to summarily terminate the respondent's services for gross misconduct; as the law by then, did not provide for the procedure to be followed in case of summary dismissal hence the only law applicable was the rules of natural justice and common law principles.

17. On the 4th thematic area the appellant submits that since the *Employment Act* 2007 was not in operation when the respondent was summarily dismissed, the remedies that were available to him were at common law, thus the award of ten months salary as compensation was erroneous and that this court should consider one month salary as appropriate compensation for wrongful and unfair termination. The appellant relied on the following cases *Kenneth Kariza Kasemo vs. Kenya Bureau of Standards [2013] eKLR* and *Peter Otieno Opollo vs. Board of Governors Kisumu Polytechnic College & Another[2013] eKLR* to buttress the above argument.

18. In his written submissions, the respondent through Mr Mwenesi learned counsel, submitted that the issuance of a certificate of service to the respondent by the appellant was a fundamental and mandatory requirement in terms of good labour relations between the parties. However, since the appellant had failed to comply with that requirement the respondent asked us to reverse the decision of the trial court on the issue as failure to do so we will simply be supporting and endorsing an illegality.

19. As to whether the trial court applied wrong principles and evaluation of evidence in arriving at its decision, the respondent highlighted chronologically the events leading to the dismissal of the respondent, but of importance is the fact that vide the warning letter dated 6th July 2007, the matter was deemed as closed, having lifted the suspension and reinstated the respondent into employment. That under the appellant's disciplinary procedure, a warning is a disciplinary measure and dismissal or termination would only be justifiable if the same employee who received a warning letter repeats a similar or more serious offence the second or third time.

20. The respondent submitted that in the testimony of the appellant, there was no mention of another offence committed by the respondent after the issuance of the warning letter. The witness however alluded to the fact that there was no provision for double punishment for the same offence as it happened to the respondent. The respondent submitted that from the testimony of the appellant in

court, the witness was not aware of the outcome of the investigations and which in any event was not tendered in evidence. As such, the trial court reached an informed decision in allowing the respondent's claim.

21. On the issue as to whether the trial court erred in awarding compensation for unlawful and unfair summary dismissal in terms of section 49(1) (c) as read with section 49(4) of the *Employment Act*, the respondent submitted that the decision was rightly arrived at. This is because section 93 of the *Employment Act* 2007 allows for the retrospective application of the same Act. That section provides that the contract made in the past and under the repealed *Employment Act* should be read and construed as if it were a contract made in accordance with and subject to the provisions of the *Employment Act* 2007.

22. Accordingly, the trial court was right in invoking section 49 to award the respondent the damages, which compensation was in any event at the discretion of the court. It was further submitted that even if section 93 had not been in place, still the Constitution would have caused the trial court to tilt its wings in triangulation with section 40 of the repealed *Employment Act*.

23. The respondent laid emphasis to the fact that the appellant had admitted that the respondent was given a first warning and therefore that was the end of the matter. If the appellant was inclined to initiate fresh disciplinary proceedings against the respondent, it should have given a fresh notice to show cause letter before the summary dismissal of the respondent. Further the appellant‘s computation of the respondent's terminal benefits was on the basis that the respondent had resigned yet this was not the case. Based on the foregoing, the respondent urged us to dismiss the appeal.

24. As the first appellate court, it is our duty to reconsider the evidence adduced before the trial court and re-evaluate it so as to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence as was held in the case of S*anitam Service (EA)Ltd vs Rentokil* [2006] 2 KLR 70.

25. We have carefully considered the judgment of the trial court, the record of appeal, the submissions by counsel as well as the authorities cited and the law. In our view only three issues stand out for determination in this appeal:

    a. Whether the respondent’s summary dismissal was unprocedural, unlawful and illegal.

    b. Whether the learned judge erred in awarding compensation for unlawful and unfair summary dismissal.

    c. Certificate of service

26. With regard to the first issue, we wish to address ourselves first on the question of the trial court applying the law retrospectively against the backdrop of the well-known principles of law that legislations are deemed to apply prospectively unless of course the legislation provides for its retrospective application. The appellant has largely based its appeal on the fact that the trial court did not take into consideration that the respondent's employment was terminated before the *Employment Act* 2007 came into force. That the trial court anchored its finding that the dismissal was unlawful and the award of damages to the respondent on the said Act. To the appellant this was wrong. That if anything, the trial court should have considered the claim on the basis of the repealed *Employment Act*.

