IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, JJ.A)

CIVIL APPEAL NO. 89 OF 2017

BETWEEN

AGA KHAN HOSPITAL KISUMU.....APPELLANT

AND

ERICK WANJOHI .....RESPONDENT

(An appeal from the judgment of the Employment and Labour Relations Court at Kisumu ***(H. Wasilwa, J.)*** *dated 30th October, 2014*

in

ELRC Cause No. 264 of 2013)

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JUDGMENT OF ASIKE-MAKHANDIA, JA

In our society today, losing jobs and or employment has become a daily norm. Be it through retrenchment, termination or even resignation. The question that begs to be answered then is whether when one loses his job, he does so willingly or is forced; so that the termination is either lawful, unlawful and or wrongful. This is one case which takes us on such a journey. It is an appeal from the judgment of the Employment and Labour Relations Court at Kisumu, **"ELRC"** in which the respondent's claim was allowed with costs.

The appellant employed the respondent as an internal auditor on 13th February, 2012 vide contract of employment dated 10th January, 2012. The agreed remuneration was Kshs. 110,000 per month. According to the respondent, he served the appellant diligently until 13th August, 2013 when the appellant in breach of the contract of employment terminated his services. Aggrieved by the decision the respondent filed a claim dated 28th September, 2013 in the ELRC. He alleged that the termination was wrongful and in breach of terms of employment as he was not given sufficient notice or pay in lieu of notice. Nor was his accrued leave paid and that the provisions of the Employment Act were similarly flouted. He contended that he had never committed any acts of gross misconduct or refused to follow lawful instructions and had never been served with a warning letter before to warrant his summary dismissal from employment. If anything he was responsible for unearthing financial fraud at work perpetrated by some employees which led to some of them being sacked.

He also contended that his appraisal was conducted by a panel not properly constituted in the absence of the audit chair whom he was required to report to directly hence the process was flawed and unprocedural. Though it was this appraisal that informed part of his sacking, the appraisal, according to him was used to set him up. He sought to be paid 3 months' salary in lieu of notice, 41 days leave, salary for the month of August, 18 months pension not remitted and damages for wrongful termination. He conceded though that on termination he was paid Kshs. 245,893 as part of his terminal dues.

The appellant in their statement of response to the claim averred that the services of the respondent were lawfully terminated after complying with procedural fairness as required by the Employment Act. It was claimed that the respondent had willfully neglected to perform proper internal audit and or carelessly and improperly performed the same. It was the appellant's contention that it had summarily dismissed the respondent due to his conduct on reasonable grounds and in strict compliance and observance of the law, procedural fairness and rules of natural justice. The appellant alleged that it lost Kshs. 3,746,711 from the chief cashier's office and Kshs. 746,496 from the front office cashiers under the watch of the respondent yet as its internal auditor; it was his key responsibility and contractual obligation to put in place mechanism to safeguard against and promptly detect such theft and report to the management. He was also expected to advise the appellant's management on appropriate ways to ensure money collected was not stolen hence theft should not have occurred.

It was further averred by the appellant that the respondent was dismissed for underperformance and gross misconduct. He had scored a 38%

in his performance appraisal and therefore it was justified in summarily dismissing him. In the premises the respondent was not entitled to the prayers sought in the claim. It however, counter claimed from the respondent Kshs. 4, 493, 207 which it claimed was lost through his negligence and non-performance as the internal auditor. The counter claim was denied by the respondent nonetheless.

Other than the statement of claim, response and counter claim as well as reply and defence to the counter claim, the respondent testified in person. The appellant on its part called 3 witnesses. All witnesses reiterated and adopted their statements recorded earlier.

Upon evaluation of the totality of evidence adduced and submissions by parties, the trial court ruled in favour of the respondent holding that the appellant was not justified in summarily terminating the respondent's employment as there was no act of gross misconduct committed by him and that performing below average did not amount to gross misconduct within the meaning of section 43 of the Employment Act. Secondly, that the respondent was not given any hearing as envisaged by section 41 of the Employment Act. Because of this the trial court found that the respondent was unfairly terminated.

Having so found, the court awarded the respondent the following; 3 months' salary in lieu of notice, Kshs. 360,000; 41 days accrued leave amounting to Kshs. 189,230; salary for 13 days worked in August totaling Kshs. 50,333; 15 months pension not remitted being Kshs. 86,000; and 12 months gross salary as damages for unlawful termination amounting to Kshs. 1,440, 000. The respondent in total was awarded in total Kshs. 1,879,670 upon deduction of monies already paid to him upon termination. The above amount was subject to statutory deductions. The appellant was also ordered to issue the respondent with a certificate of service. The appellant's counter-claim was dismissed with costs for want of proof that the respondent owed the Kshs.4, 493, 207 claimed by the appellant.

Dissatisfied with the judgment and decree of the trial court, the appellant lodged the present appeal and raised eight grounds which in summary are that the learned Judge erred in law and in fact by; failing to consider the mitigating factors and proceeded in a whimsical manner to award the respondent 12 months gross salary as compensation; failing to exercise proportionality and fairness in awarding the respondent the colossal sum of 12 months gross salary compensation which had the net effect of jeopardizing and crippling the appellant's operations; failing to take into account the various instances of gross misconduct and disobedience by the respondent throughout the course of his employment because if she had done so, she would not have awarded 12 months' salary compensation; awarding a sum in respect of 41 accrued leave days without an analysis of the evidence and disregarding the appellant's evidence in this respect; awarding a sum in respect of 15 months pension yet the respondent had not been confirmed due to his own lack of cooperation; failing to find based on the evidence that the respondent's dismissal was fair and justified; failing to take into account and to consider the evidence adduced on behalf of the appellant; and failing to appreciate the submissions by counsel for the appellant.

At the plenary hearing of the appeal, learned counsel **Mr. Maganga** appeared for the appellant whereas learned counsel, **Mr. Odeny** appeared for the respondent. Counsel wholly relied on their written submissions.

Mr. Maganga submitted that the respondent's employment was terminated for his gross misconduct which caused the appellant financial loss to the tune of Kshs. 4,493,207/-. He contended that the respondent failed to complete his audit plan for the year 2013 because had he done so, he would have discovered the financial fraud aforesaid. That though the respondent made 11 audits, only four were finalized hence his dismal score of 38% during his performance appraisal. He faulted the trial court for making a finding that the respondent's employment was terminated as a result of a witch hunt for uncovering fraud and submitted that the respondent failed to trace any financial impropriety in the year 2012 which became apparent after an external audit and that what he uncovered in May 2013 was traced to 2010 accounts. Counsel's further argument was that the respondent's termination was predicated upon the contract of employment which provided for termination on notice hence awardable damages were those equivalent to the notice period provided for in the contract of employment. Therefore the respondent was not entitled to the maximum amount of damages provided for under Section 49 (1) of the Employment Act. He relied on the case of **Central Bank of Kenya v Nkabu Civil Appeal No. 81 of 2000** for this proposition.

Counsel submitted further that it was wrong for the court to award 41 accrued leave days when the respondent had conceded to have been paid through his advocates for 37 accrued leave days. That even though the respondent was to be confirmed into permanent employment after the three months' probation period, he had never been confirmed $1^1/2$ years later due to his underperformance. He reiterated that the respondent was procedurally summarily dismissed in line with Section 44 (3) of the Employment Act when he failed to obey his supervisor's instructions to carry out a high risk audit, failed to avail the audit plan for 2013, he finalized only 4 of 15 audits, the quality of audits finalized was wanting, performed dismally in his performance appraisal and when he failed to detect the cash fraud. Counsel therefore urged this Court to allow the appeal and set aside the judgment and decree of the ELRC.

Opposing the appeal, Mr. Odeny contended that the various allegations raised by the appellant in its submissions were not contained in the respondent's termination letter nor pleaded and proved as it only highlighted the issue of the respondent's performance at work. He faulted the appellant's reliance on an old case and argued that the law was dynamic hence compensation for wrongful dismissal is now governed by Section 49 (1) (c) of the Employment Act. That the award of 12 months' salary as damages for unlawful termination of employment was justified. Counsel submitted that the respondent pleaded and proved that he had 41 accrued leave days and the same was not controverted by the appellant. That the admitted payment was with regard to the respondent's pension and not accrued leave days. It was counsel's argument that though the respondent had not been officially confirmed into permanent employment, he had worked for the appellant for 19 months and as such his temporary employment was automatically converted into permanent employment by operation of the law pursuant to Section 37 of the Employment Act. That the respondent was entitled to the staff pension scheme and life assurance scheme for 15 months by virtue of clause 13 of the employment contract. Finally, counsel submitted that the appellant did not follow due process when terminating the services of the respondent as he was not accorded a fair hearing. He urged this court to dismiss the appeal as it was bereft of merit.

I have considered the record, submissions by respective counsel, authorities cited and the law. The issues for determination are whether the respondent's termination was fair, whether the respondent was in permanent employment and whether the respondent was entitled to the remedies granted. In the process of considering the issues so I will bear in mind my duty as the first appellate court which is to re-evaluate the evidence tendered in the trial court afresh in order to reach my own conclusion as envisioned by Rule 29(1) (a) of the Rules of this Court.

I must also defer to the findings of fact made by the trial court, especially where they are based on the credibility of witnesses because the trial court had the added advantage of hearing and seeing the said witnesses testify. Nevertheless, I am entitled to interfere with those

findings if they are based on no evidence or on a misapprehension of the evidence or the trial court is shown demonstrably to have acted on wrong principles in reaching the findings**.** See **Mwangi v Wambugu [1984] KLR page 453.**

As regards whether the respondent was unfairly terminated, the onus was on the appellant to prove that the dismissal was justified. In the case of **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR** this Court had this to say on the issue:-

> ***"There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed thus obviating reliance on the Evidence Act and the Civil Procedure Act/Rules. Finally the remedies for breach set out under section 49 are also fairly onerous to the employer and generous to the employee. But all that accords with the main object of the Act as appears in the preamble:***
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> > ***"…to declare and define the fundamental rights of employees, to provide basic conditions of employment of employees…"***
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> ***Those provisions are a mirror image of their constitutional underpinning in Article 41 which governs rights and fairness in labour relations. Section 47 (5) of the Act provides for the procedure to be followed in matters of complaints of unfair termination as follows:***
>
> > ***"(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer."***
>
> ***So that, the appellant in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 (1): "to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45."***

Summary dismissal as was in this case occurs when an employer terminates the employment of an employee without notice or with less notice period than that which the employee is entitled to by any statutory provision or contractual term. It also occurs where there is payment in lieu of notice. But as a general rule, no employer is entitled to act as above unless the employee is guilty of gross misconduct. Section 44(4) (a) of the Employment Act, provides a list of what may constitute gross misconduct. For purposes of the present appeal, subsection (4) (c) is relevant as it is the section that was invoked by the appellant in dismissing the respondent. It provides that an employee will be dismissed for gross misconduct if:

> **"(c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly."**

In the instant appeal, it is not in dispute that the respondent failed to meet his targets. He even scored a dismissal 38% in his performance appraisal which could have amounted to gross misconduct under subsection (4) (c) above. However, the issue here is whether due process was followed by the appellant in terminating the respondent's employment. Both the employee and employer under Section 35(3) and (4) of the Employment Act have specific rights regarding termination of employment. For instance, an employer or employee has a right to terminate a contract of employment without notice so long as it is done in accordance with the law and process. Nothing stops an employer from summarily dismissing an employee for gross misconduct save that Section 44 requires such an employer to demonstrate that the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of employment by doing or not doing a series of things listed in that section and any other related things. But that is not all, Section 41 provides the procedure for notification and hearing before termination on grounds of gross misconduct. An employer must, before terminating the employment for gross misconduct:

> **"...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.**
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> **(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".**

In this case the reason given was that the respondent was negligent in the discharge of his duties as an internal auditor. That he caused the appellant to loose Kshs.4, 493, 207. As an internal auditor it was no doubt his duty to trace and seal any loopholes that could lead to the loss of money. But as far as the respondent is concerned he exactly did that. He unearthed that loss which led to the sacking of some staff in the finance department of the appellant. He maintained that he never stole the money since he unearthed the culprits who were promptly dealt with. Based on the foregoing, I would agree with the trial court that this was not reason that could be termed as gross misconduct that would attract summary dismissal. In a nutshell the appellant was not justified to summarily terminate the respondent's empoloyment as there was no act of gross misconduct committed by the respondent and performing below average which is not deliberate as was the case here during performance appraisal did not amount to a case of gross misconduct. Besides the respondent was not given a hearing envisioned in section 41 of the Employment Act above. It follows that the act of the appellant in summarily dismissing the respondent without giving him an

opportunity to be heard amounted to unfair termination as defined in Section 45 of the Act. Section 45(3) of Employment Act which provides *inter alia*:-

> **"(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated".**

Even assuming that the reasons for the dismissal of the respondent met the threshold, was the termination in accordance with fair procedure or due process? The burden was on the appellant to prove that fact which he did not discharge. (See: **Kenfreight (E.A) Limited v Benson K. Nguti, [2016] eKLR).**

Based on the foregoing, it is apparent that the respondent was not given any hearing at all. For that very reason the termination of his employment was unfair as correctly found by the trial court. For avoidance of doubt, termination of employment is deemed to be unfair on the following grounds under section 45(2) of the Employment Act:

> **"A termination of employment by an employer is unfair if the employer fails to prove:**
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> **a. that the reason for the termination is valid;**
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> **b. that the reason for the termination is a fair reason:-**
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> **i. related to the employee's conduct, capacity or compatibility; or**
>
> **ii. based on the operational requirements of the employer; and**
>
> **c. that the employment was terminated in accordance with fair procedure."**

The elements of a claim for unfair dismissal were explained in **Tolley's Employment Handbook, 20th Edition** at paragraph 53.1 at page 984 as follows:

> **"An employer who dismisses an employee without good reason or without following a fair procedure lays itself open to a claim for unfair dismissal. When such a claim is brought, the employer has to establish the reason for dismissal…if the dismissal is found to be unfair the employer can be ordered to re-engage, reinstate of to pay compensation to the ex – employees."**

Similarly in the case of **CMC Aviation Limited v Mohammed Noor [2015] eKLR** this Court stated *inter alia* that:

> ***"Unfair termination involves breach of statutory law. Where there is a fair reason for terminating an employee's service but the employer does it in a procedure that does not conform with the provisions of a statute that still amounts to unfair termination. On the other hand, wrongful dismissal involves breach of employment contract, like where an employer dismisses an employee without notice or without the right amount of notice contrary to the employment contract."***

It was amply demonstrated before the trial court and which I agree with that the reasons given for termination were not valid nor fair and the employment was not terminated in accordance with procedure.

It is common ground that the respondent was employed by the appellant on 13th February, 2012 by virtue of a contract of employment dated 10th January, 2012. The contract expressly stated that the respondent would be on probation for the first three months and the employment would be terminable by either party giving one month notice. However, on successful completion he would be confirmed to permanent employment in writing. It is also not in dispute that the respondent worked for close to 18 months with the appellant despite his employment having not been confirmed. It is my understanding from the wording of the contract that it was not intended to be a probationary contract within the meaning of Section 2 of the Employment Act which defines such a contract as a contract of employment which is of not more than twelve months' duration or part thereof, is in writing and expressly states that it is for a probationary period. The appellant can therefore not be heard to allege that the respondent was on probation all these time. In any event section 42(2) of Employment Act provides as follows:

> ***"A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee".***

In the persuasive case of **James O. Oloo v Tana & Athi River Development Authority [2016] eKLR** the court expressed itself on section 42(2) thus:

> ***"This Section is couched in mandatory terms in respect to the probationary period. In case of the claimant then this probation period be extended, then it would have been done in agreement with the Claimant."***

Likewise in the case of **Narry Philemons Onaya-Odeck v Technical University of Kenya [2017] eKLR** the court cited with approval the case of **Peris Nyambura Kimani v Dalbit Petroleum Ltd, Petition No.63 of 2013** that:

> ***"Parties to an employment contract are allowed to set their own parameters as to the applicable period for probation. Such a***

***period must however follow the basis of law and cannot go beyond the legal maximum of 12 months. Such a probation period shall not be for more than 6 months but it may be extended for a further period of not more than six months with the agreement of the employee. As much as an employer has long latitude with exercise of their powers within the probation period, the legal requirements therein are set in mandatory terms. Such a probation time can be for up to 6 months and may be extended with the agreement of the employee*.”**

In the appeal before us, at the lapse of the three months, the respondent was not confirmed into permanent employment and the probation period was not extended either. Having been employed in February 2012, the statutory mandatory period of probation could not go beyond September 2012. By this time, his employment had not been terminated nor had he been informed that the probation period had been extended. It remained so until 13th August, 2013 when his services were finally terminated. This was after the 12 months maximum period allowable for probation. Under section 42 (2) the probation period of 6 months may only be extended for a further period of not more than 6 months. After the six months extension, an employee cannot be deemed to be still on probation. It is for this reason that I find just like the trial court that the respondent was not on probation at the time of his summary dismissal. Having so found, Section 41 of Employment Act provides that an employee who is not on probation cannot be terminated without following the due process envisaged therein where the employee must be given opportunity to be heard and make his own representation, which avenue he was denied.

The respondent's termination having been found unlawful and unfair, he was entitled to compensation in terms of section 49(1) (c) as read with sub-section 49(4) of the Act. The trial court awarded him 3 months' salary in lieu of notice as provided for by clause 12 of the letter of appointment, Kshs. 360,000/-; 41 days accrued leave, Kshs. 189,230/-; salary for 13 days worked in August, Kshs. 50,333/-; 15 months pension not remitted, Kshs. 86,000/-; and 12 months' salary as damages for unlawful termination, Kshs. 1,440, 000/-. The respondent was therefore awarded Kshs. 1,879,670/- less statutory deductions and deduction of monies already paid by the appellant. I am alive to the principle that this Court will not interfere with an award of damages unless the same was inordinately high or low or the learned Judge proceeded on wrong principles. (See: **International Planned Parenthood Federation v Pamela Ebot Arrey Effiom [2016] eKLR)**.

The appellant contested the award of 15 months pension on the basis that the respondent had not been confirmed into permanent employment. As I have stated elsewhere in this judgment, the respondent was no longer on probation. He was therefore entitled to all benefits as a permanent employee including pension. The trial court was right in so finding and I see no reason to interfere with the award. On accrued leave days, the appellant has not tendered any reason to warrant my interference with the same. The accrued leave days were arrived at on the basis of the evidence proffered in court. However, the main ball of contention is the award of 12 months' salary as compensation for unlawful termination. The governing statutory provisions in determining damages involving unfair termination are set out under Section 50 of the Employment Act, the court can award to the employee, among other reliefs:

“(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)...

(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.”

Much as the trial court has discretion in the quantum of damages to award for unfair termination of employment, statutory considerations constitute the guiding principles and parameters within which such discretion is to be exercised. This Court has in several previous decisions decried and bemoaned the awarding of maximum compensatory damages for wrongful or unfair termination without a firm factual and legal basis for such awards. It did so in **CMC Aviation Limited case** (Supra) when it stated:-

“***The trial court did not state why it opted to give the remedy provided under section 49 (1) (c) that is, twelve months gross salary, and not the other remedies under section 49 (1) (a) or (b). The court should have been guided by the provisions of section 49 (4) but the trial judge said nothing about the reasons that led him to exercise his discretion in the manner he did***."

