



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, KIAGE & MURGOR, J.J.A)

CIVIL APPEAL NO. 240 OF 2016

BETWEEN

LEONARD GETHOI KAMWETI.....APPELLANT

AND

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

CONSOLIDATED WITH

CIVIL APPEAL NO. 299 OF 2017

*(Being an appeal from the award and order of the Employment and Labour Relations Court of Kenya at Nairobi (Wasilwa J.,) dated 12<sup>th</sup> October, 2016*

in

ELRC No. 273 of 2014)

\*\*\*\*\*

### JUDGMENT OF THE COURT

[1] *Leonard Gethoi Kamweti* (appellant) is an advocate of the High Court of Kenya and a certified public secretary. Prior to the matters discussed here below, the appellant was an employee of the *National Bank of Kenya* (Bank) from February, 1996 to July, 2013. His employment was on permanent and pensionable terms, his starting salary was Ksh. 49,995 per month and, he earned several promotions and by the time his services were terminated, he was earning Ksh. 670,895 per month. The appellant claimed that he worked diligently during his seventeen (17) years tenure rising through the ranks and in the year 2000, he was promoted to the position of company secretary the position he remained at until his services were terminated.

[2] By a letter dated 24<sup>th</sup> July, 2013 addressed to the appellant by the Bank, it was indicated that the Bank's policy on retirement was 60 years, and pursuant to the option granted therein for either party to exercise discretion to retire early from the age of 50, the Bank had opted to retire the appellant at the age of 51 years with effect from 31<sup>st</sup> July, 2014. This is what the letter stated in key paragraphs:

*“You will be entitled to the following payments less any statutory taxes and deductions as may be applicable;*

- i. Three (3) months' salary in lieu of notice totalling to Ksh 2,012, 682.00.*
- ii. Payment of your 14 days leave earned but not taken as at 31<sup>st</sup> July, 2013 totalling to Ksh 308,795.00.*
- iii. Your retirement benefits will also be paid to you in accordance with the terms of the Bank's retirement benefits scheme.*

*The bank appreciates your long devoted service and wish to make the following additional benefits;*

- i. Severance pay of one month for every completed year of service (17 years), which will be totalling to Ksh 11, 405,*

198.00.

ii. *Medical allowance of Ksh 150,000.00.*

iii. *Half ( $\frac{1}{2}$ ) a month's salary for each year to retirement (9 years) totalling Ksh 3,019,023.00.*

*As you are also aware, you are indebted to the Bank for certain loan facilities advanced to you currently totalling Ksh 6,488,012.15. I am however pleased to inform you that the Board of Directors has approved a 40% rebate of the outstanding loan if you settle the amount immediately. However if you chose to settle 50% and above but less than 100% of the outstanding loan then you will be entitled to a 20% rebate. Otherwise the total outstanding loan will be restructured per the Bank's credit policy. Any settlement below 50% of the outstanding loan will not qualify for any rebate.*

*You are also entitled to statutory certificate of service from the Bank. However, please feel free to let us know should you require further references for a possible employment opportunity in future..."*

[3] Although the appellant took the retirement package offered, the so called early retirement did not go down well with him as he termed it unfair, unlawful and unconstitutional termination of employment that was against the Employment Act and he cited several Articles of the Constitution that he alleged were violated by the Bank. The appellant therefore filed a claim before the **Employment and Labour Relations Court** (ELRC) at Nairobi. The 23 page statement of claim contained a long history of how the appellant fell out with the Bank and that he was victimized when he pursued a lawful complaint against an advocate for theft of official documents that were in his custody as a company secretary. He stated that the Bank retaliated such that not only did he suffer loss of employment, but he also alleged that he was subjected to differential treatment, he was defamed by the Bank and subjected to malicious prosecution. He therefore prayed for several orders to wit a declaration that: -

*"1) His services were unlawfully terminated by the bank;*

*2) His constitutional rights under Articles 27(4), 33 (3), 41(1), 50 (1) were violated;*

*3) There was breach of the Human Resources Policy which provide for fair hearing, natural justice and provide for sanctions only after due enquiry;*

*4) General damages in the sum of Ksh. 8,050,728 being 12 months gross salary at the time of termination;*

*5) Special damages incurred in respect of defending a malicious claim filed by the Bank with ICPSK at Ksh. 670,895, Ksh. 450,000 which was after tax annuity with Jubilee Insurance Company, Ksh. 3,019,023 being half salary for every month for the remaining 9 years of his term;*

*6) Exemplary damages, reparations for the various violations of the constitution, for obstruction of justice by interfering with an ongoing disciplinary matter; contempt of court, mental anguish and loss of marketability, economic and social status as a consequence;*

*7) A certificate of service, cost of the suit with interest and any other relief including reinstatement as the court may deem fit.*

[4] The Bank denied the appellant's claim that he was terminated but called it a separation from service pursuant to what is provided in the Bank's Human Resource Manual which stipulated that the official retirement age was sixty (60) years but either the Bank or the employee had the discretion to retire early from the age of 50 years. Therefore, the Bank opted to exercise that option and retired the appellant from service upon attaining the age of fifty-one (51) years. The Bank termed it a separation and not a termination and denied all the allegations that it was motivated by bad intentions to frustrate and terminate the disciplinary matter that was lodged by the appellant against an advocate. As far as the complaint with LSK against an advocate was concerned, the Bank termed it a personal matter between the appellant and the advocate as there was no resolution passed by the Bank instructing the appellant to lodge the same. Responding to the allegation that that the Bank had published defamatory matters against the appellant, it was stated that the appellant was the one who was in breach of his express/or implied term of employment and professional obligation by disclosing information acquired in the course of his work without a written authorization by disseminating contents of audio recording of a board meeting of the Bank. The Bank vehemently denied having infringed on any law or the Constitution.

[5] The claim fell for hearing before **Wasilwa, J.** who considered the matter and in a judgment, dated 12<sup>th</sup> October, 2016 issued the following orders: -

*"I have already stated that the termination of the claimant was unfair and unjustified. I will therefore award him as follows: -*

*1. 12 months' salary as damages for the unfair termination = 12x 670,894 = 8,050,728 less statutory deductions.*

*2. Issuance of certificate of service.*

*3. Respondents to pay cost of this suit.*

*4. The awarded amount will attract interest at court rates with effect from the date of this judgment"*

[6] The appellant was dissatisfied with the said judgement and filed the instant appeal that is predicated on the grounds that the Judge erred in failing to; make an order for payment of punitive/exemplary damages arising out of a retaliatory and malicious conduct of the Bank; for finding that the claim for discrimination was not proved; for failing to make an award for damages in respect of malicious prosecution at ICPSK, and for false malicious and defamatory words uttered and published by the Bank on 8<sup>th</sup> July, 2013 and for several violations of the appellants' constitutional rights. For that the appellant prayed that the appeal be allowed with the following orders that the respondent do pay the appellant: -

*a) a sum of Ksh 3,019,023 being the amount discriminatorily paid to others but denied to the appellant.*

*b) damages for discrimination as provided by Article 23 (3) (e) of the Constitution.*

*c) a sum of Ksh 22,810,430 being foreseeable loss of earnings during the 37 months of the duration of the malicious prosecution at ICPSK.*

*d) punitive and exemplary damages for malicious termination.*

*e) Damages for defamation as provided by Section 3 of the Defamation Act and Article 33 (3) of the Constitution as well as costs of the suit and any other relief as the Court may deem fit to grant.*

[7] The Bank also filed a separate appeal being **Civil Appeal No. 299 of 2017** which was consolidated to be heard and determined together with the instant appeal. The Bank was also dissatisfied with the same judgment and in its appeal it criticised the impugned judgment on the grounds that the learned Judge erred in law and fact by; holding that the appellant's contract of employment was unfairly terminated when it was brought to an end under the provisions of **Section 9.41** of the **Bank's Human Resource Manual 2012**; awarding the appellant damages equivalent to twelve months' salary when he had already been compensated for early retirement; by failing to hold that the appellant had fully negotiated his early retirement payment package and that he voluntarily accepted and signed in acknowledgement of the payments; by holding that the provision for optional early retirement in the Bank's human resources policy was unconstitutional and finally for allowing adduction of evidence from a tape recording of the Bank's Directors meeting held on 8<sup>th</sup> July, 2013 as evidence when it had been excluded by an order of injunction issued in **HCCC No. 370 of 2014** between the same parties which was inadmissible under the rules of evidence.

[8] During the plenary hearing, the appellant appeared for himself, he relied on his written submissions filed on 11<sup>th</sup> March, 2019 and replying submissions filed on 25<sup>th</sup> March, 2019. The Bank was represented by learned counsel **Ms. Rubena Dar** who also relied wholly on the written submissions filed on 14<sup>th</sup> March, 2019 and in support of their appeal dated on 18<sup>th</sup> June, 2019. Both parties also filed lists of authorities.

[9] According to the appellant, he was entitled to other heads of damages because he was victimized by the Bank that was trying to shield an advocate against whom he had lodged a complaint before the LSK Disciplinary Tribunal for alleged theft of the Bank's privileged legal documents which the appellant held in his personal custody. In the course of the said proceedings, the appellant complained that there was arm twisting and threats by the managing director who was a cousin to the advocate aimed at threatening him to withdraw the disciplinary cause and stop pursuing the same using the Bank's letter head. The appellant stopped using the Banks' letter heads but insisted on prosecuting the cause to defend his own professional integrity to demonstrate that he had not given the advocate the said documents. Although the Tribunal found the appellant had established a *prima facie* case requiring the advocate to respond, the appellant accused the Bank's managing director and Chairman for colluding with the advocate to have him dismissed from his employment so as to frustrate him into withdrawing the complaint. The appellant had recorded the proceedings of the board meetings and the audio tape recording was produced in court where they castigated the appellant for failing to withdraw the complaint. In the said meeting, the Board discussed the dismissal of the appellant and the efforts put in place by the managing director to recruit another company secretary.

[10] On differential treatment, the appellant submitted that the formula used to calculate his dues reduced them by half of what was paid to another member of staff, **Mr. Ismail** who had exited the Bank earlier notwithstanding that he had not been subjected to torture, bad faith and vindictiveness like the appellant. In his view, discrimination was not allowed even in the Human Resources Policy that provided for equal treatment. He went on to cite another case of **Mr. Mworio** who had filed a case against the Bank in **ELRC No 273 of 2014** in which the Bank was found liable for inexplicable discrimination in treatment of the said member of staff. The Bank did not offer any cogent explanation for offering differential treatment and according to the appellant he was entitled to a sum of Ksh. 3,019,023 and to be awarded damages for malicious prosecution before ICPSK where the Bank filed a baseless complaint. The appellant attributed this to malice as the complaint was dismissed after he was inconvenienced by defending himself and thereby suffering damages.

[11] On the issue of defamation and malicious prosecution, the appellant cited many authorities not only from this jurisdiction but from as far as Canada and Malaysia. Among them was the case **Mak Ónyango vs. AG and Another [2013] 1 EA at 353** who was awarded Kenya shillings 20 million as punitive damages for violation of rights due to unlawful and malicious arrest, search and detention. **Pravin Bowry vs. EACC, ELRC No 1168 of 2012 [2013] eKLR** where it was held that discrimination is established when the respondent is unable to reasonably explain the disparity in treatment of staff. He also cited **the ILO Convention 111** that outlaws discrimination which includes differential treatment in employment or occupation.

[12] The Bank's submissions in opposition of the appeal were that exemplary or punitive damages are awarded in special cases where compensatory damages are deemed to be inadequate remedy. This is only in actions for tort but not for breach of contract. In the instant case where the cause of action was an alleged breach of express and or implied terms of an employment contract, punitive damages are not available. Reference was made to Halsbury's Laws of England 4<sup>th</sup> Edition Volume 12 at page 474 and **Harris vs. Digital Pulse PTY Ltd [2003] 197 ALR 626** where the employee knowingly breached contractual and fiduciary duties to their employer by diverting business to themselves and misusing its confidential information. The New South Wales Court of Appeal held that punitive damages are not available both for breach of contract and breach of fiduciary duty.

[13] Counsel for the Bank also made reference to the case of **Cassell & Co Ltd vs. Broome [1972] AC 1027** where the defendant published a book which made defamatory statements about the plaintiff. The book was published in the face of threats by the plaintiff that he would bring a libel action against the defendants. The plaintiff was awarded 15,000 pounds compensatory damages and 25,000 exemplary damages. That exemplary damages were awarded because the defendant had calculated that it was worth running the risk of being held responsible for libellous publication because of the profits which they thought they would make from the sales of the book and the attendant publicity. Drawing a parallel with the instant case, counsel submitted that there was no evidence led by the appellant to show that the actions taken by the Bank were oppressive, arbitrary, unconstitutional and geared to profit the Bank so as to fall into the category of the Cassell case. The appellant had a duty to establish that the alleged offending statement was defamatory of him and how it lowered his estimation in the society, whether as a result he was avoided by right thinking members of the society and how he was exposed to hatred, contempt and odium. Counsel went on to state that the specific words that were allegedly uttered by the Bank that were defamatory of the appellant were not identified. Counsel therefore argued that the words in the audio tape were incapable of being defamatory of the appellant. Moreover the **Employment and Labour Relations Act (Procedural Rules 2010)** expressly states that a court should not award exemplary or punitive costs in employment matters.

[14] On differential treatment counsel submitted that salaries and benefits are based on various considerations including but not limited to levels of responsibilities, expertise and skill. The mere fact that another employee received a higher amount does not amount to discrimination. This was held by the South African Labour Court in **Transport & General Workers Union & Another vs. Bayete Security Holdings (J2512/98)**. Where it was further held that discrimination takes place when two similarly circumstanced individuals are treated differently since pay differentials are justified by the fact that employees operate at different levels of responsibilities among other. Counsel also submitted that as far as the claim for malicious prosecution was concerned, there was no such criminal prosecution against the appellant and the ratio on what constitutes malicious prosecution was not met as stated in the case of **Mbowa vs. East Menzo District Administration [1972] EA 352**. The complaint lodged by the Bank at ICPSK, a professional body that governs company secretaries was because the appellant had secretly recorded the proceedings of a board meeting which contained privileged information and he threatened to disseminate it to the public.

[15] In support of the appeal by the Bank it is submitted that all the four grounds of appeal challenge the quantum which can only be challenged if it is manifestly high or low as to represent an erroneous estimate of damages. In the instant case, the Judge awarded a maximum of 12 months' salary without assigning any reason for doing so and without bringing to bear the principles on assessment of damages and assigning reasons why the particular award was made. According to counsel, the Judge erred by failing to consider that the appellant had already received a hefty compensation for early retirement which he had voluntarily negotiated. Counsel cited the cases of; **United States International University vs Eric Rading Outa [2016] eKLR** and **CMC Aviation Ltd vs Captain Mohammed Noor [2015] eKLR** where the maximum awards of twelve (12) months were successfully challenged in the absence of reasons justifying the same. Counsel therefore urged us to dismiss the appellant's appeal and allow the Bank's appeal with costs.

[16] In reply to the Bank's submissions the appellant supported the awards made by the trial Judge which were in exercise of the discretion which was perfectly within what is provided under **Section 50 (m)** of the **Employment Act**. The Judge duly noted that the appellant had been paid some benefits and the awards did not exceed the statutory limit of twelve (12) months due to the highhandedness by the Bank. The appellant denied negotiating with the Bank on the terms of his retirement or at all as the audio recording showed that the appellant was terminated for seeking justice in a lawfully established judicial tribunal. The evidence clearly showed that the Bank wanted the appellant replaced and early retirement was just a mere excuse contrived to hide the heinous motive behind the termination. On admission of the audio recording of the proceedings of the Board meeting, the appellant submitted that since its authenticity was not in issue, the Bank was merely trying to block evidence which was necessary to establish disputed facts in contention.

[17] Finally, the appellant submitted that due to the callousness exhibited by the Bank in the way it terminated the him in a bid to circumvent his quest for justice in a legally instituted tribunal, the Judge should have subjected the Bank to all the sanctions including punitive damages for oppressive actions. The appellant emphasized that the Bank is not a just a public body, but a banking institution charged with the responsibility of engendering best practices and trust. As regards the submission that the appellant did not prove there was any profit motive in terminating the contract of the appellant, he stated that there was a deliberate intention of the Bank to obstruct and interfere with the disciplinary cause before the Tribunal. On the issue of the defamation claim being statute barred the appellant clarified that the claim before the ELRC was filed on 27<sup>th</sup> February, 2014 which was seven (7) months after he was terminated.

[18] This is a first appeal, that being so, we are conscious of our duty to re-evaluate the evidence before the trial court and determine the matter afresh with the usual caveat that we did not hear or see the witnesses testify. See **Mary Njoki vs. John Kinyanjui Muthuru [1985] eKLR**: -

**“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight of bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate to decide. Watt v Thomas, [1947] AC 484.”** Also the case of; - **S. M. v E. N. B. [2015] eKLR**:-

**“We shall however bear in mind that this Court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable. Should we, however, be satisfied that the conclusions of the trial judge are based on no evidence or on a misapprehension of the evidence on record or that the learned judge demonstrably acted on wrong principles, we are enjoined to interfere with those conclusions.”**

[19] In the premises and having regard to the grounds of appeal, the evidence before the trial court and the submissions made before us, the issues that we discern as falling for determination which are germane and cut across both appeals are; whether the appellant was entitled to exemplary or punitive damages; whether he was entitled to damages for violation of constitutional rights for differential treatment, whether the appellant was entitled to an award for damages for defamation and malicious prosecution and whether the learned Judge erred in

awarding him a maximum of twelve (12) months' pay notwithstanding that he

was paid other retirement benefits.

[20] We will begin with the issue of whether the Judge erred by not awarding the appellant exemplary damages having found the termination by the Bank was illegal. We think it is also useful to reiterate that, when the appellant's employment was terminated or call it early retirement was effected, he was paid some compensation totalling Ksh. 16,895,698 for early retirement. This excluded the appellant's retirement benefits and some other concessions which were given to him in appreciation for many years of service to the Bank. It is also instructive that the appellant voluntarily accepted the terms of early retirement offered without raising any issues that the decision was actuated by malice and driven by high ranking officials of the Bank who wanted to interfere with a disciplinary cause the appellant was pursuing against an advocate.

[21] The appellant acknowledged receipt of the retirement dues but proceeded to file the claim, after hearing the same the learned trial Judge found the termination of appellant was unlawfully and it was malicious on the part of the Bank. The appellant was consequently awarded a total sum of Ksh. 8,050,728 being twelve (12) months gross salary as at the time of termination and costs of the suit. The appellant complains that he was not awarded exemplary damages for maliciousness and bad faith which was the sole motivating factor in terminating his employment. It is trite that exemplary damages, are only awarded in limited instances. The categories of cases in which exemplary damages should be awarded are set out, at paragraph 243 of *Halsbury's Laws of England*, as follows: -

**“Exemplary damages should be awarded only in cases within the following categories: -**

**(1) Oppressive, arbitrary on unconstitutional action by servants of government;**

**(2) Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff; or**

**(3) Cases in which the payment of exemplary damages is authorized by statute.**

[22] Arising from the above, it is clear to us that the appellant's contention was that his claim was based on allegations of arbitrariness and breach of the Constitution. To determine this issue we wish to make reference to the case of Kenya **Revenue Authority vs. Menginya Salim Murgani [2010] eKLR**, where the respondent was employed by the appellant, whom he sued for unlawful termination and breach of contract. The appellant was awarded exemplary damages of Ksh. 1 million by the trial Judge as well as other claims that the trial Judge had directed the deputy registrar to compute. In setting aside the award of exemplary damages, this Court restated with approval the principle established by the House of Lords in the case of **Herderson vs. Merrett (1994) 2 ALL ER 506** that, where there is concurrent liability under tort and contract arising from the same facts, the plaintiff is entitled to take the remedy which is most advantageous to him. Also this Court in the case of **Obongo vs. Municipal Council of Kisumu (1971) EA at page 91**, reiterated that exemplary damages will be awarded in Kenya in torts where there is appearance of arbitrary or unconstitutional actions by the servants of government and therefore the facts of the case before the Court fell for determination along similar lines as in both the **Herderson** case and the **Obongo case**.

[23] We take note that the appellant's claim arose from an employment contract. Therefore on our own analysis of what transpired between the appellant and the Bank, we do not see any element of arbitrariness to warrant an award of exemplary damages as the appellant was offered a package of early retirement and he willingly accepted it without raising an issue. As matters stood, the appellant had the option of turning the early retirement package down and wait and see what the Bank was going to do. The trial Judge found and faulted the Bank because there were no reasons given for taking the option to offer the appellant early retirement. But against the background of the stand-off that existed at the time, one could not fail to see that the appellant was more or less pushed out of his employment. Notwithstanding the standoff, we have not seen any evidence of mistreatment that would amount to arbitrariness.

[24] What would have amounted to arbitrariness is for instance if there was evidence of extreme and unwarranted harassment or inhuman treatment such as being arrested by police or being charged with trumped up criminal charges as a way of pushing the appellant out of employment. It is common ground that the appellant was not subjected to any disciplinary proceedings, he was offered early retirement which was provided under the Bank's Human Resource Hand book which he did not object to, and the Bank thought that was the end of the matter. On the same issue of arbitrariness, we have also found some persuasion in the dicta stated in the celebrated case of **Rookes vs Barnard [1964] I ALL ER 367**, where it was held that there are only two categories of cases in which an award of exemplary damages could serve a useful purpose, viz, in the case of oppressive, arbitrary or unconstitutional action by the servants of the government and in the case where the defendant's conduct had been calculated to make a profit for himself which might well exceed the compensation payable to the plaintiff. As aforesaid, none of these ingredients was in existence in the matter before us. Accordingly this ground of appeal fails.

[25] The appellant's next contention was that he suffered constitutional violations such as unfair treatment in that he was subjected to differential treatment when he was offered half of the amount that was paid to other members of staff who were leaving at the same time. What evidence did the appellant adduce to demonstrate damages that he suffered as a result of violations of guaranteed rights under the Constitution and to support the claim of differential treatment? There is an imperative requirement that a party who seeks compensatory damages must prove what he suffered before a court can exercise its discretion to award damages. The appellant's recorded evidence does not show the breach of his constitutional rights nor the loss or damages he suffered as a result of the alleged breaches. This is what the appellant stated at paragraph 6.21 of his written submissions:-

**“The irrefutable factual evidence presented to the Hon. ELRC court and summarised in para 2.6 to 2.9 pg 3 and 4 herein shows beyond any doubt unimaginable outrageous, deliberate cruelty impunity, bad faith, bullying insensitive, discriminatory conduct, retaliatory conduct whose final remedy was entirely ignored by court. Pursuing a right at a lawfully established judicial tribunal ought not to attract punishment of one private citizen upon another. The rule of law will break down if this conduct is allowed”.**

[26] What is deducible from the above high-sounding phrases is that the appellant was given differential treatment from other staff members who exited at the same time under the same early retirement policy. What is not clear is whether those staff were of the same rank and had the same responsibilities as the appellant. The appellant filed an affidavit in this appeal, which is filed as a separate document and it is sworn on 10<sup>th</sup> October, 2017. In it, he attached a letter dated 23<sup>rd</sup> May, 2013 addressed to one Isaiah Magambo Mworira. This evidence seems not to have been availed before the trial Judge as the affidavit is titled **“pursuant to Rule 29 of the Court of Appeal Rules”**. We have not seen any order granting leave to the appellant to adduce this evidence. Even if there was such leave, introducing this evidence would still be problematic because as submitted by counsel for the Bank, the mere fact that an employer pays one employee more than another does not in itself amount to discrimination. We do not know whether the appellant and the said Mr Mworira were similarly circumstanced as pay differentials are justified due to levels of responsibilities, expertise and skills among other considerations. This ground of appeal therefore fails.

[27] The next issue is in regard to a claim for damages for defamation and malicious prosecution. The appellant argued that the Bank maliciously filed a complaint against him with ICPSK claiming that the appellant had breached a professional duty of confidentiality and disseminated an audio recorded proceedings of a Board meeting. The appellant also did not adduce evidence to show how the said letter was defamatory of him; how the said letter lowered his estimation by right thinking members of the society and or how it exposed him to hatred, contempt and ridicule. It is trite that in an employment context, defamation takes place when an employer publicizes or causes to be published, statements which stigmatizes an employee. We note that the appellant did not deny that he disseminated the audio recording of the Bank’s board meeting. Writing a letter of complaint also does not amount to malicious prosecution, as this was not criminal prosecution. Be that as it may, we think the appellant had a burden of demonstrating that there was no legal reason for the Bank to file a complaint at ICPSK regarding the dissemination of the audio recording of the Board meeting; that it was written to spite rather than to pursue a common good for the Bank, which he did not do. In the event these two grounds also fail.

[28] The last ground is raised by the Bank in their appeal against the award of 12 months’ salary and in particular the fact that the Judge did not give reasons for the award as stated by this Court in the case of; - **United States International University vs. Eric Rading Outa** (supra);

**“In the instant appeal the learned trial Judge gave a maximum award of 12 months’ salary without assigning any reason for doing so at all. We have noticed a trend by the Employment and Labour Relations Court where maximum awards are made without assigning any reasons for doing so and without carrying out any evaluation of the effect such awards on employers and to the economy in general. Awards such as the one made by the trial Judge in the judgment appealed from are made without any consideration of principles on assessment of damages and without assigning any reasons why a particular award is made”**

[29] The above exposition of the law in assessment of damages and assigning reasons for the same is correct and it accords with our own thinking in this matter that the trial Judge had a duty to give reasons. However this being a first appeal we have a duty to re-examine the evidence and give own consideration of the matter. See the case of; - **Selle and Another V Associated Motor Boat Company Ltd and Others**, [1968] 1 EA 123 (CAZ):

**“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 the demeanour of a witness is inconsistent with the evidence in the case generally. (Abdul Hameed Saif v. Ali Mohamed Sholan, (1955), 22 E.A.C.A. 270).”**

That said, the Bank argued that the appellant was not dismissed from employment but it exercised its discretion to invoke an early retirement clause in its human resource policy. The Judge was not persuaded this was the case and even if it was, the appellant was entitled to a hearing and to be given reasons for the separation. On our part looking at the circumstances surrounding the appellant at the time the Bank opted to retire him early, it cannot be divorced from the case that the appellant was pursuing a complaint with the LSK against an advocate because that was the genesis of the fall out. The evidence shows that the Bank was dissatisfied with the appellant for pursuing the matter and it ultimately withdrew it. Although the Bank denies the appellant’s employment was terminated, the Judge found and we have no reason to disagree with her finding that the same was an illegal termination.

[30] Was the award of 12 months justified in view of the fact that the appellant had already pocketed other compensation for early retirement? Bearing in mind the surrounding circumstances of this case, that the appellant did not willingly choose to go on early retirement but he was pushed out for a particular stand he had taken in a matter, the Bank contrived its intention by covering it with early retirement. Considering the many years of service the appellant had given to the Bank and the fact that there was never a complaint registered against his performance, we think that among the remedies that are provided under Section 50 of the Act an award of damages was the most appropriate. On the award of 12 months we probably would have awarded less but we are not the trial Judge, who had the advantage of seeing and hearing the parties. We also take note that due to the acrimonious departure, the appellant was unlikely to find another employment in the Banking industry where he had distinguished himself as a company secretary for many years. For those reasons, we are not inclined to interfere with the award made by the trial Judge.

[31] We therefore find no merit in the appeal by the Bank which we hereby order dismissed. Since we also dismissed all the grounds of appeal by the appellant, it follows both parties are unsuccessful in their respective appeals, we make no order as to costs.

*Dated and delivered at Nairobi this 8<sup>th</sup> Day of May, 2020.*

**M. K. KOOME**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

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

***Signed***

**DEPUTY REGISTRAR**