27. The issue of the effect of repealed legislation was discussed at length in the case of N*ational Social Security Fund Board Trustees & Others vs Central Organization of Trade Union (K)* [2015] eKLR, where the court held that,

> "We have no hesitation in addition in upholding that once an Act of Parliament is repealed it ceases to exist completely unless the Repealing Act provides otherwise and that the repealed law cannot form an order of *mandamus*."
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> The Court cited The Punjab - Haryana Indian Case in the High Court of India *National Planners Limited vs Contributories ETC Air* (1958) PH 230 where Bhandari CJ stated as follows;
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> "The effect of repealing a statue is to obliterate it as completely from the records of Parliament as it had never been passed, and it must be considered as a Law that never existed, except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law."
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> However, clarity of the same issue of retrospective application of statutes was settled by the Supreme Court in the case of; *Samuel Kamau Macharia and Another vs. K.C.B & 2 Others* [2012] eKLR where it was held -
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> "As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (*Halsbury's Laws of England*, 4th Edition Vol 44 at p 570)."

28. It should be noted that the *Employment Act*, 2007, came into force on 2nd June 2008 vide legal notice No 61 dated 23rd May 2008 thus repealing the previous *Employment Act*. The contention by the appellant is that the respondent was terminated before the enactment of the said Act or before it came into force and thus the trial court ought not to have applied the said law whilst dealing with the matter but rather ought to have applied the provisions of the repealed *Employment Act*.

29. While we are alive to the principle of retrospectivity, this law had been repealed and the only thing the legislators had to consider was the methodology of transiting from the repealed act to the current act and in so doing, had to save what they saw was of importance. Hence they inserted section 93 in the current *Employment Act* which provides *inter alia*;

> "A valid contract of service..... entered into in accordance with the repealed *Employment Act* shall continue in force to the extent that the terms and conditions thereof are not inconsistent with the provisions of this Act, and subject to the foregoing every such contract shall be read and constructed as if it were a contract made in accordance with and subject to the provisions of this Act, and the parties thereto shall be subject to those provisions accordingly."

30. The above clearly demonstrates that there was a clear intention by the legislators whilst enacting the current *Employment Act* that it would apply retrospectively. In the premises we agree with the trial court's finding that respondent's contract of employment could be construed under the current *Employment Act*. The trial court was thus right in making the decision based on the *Employment Act* 2007. The grounds of appeal and submissions by the appellant to the effect that the trial court erred in law in invoking the current *Employment Act* in determining the claim has no legal basis at all therefor.

31. From the record it is apparent that the respondent's employment was terminated without according a fair hearing. Even under the repealed legislation, this was a necessary prerequisite. Indeed, the appellant's own witness did concede that much.

32. As already stated the respondent's tribulations started when he was suspected to have been involved in the loss of money at the appellant's Nakuru branch. The respondent was as a result suspended to allow for investigations. The suspension was subsequently lifted following the conclusion of investigations and respondent was given another lease of life with a warning that incase of any similar infractions in future the respondent would face drastic sanctions. Later, on 11th September, 2008 the respondent was issued with a letter of summary dismissal for the same mistake that he had already been forgiven. The question that remains unanswered is for what offence or infraction was this subsequent summary dismissal given that the first complaint had already been dealt with, resolved, and a determination made known to the respondent? The complaint having been resolved it was as good as buried forever and the appellant could not revive it later and use it as a basis for summary dismissal of the respondent as it happened here amounted to double punishment over the same complaint which is unfair and unconscionable.