This position was reiterated in the case of **Ol Pejeta Ranching Limited v David Wanjau Muhoro, Civil Appeal No. 42 of 2015** when this Court expressed itself as follows:

“Was the award of Kshs. 3,489,084/- representing the respondent's 12 months gross salary as compensation for unfair termination justifiable? Remedies for wrongful dismissal and unfair termination are provided for in section 49 of the Act. They include....., 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 conduct of the employee which to any extent caused or contributed to the termination.....The compensation awarded to the respondent under this head was the maximum awardable, that is to say, 12 months' pay. 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...”

In granting the statutory maximum award, the learned Judge did not at all attempt explaining why she thought that the respondent was entitled to such an award and cannot be said to have exercised her discretion properly therefor. The appellant's complaint on this account is justified. (See: **Mary Wakhabubi Wafula v British Airways PLC**, **Civil Appeal No. 105 of 2007)**. While holding that the respondent was unfairly terminated when he was not given a hearing was relevant in the overall award of damages, I think that the award lacked a sense of balance introduced by Section 49 (4) which lists a raft of considerations for a court to take into account. The trial court made no mention of those provisions. I note that though the respondent was not accorded a disciplinary hearing, he was appraised on his performance in person. It is also admitted that he was compensated in lump sum the amount of Kshs. 245,893/-. I also not that the respondent did not offer any concrete or clear evidence to show that he was entitled to the sum of 12 months gross salary as pleaded. In fact he did not attempt at all. I

therefore see nothing in the conduct of the appellant that would invite maximum penalty in damages as was ordered by the trial court. In the case of **Elizabeth Wakanyi Kibe v Telkom Kenya Limited [2014] eKLR** this Court held that employees have the obligation to move on and look for fresh employment after termination and not sit back in the hope of enjoying anticipatory remuneration. Employment remedies must be proportionate and employees must be discouraged from replicating employment wrongs and multiplying remedies. It is now trite law that under Section 49(1) of the Employment Act that employees are expected to reasonably mitigate their losses and not expect compensation in form of salary until retirement age. (See: **Kenya Power & Lighting Company Limited v Lydia Chepkosgei Mutai [2019] eKLR).**

In view of what I have stated above, I think the award was inordinately high and was not based on a balanced consideration of the applicable principles. I am therefore left with no option but to interfere with the award of damages from what was ordered by the trial court to the equivalent of 6 months gross pay at the rate of Kshs. 120,000/- per month bringing the total award to Kshs. 720,000/-. In so doing, I bear in mind the current hard economic times in the country and that the respondent was a senior officer, getting another job in that capacity would take some time. I will however not interfere with the other findings for reasons earlier stated elsewhere in this judgment.

The final orders of this Court is that the award of the trial court be and is hereby varied to the extent that the 12 months gross salary is set aside and substituted with an award of 6 months gross salary of Kshs. 720,000/-. For avoidance of doubt, the award of Kshs. 360,000/- 3 months' salary in lieu of notice; Kshs. 189,230/- 41 days accrued leave; Kshs. 50,333/- 13 days worked in August, 2013; Kshs. 86,000/- 15 months pension; and the order directing the appellant to issue the respondent with a certificate of service is upheld. The total award to the respondent is Kshs. 1, 159, 670/- less statutory deductions and terminal dues already paid to the respondent by the appellant.

Regarding the counter-claim lodged by the appellant, I have examined the record and agree with the trial court that the appellant did not lead any evidence to prove it.

Accordingly, the appeal partially succeeds to that limited extent. I award the appellant $^{1}/3$ of the costs of this appeal.

This Judgment is delivered pursuant to rule 32(3) of the Court of Appeal Rules since Odek, JA passed on before the delivery of the judgment.

As Kiage, JA concurs, orders accordingly.

Dated and delivered at Nairobi this 3rd day of April, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR

JUDGMENT OF KIAGE, JA

I have had the advantage of reading in draft the Judgment of my learned brother Makhandia, JA with which I agree and to which I have nothing useful to add.

Dated and delivered at Nairobi this 3rd day of April, 2020.

P.O. KIAGE

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JUDGE OF APPEAL