33. That notwithstanding, even where an employee has committed gross acts of misconduct, which acts warrant summary dismissal, the law requires that before such sanction is undertaken, an employer must ensure procedural fairness to the employee by allowing the employee to give his defence. Where the employer is unable to hear the employee in defence, such must only be in exceptional circumstances which the employer must demonstrate. We have laboured through the appellant's disciplinary policy and procedure manual to find out the disciplinary procedure adopted in the case of the respondent and have not been able to find any, considering that the earlier complaint had been dealt with exhaustively. If another complaint arose after the earlier one, then the appellant was obligated to commence the termination procedure in accordance with its manual. That this did not happen the summary dismissal of the respondent was unfair, unprocedural and illegal. We therefore find no basis for interfering with the judge's finding to that effect. It follows that the act of summarily dismissing the respondent without giving him an opportunity to be heard as was the case with the first complaint amounted to unfair termination. The burden was on the appellant to prove 'that the employment was terminated in accordance with fair procedure. The appellant did not discharge this burden at all.

34. Turning on the issue of the damages awarded, one of the guiding principle for the remedies under section 49 is that damages are awarded to compensate the claimant, not as punishment to the employer but to make good the employees loss. In *Hema Hospital vs Wilson Makongo Marwa [2015] eKLR* this Court adopted with approval the holding of the Labour Court of South Africa in *Le Monde Luggage cc t/a Pakwells Petze vs Commissioner G Dun & Others, Appeal Case No JA 65/205* which when applying provisions of the Labor Relations Act of South Africa which is similar to ours held that:

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

35. The remedies for wrongful dismissal and unfair termination are provided for in section 49 as read with section 50 of the Act. Among them is an award of 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." This is what the trial court based its award on. But Section 49 (4) sets out 14 considerations

which should be taken into account in deciding the appropriate remedy under 49 (1); It has not been demonstrated to our satisfaction that the trial court did not take into account any of the considerations aforesaid. In any event, it should never be forgotten that the remedies are discretionary. Expounding on this aspect this court in the case of *Co-operative Bank of Kenya Ltd vs Banking Insurance & Finance Union CA No 188 of 2014* stated as follows:

> "Our understanding of the Act is that the prescribed remedies...are discretionary rather than mandatory remedies, to be granted on the basis of the peculiar facts of each case. This is made absolutely clear by the use of the word "may", which in the context of the provision imports a discretionary rather than a mandatory meaning. That the remedies....are not a mandatory remedies, is made even clearer by section 49(4) which sets out some 13 considerations which the court must take into account before determining what remedy is appropriate in each case. Those considerations include the wishes of the employee, the circumstances of the termination and the extent to which the employee caused or contributed to it, the practicability of reinstatement or re-engagement, the common law principle that an order for specific performance of a contract for service should not be made save in exceptional cases, the employee's length of service with the employer, the employee's reasonable expectation of the length of time the employment was to last but for the termination, the employee's opportunities for securing comparable or suitable employment, any conduct of the employee that may have caused or contributed to the termination, any action on the part of the employee to mitigate his loses, etc. What all the above means, is that before exercising the discretion to determine which remedy to award, the court must be guided by the above comprehensive list of considerations."

36. Section 50 of the *Employment Act*, as well as section 12(3) (vi) and (vii) gives the Employment and Labor Relations Court power to make an award in line with section 49 aforementioned. As already stated power to grant the remedies provided for under section 49 of the Act is discretionary. Such discretion must however be exercised judiciously, and in the words of this court in *Kenya Revenue Authority & 2 others vs Darasa Investments Limited [2018] eKLR ,Civil Appeal No 24 of 2018*:

> "The court ought not to interfere with the exercise of such discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice."

37. In the instant appeal, the learned judge awarded ten-months salary as compensation and the reasons given were that the respondent had lost a good job in the lucrative banking industry and it would be difficult to get another job in the sector once accused of loss of money. That the respondent suffered loss of his source of income at the time he had big loans to pay and young children to take care of. Lastly that the respondent lost his job without notice or payment in lieu thereof and suffered loss and pain having served the appellant for a period of fifteen years. We find no fault in the above reasoning. We indeed embrace it and therefore have no basis to interfere with the award of ten months salary as compensation. The other awards were justified and equally find no basis to interfere with the same.

38. The respondent submitted at length on the issue of certificate of service upon termination which had not been issued to the respondent. Indeed, in the end he implored us to direct that the appellant do forthwith issue the same to the respondent. Our simple answer is that we are unable to address the issue substantively as there is no cross appeal.

39. In the end, we find the appeal to be devoid of merit and accordingly dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. OMONDI

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR