



**Package Insurance Brokers Limited v Gichuru (Civil Appeal  
307 of 2018) [2019] KECA 477 (KLR) (19 July 2019) (Judgment)**

*Package Insurance Brokers Ltd v Simon Gitau Gichuru [2019] eKLR*

Neutral citation: [2019] KECA 477 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 307 OF 2018  
PN WAKI, MSA MAKHANDIA & F SICHALE, JJA**

**JULY 19, 2019**

**BETWEEN**

**PACKAGE INSURANCE BROKERS LIMITED ..... APPELLANT**

**AND**

**SIMON GITAU GICHURU ..... RESPONDENT**

*(Being an appeal against the Judgment of the Employment and Labour Relations Court of Kenya at Nairobi (Ndolo, J) dated 19th October, 2017 in E.L.R.C Cause No. 1375 of 2014)*

**Court of Appeal considers employers good will in claim for unfair termination**

*The appeal arose from a claim of discrimination and unlawful termination of employment. The respondent, an Operations Manager, was summarily dismissed by Package Insurance Brokers Ltd after being diagnosed with a spinal cord tumor, despite initially receiving support for treatment. The employer cited the respondent's physical condition, lack of medical reports, and later, alleged incompetence and negligence, without following due process. The Employment and Labour Relations Court initially awarded the respondent a consolidated sum, including Kshs. 5 million for discrimination and 12 months' salary for unfair termination. On appeal, the Court of Appeal set aside the discrimination award, finding insufficient basis. While upholding the finding of unlawful termination, the appellate court reduced the compensation for unfair termination from 12 months' to 8 months' salary, considering the employer's initial goodwill and the respondent's conduct. The overall appeal was partially allowed, with each party bearing its own costs.*

Reported by John Ribia

**Constitutional Law** – fundamental rights and freedoms – freedom against discrimination – discrimination at the workplace – employee contending discrimination after being asked to present a medical report and to go on sick leave - whether a sick employee that was asked to go on sick leave and to present medical reports based on their condition could be deemed to have discriminated against by the employer – Constitution of Kenya article 47



**Employment Law** – summary dismissal – unfair dismissal – grounds – where the employer showed good will and the employee was partly at fault - whether an award of the maximum 12 months' salary as compensation for unfair termination could be considered appropriate, where an employer shows initial goodwill and the employee fails to cooperate with the employer – Employment Act (Cap 226) section 45(2)

### **Brief facts**

The appeal arose from a judgment by the Employment and Labour Relations Court of Kenya at Nairobi, which awarded Simon Gitau Gichuru (the respondent) a consolidated sum of Kshs. 7,781,450/= for discrimination and unlawful termination of employment.

The respondent was employed by the appellant as its Operations Manager on a permanent and pensionable basis starting January 1, 2010. In November 2013, Mr. Gichuru was diagnosed with a spinal cord tumour and underwent specialized treatment in India from November 2014 to January 2014, during which the appellant continued to pay his full salary.

Upon resuming duties on February 10, 2014, the respondent's salary was increased. However, due to his physical condition, which required aid for movement and made office access difficult, the appellant became concerned about his recovery speed. On April 14, 2014, the appellant asked the respondent to take sick leave for recuperation and to provide a medical appraisal. The appellant stated that the office lacked suitable facilities for his condition and that his presence compromised his capacity to work and the company's image.

When the medical appraisal was not immediately received, the appellant issued a 30-day notice to suspend the respondent's services on May 22, 2014, citing lack of information about his condition and the company's need for productivity. The respondent contended he had submitted a medical report promptly, and that the appellant had recommended his rest. Although a medical report dated May 27, 2014, recommended he could resume duties after two months, the appellant suspended his employment on health grounds on June 23, 2014, ceasing all benefits and demanding a repayment plan for outstanding loans. The respondent viewed this as constructive termination due to lack of hearing.

Finally, on August 1, 2014, the appellant summarily terminated The respondent's employment for alleged gross incompetence and negligence, citing customer complaints and failure to reconcile underwriter accounts, without according him a hearing. The respondent subsequently filed a claim, alleging unlawful, unjustified, and discriminatory termination, seeking damages for discrimination, mental anguish, and unfair termination. The appellant maintained its actions were sympathetic and within its right to summarily dismiss for gross misconduct under section 44(4) of the Employment Act.

### **Issues**

- i. Whether a sick employee that was asked to go on sick leave and to present medical reports based on their condition could be deemed to have discriminated against by the employer.
- ii. Whether an award of the maximum 12 months' salary as compensation for unfair termination could be considered appropriate, where an employer shows initial goodwill and the employee fails to cooperate with the employer.

### **Held**

1. The respondent suffered an ailment that caused him to be out of the office whilst seeking treatment outside the country. Upon the respondent's resumption of duty on February 10, 2014, his productivity was not optimal as he still needed to seek medical help by way of physiotherapy. He also could not move around unaided. It was difficult for him to climb stairs. After a barrage of letters addressed to the respondent, the respondent was subsequently dismissed by the appellant on August 1, 2014.
2. The respondent was unwell and he still needed medical attention that hampered his performance. It was on account of ill-health that the respondent could not perform like other employees who enjoyed good health. It was not that all employees of the appellant were sick and that the respondent was singled out for dismissal vis-à-vis other sick employees.



3. The respondent was not given differential treatment from other sick employees, and being the only one who was sick, he could not be heard to say he was discriminated against. There was no discrimination. If anything, it would appear that the appellant supported the respondent in the course of his treatment. Upon resumption of duty, it was expected that the appellant as a business entity would want to know the respondent's medical condition. The report was not forthcoming in spite of the appellant's request vide the letter of April 14, 2014. On May 24, 2014, the appellant once more wrote to the respondent and reiterated that it had not received the medical report. It was the letter that caused the doctor to write a "Report" which on the face of it did not answer the appellant's concerns.
4. Under section 45(2) of the Employment Act an unfair termination occurred when an employer failed to prove: that the reason for the termination was valid, that the reason for the termination was a fair reason; related to the employee's conduct, capacity or compatibility; or based on the operational requirement of the employer; and that the employment was terminated in accordance with fair procedure.
5. Although the respondent was blamed for certain transgressions relating to financial misappropriation, the letter of August 1, 2014 gave a final verdict, summary dismissal. The respondent was not subjected to due process. It was on account of that that the trial court awarded compensation equivalent to twelve (12) months' salary. Under the law, the twelve (12) months' salary was the maximum amount of compensation. The circumstances leading to the summary dismissal were of a progressive nature. It was a situation where the appellant demonstrated a lot of goodwill towards its employee, the respondent. However, over a period of time, the good will waned, more so when it appeared that the respondent was not cooperating in terms of availing a medical report as required by the appellant. The doctor finally submitted the report. The respondent should not have been awarded the maximum number of twelve (12) months' salary, which the instant court reduced to eight (8) months' salary.
6. The contract of employment provided that upon dismissal, the respondent was entitled to one (1) month's salary in lieu of notice. He was also still on the appellant's employment up to August 1, 2014. He was not paid salary for the month of July, 2014.

*Appeal partly allowed.*

#### **Orders**

- i. *The award of the High Court of Kshs 5,000,000 being damages for discrimination was set aside.*
- ii. *In place of twelve months' salary in compensation, was substituted for eight (8) months' salary, a sum of Kshs 1,589,400.*
- iii. *The respondent was also entitled to one (1) month's salary in lieu of notice as well as salary for the month of July, 2014.*
- iv. *Each party was to bear its own costs.*

#### **Citations**

##### **Statutes**

1. Constitution of Kenya, 2010
2. Employment Act

##### **Advocates**

None mentioned

## **JUDGMENT**

1. This is an appeal against the decision of Ndolo J awarding to the respondent a consolidated sum of Kshs.7, 781,450/= plus costs and interest for discrimination and unlawful termination of employment. Simon Gitau Gichuru (the respondent) was employed by Package Insurance Brokers Ltd



(the appellant) as its Operations Manager on a permanent and pensionable basis effective 1<sup>st</sup> January, 2010 at an initial consolidated monthly salary of Kshs.129,000/=. In the course of his employment, the respondent was able to purchase two vehicles from loan facilities granted to him by the appellant, KBJ 278P (personal vehicle) and KAN 429N (commercial vehicle) which he serviced in a payment plan entered into with the appellant.

2. As fate would have it, in November, 2013, the respondent was diagnosed with a spinal cord tumour and was referred to India for specialised treatment. He was admitted to Max Health Care in India on 16<sup>th</sup> November, 2014 where he underwent successful treatment until 17<sup>th</sup> January, 2014, when he was discharged and thereafter travelled back to Kenya. During the entire period the respondent was hospitalised he continued to receive full salary from the appellant.
3. The respondent resumed his official duties on 10<sup>th</sup> February, 2014. On 18<sup>th</sup> February, 2014, the appellant increased Simon's salary to Kshs.138, 675/= with a further allowance of Kshs.60, 000/=. However, while watching him discharge his duties, the appellant became anxious about the speed of the respondent's recovery and healing process. By a letter dated 14<sup>th</sup> April, 2014, the contents of which have been extracted herein below, the appellant asked the respondent to proceed on sick leave to facilitate his recuperation. He was only to resume his duties when he could walk unaided in the office. The respondent was also requested to update the appellant on his current medical condition by submitting a medical appraisal from his doctor. The letter reads as follows:

Dear Simon,

Re: Appraising Your Medical Condition

We take this opportunity to appreciate the progress you have made in normalizing your health after the delicate spinal surgery you underwent last year. Indeed, we can only be very grateful to the Almighty God for His great mercies and His healing hand on you.

Having said the above, the way forward is very important to both you and the company. We are convinced that both you and company have a role to play for your healing to be complete. In this regard, the company would like to play its role in the most effective way and therefore it has been decided that:-

- “ 1. The company does not improve your healing process by having you in the office in your current physical condition. In the circumstances and until you are able to move around the office unaided, and while you continue to attend the physiotherapy clinics, we ask that you rest at home as the office does not have suitable facilities and conditions for your easements.(sic)
2. You will appreciate that we have not been informed by any medical report or advice on the nature of your sickness to date. We therefore ask for a medical appraisal of your current condition from your medical consultant for our information and guidance. You will please ask him to release the information to us in confidence as soon as possible. A letter addressed to the consultant is attached.

We continue interceding our Lord with prayers for your quick and complete recovery.

Yours Sincerely,

MRS. S.N. Mwangi

Director ”



4. According to the appellant, this decision was informed by the fact that the respondent could only move around with the aid of a walker and had great difficulty accessing the office via the stairs. The appellant felt this compromised his capacity to work and could hurt the company's image by retaining in the office, an employee who was evidently ill. The respondent on the other hand, felt this decision was both unnecessary and discriminatory as he was still able to discharge his official duties and had done so since his return for about two months.
5. As it turned out, the appellant failed to receive the respondent's medical appraisal from his doctor. In consideration of the seriousness of his illness and the fact that the appellant had continued to pay his salary even for the period that he had been absent from his station, the appellant felt compelled to issue to the respondent a 30-day notice to suspend his services via letter dated 22<sup>nd</sup> May 2014.

The letter stated:

Dear Simon,

Re: Appraising Your Health Condition

Following our letter to you dated 14<sup>th</sup> April 2014 and your text message (sms) of 14<sup>th</sup> May, 2014, we regret to note that this company is not any better in terms of information regarding your health. Lack of a professional advice on your condition as requested in our said letter has really inhibited our decision making.

Needlessly to state, this company has continued to pay your dues for the last 7 months despite your being off duty. In view of our lack of information about your condition, we may not predict of your condition [sic] and the future. You will appreciate that this is not normal anywhere else.

Notwithstanding the above circumstances, this company is in need of productivity. We therefore give notice that we shall have no alternative but to suspend your employment together with all accruing benefits 30 days from the date of this letter. Please be guided accordingly.

We continue to intercede our Lord with prayers for your recovery.

Yours Sincerely,

MRS. S.N. Mwangi

Director ”

6. The respondent felt that this decision was uncalled for since he had submitted to the appellant a medical examination report immediately after receiving the request on 14<sup>th</sup> April, 2014. Moreover, it was the appellant who had initially recommended that the respondent takes full rest at home to speed up his recovery. Dr. Kiboi Julius Githinji eventually released his medical examination report dated 27<sup>th</sup> May, 2014 which recommended that the respondent could resume his duties after two (2) months.
7. As a consequence of the belated medical report, the appellant, through its Managing Director, opted to suspend the respondent from employment on medical grounds via letter dated 23<sup>rd</sup> June, 2014. This letter is reproduced herein:

Dear Simon,

Re: Suspension Of Employment

Further to our letter of 22<sup>nd</sup> May, 2014, we regret to advise that your employment with this company has been suspended with effect from the date of this letter on health grounds as earlier advised in our above quoted letter. All benefits arising out of your employment have therefore ceased from today.



In the circumstances, we attach a cheque No. 001218 for Kshs. 72,530/= (Seventy Two Thousand Five Hundred and Thirty only) being your June, 2014 emoluments less your loan reductions which kindly acknowledge. In the meantime, we advise that you have outstanding liabilities with us as follows:-

1. Personal car loan Shs. 212, 344.00
2. Commercial Vehicle Shs. 883, 067.00

Total Shs. 1095, and 411.00

8. In terms of repayments thereof, we ask that you provide a repayment plan for the debt within the next 14 days. We advise that if we do not receive an acceptable plan within the said 14 days, we shall proceed to demand and enforce our rights under the conditions of the advances accordingly.

We ask that you return to the CEO, any company property in your possession.

We thank you for the dedicated service you have given this company in the past and wish you the very best in your future endeavours.

Yours Sincerely,

MRS. S.N. Mwangi

Director ”

9. The respondent felt this arbitrary suspension without according him any hearing and without considering the medical report earlier submitted amounted to constructive termination. Through his advocates, the respondent wrote to the appellant challenging the “termination disguised as a suspension” as unjustified, unfair and discriminatory and notified the appellant of his intention to sue if the appellant failed to accept liability. By a letter dated 11<sup>th</sup> July, 2014 from the appellant’s advocates, it was denied that the respondent’s services had been terminated or that he was entitled to any of his terminal dues.
10. Later on, by a letter dated 1<sup>st</sup> August, 2014 the appellant summarily terminated the respondent’s employment for gross incompetence and negligence without according him any hearing to defend himself against the allegations. An extract of the letter is as follows:

Dear Simon

Re: Termination Of Employment Contract

Following a review of your performance while in employment and our clients’ complaints, we have carried out an in depth investigation of customer’s [sic] accounts, you did not act in the company’s interests. As a result, the company has lost money with some of the customers alleging that they paid their debts albeit through yourself. We are further satisfied that in your supervisory role, you continuously asked the brokers in charge of the accounts to renew policies that you knew very well hand [sic] issues which you personally was aware of [sic] and indeed it was your responsibility to resolve or account for. We are satisfied that you continuously covered up for the non-performance of the accounts contrary to the company policy.

Some of the accounts cited inter alia are:

1. Abdirizik Hussein Farah shs 28,318/=
2. Jane Muthoni Shs 20,000/=
3. Kamau Nyoike Shs 22, 947/=
4. Charles Mungai Gakuo Shs 22, 385/=



5. Stabket Gatonye Kagimbi Shs 12, 194/=
6. Francis Nganga Shs. 16, 052/=
10. In addition, over your employment period, you have miserably failed to reconcile the underwriter accounts which was one of the key responsibilities, indeed the main reason of your employment, details of which are well known to you. You have continuously misled the board of directors to cover up for your underperformance. This is tantamount to gross incompetence.
11. In the circumstances, we are satisfied that you acted in breach of clause 11 of your employment contract dated 1st December, 2009 and accordingly dismiss your employment summarily.
- Your pension to date stands at shs 636,063.00 which is payable immediately.
- Purely on humanitarian grounds, the company will allow the existing medical cover to run until expiry next March. Should it not be required, kindly let us know as soon as possible.
- Please let us have your proposal in the next 7 days to repay the existing loans owed to the company. Should we fail to receive a suitable proposal within the period, we reserve the right to take appropriate action.
- Without further reference to you, please also return the following company property: laptop, ipad, keys to the main door, keys to your desk drawers and the Operations office door.
- Kindly acknowledge receipt of this letter by signing and returning a copy to us.
- We thank you for the period you served in this company and wish you well in your future endeavours.
- Yours Sincerely,
- MRS. S.N. Mwangi
- Director ”
12. The respondent thus filed a claim against the appellant for unlawful, unjustified and wrongful termination and sought inter alia: a declaration that the appellant’s conduct was discriminatory; damages for discrimination and mental anguish; a declaration that his termination was wrongful and unfair; Kshs.198, 675/= unpaid salary for July, 2014; Kshs.198, 675/= being salary in lieu of notice; and twelve (12) months’ salary of Kshs. 2,384,100/= as damages for wrongful termination.
13. In response, the appellant remained adamant that it was at all times sympathetic to the respondent’s plight and acted in his best interest in order to facilitate his quick recovery. The appellant argued that it was within its right to summarily dismiss the respondent as per S.44 (4) of the *Employment Act* for gross incompetence, negligence and recklessness. The appellant also sought to challenge the respondent’s academic and professional qualifications claiming that he secured employment through fraud and forgery and therefore ought not be allowed to benefit from his own illegal acts. Ndolo, J heard the claim and determined that the appellant had acted in a discriminatory manner against the respondent. Further, that since due process was not followed, the allegations against the respondent did not meet the threshold of valid reasons as provided for under S. 43 of the *Employment Act*. Ndolo, J thus entered judgment for the respondent and awarded him:
1. Damages for discrimination Kshs. 5,000,000
  2. 12 month’s salary in compensation Kshs. 2,384,100
  3. 1 month’s salary in lieu of notice Kshs. 198,675
  4. Salary for July 2014 Kshs. 198, 675



14. Aggrieved, the appellant has brought this appeal premised on twelve (12) grounds of appeal, that the learned judge erred in:
- (i) finding that the appellant discriminated against the respondent
  - (ii) awarding the respondent Kshs. 5 million in damages for discrimination
  - (iii) finding that the appellant had unlawfully and unfairly terminated the respondent's employment
  - (iv) awarding the respondent damages for unlawful termination
  - (v) finding that the appellant had terminated the respondent's employment without notice
  - (vi) awarding the respondent one month's salary in lieu of notice
  - (vii) disregarding the principles governing redress of violations of fundamental rights and freedoms
  - (viii) failing to observe the doctrine of stare decisis in determining the suit before the court
  - (ix) finding for the respondent against the weight of evidence and submissions
  - (x) considering extraneous matters which were not supported by evidence
  - (xi) allowing a multiplicity of awards claimed by the respondent
  - (xii) awarding Kshs.7, 781, 450/= without considering the appellant's mitigating actions.
15. The appeal was disposed of by way of written submissions and oral highlights by counsel: Mr. Omotii for the appellant and Ms. W. Cuna holding brief for Mr. Mongeri for the respondent.
16. To start off, the appellant contested the finding by the learned judge that it had discriminated against the respondent on the basis of the letter dated 14<sup>th</sup> April, 2014. It was submitted that the letter was in response to the respondent's physical frailty and struggles in performance of his duties. The appellant contended that the respondent reported to work at 9:00am and left at noon to attend physiotherapy sessions. Furthermore, that there was no medical report that had been availed to the appellant to appraise the respondent's fitness to resume duty.
17. It was therefore necessary to send the respondent home to recuperate. This move, it was submitted, was vindicated by the subsequent medical report dated 27<sup>th</sup> May, 2014 that advised the respondent to stay home for another two (2) months.
18. Additionally, in full support and sympathy to the respondent, the appellant paid him full salary for the entire period he was off-duty. The appellant submitted that the learned judge failed to consider the appellant's compassionate actions and mitigating factors from the time of the respondent's diagnosis, that is: ensuring that he accessed treatment and medication; facilitating his travel to India; increasing his salary even though he had not worked for seven (7) months; ensuring that he received his pension; and donating vehicle KBJ 278P to him for ease of transport.
19. Nevertheless, and without prejudice to these averments, it was submitted that the award of Kshs.5 million for discrimination was inordinately high and unjustifiable. Counsel urged the court to review the award and reduce the same to Kshs.1.5 million, if inclined to find that indeed there was discrimination.
20. Secondly, it was submitted that there was no justification for the finding of unfair termination. According to the appellant, the respondent's terms of employment, as well as Sections 44(3) & (4)



of the Employment Act provided for summary dismissal where he was found to be in fundamental breach of his terms of employment. The appellant submitted that internal investigations uncovered anomalies in clients' accounts that had been handled by the respondent. Thus, being in breach of his duties the appellant was entitled to summarily dismiss the respondent from service. In any event, counsel submitted that the award of 12 months' salary in compensation was excessive and unfair. It was proposed that 5 months' salary was sufficient in damages. The award of one-month's salary in lieu of notice did not also sit well with the appellant.

21. In relying on two persuasive authorities from the Industrial Court (*D.K Njagi Marete v Teachers Service Commission* [2013] eKLR and *GMV v Bank of Africa Kenya Ltd* [2013] eKLR), it was submitted on behalf of the appellant that the learned judge erred in awarding multiple awards as compensation to the respondent by awarding damages for unlawful termination, damages for discrimination and one month's salary in lieu of notice.
22. The appeal was opposed and the respondent condensed the grounds of appeal into three. Whether the respondent's right under Article 27 against discrimination had been violated?  
Whether the dismissal was lawful and fair?  
Whether the respondent was entitled to the remedies awarded?
23. On discrimination, it was submitted that the letter sending him home left the respondent mentally and emotionally disturbed as his input was not sought and despite the fact that he was still performing his duties at optimal levels. It was the respondent's view that the tone of the letter was correctly identified by the learned judge as discriminatory. It was also argued that the delay in receiving the medical report was beyond the respondent's control and thus this should not have been a contributing factor to suspend or terminate the respondent. It was also noted that despite finally receiving the medical report, the appellant had failed to consider it. It was pointed out that no evidence was put forward to show that the respondent's inability to walk unaided compromised his performance in any way.
24. There was therefore no justification to support the termination disguised as a suspension.
25. Citing the decision of *JSC v Gladys Boss Shollei & another* [2014] eKLR, the respondent highlighted the importance of an employee's right to a fair hearing.
26. The respondent contended that as per S. 45 of the Employment Act, his termination was unfair since due process was not followed. In support of his contention, the court was referred to *Kenfreight (EA) Ltd v Benson K. Nguti* [2016] eKLR wherein this Court stated "Termination of employment will be unfair if the court finds that in all the circumstances of the case, it is based on invalid reasons or if the reason itself or the procedure of termination is itself not fair". It was reiterated that the respondent was summarily dismissed without the opportunity to defend himself against the allegations levelled against him and without notice. If this had been done, the respondent would have had occasion to explain the allegations made against him. The respondent further denied ever receiving the unsigned letter of 16<sup>th</sup> June, 2014 purporting to demand from him explanations of the alleged anomalies.
27. The respondent submitted that having discharged the burden of proving unfair dismissal, the onus shifted to the appellant to justify the dismissal. It was the respondent's further submission that the damages for unfair termination were in line with S. 49 of the Employment Act as the learned judge took into account the slim chances of the respondent securing alternative employment; the callous nature in the way the appellant handled the respondent; as well as the belated attempts to discredit his professional and academic qualifications after his termination. This Court was thus urged not to interfere with the discretionary award. The award for July, 2014 salary was also said to be proper as the respondent was terminated on 1<sup>st</sup> August, 2014 and his July, 2014 salary remained unpaid.



28. It was finally submitted that the mitigating factors raised by the appellant were never canvassed before the trial court and that these factors are not applicable. Firstly, as a permanent and pensionable employee, the respondent was lawfully entitled to his pension as per S. 35 of the Employment Act. Secondly, no evidence was tendered to demonstrate that the appellant facilitated the respondent's travel to India. The respondent submitted that it was a misdirection to the court to state that the appellant donated the private vehicle KBJ 278P to the respondent, as the appellant had repossessed the commercial vehicle KAN 429N which essentially covered all the debts due and owing to the appellant. The respondent's view was that it was also erroneous for the appellant to state that he was paid salary for seven (7) months as he only spent two (2) months in India and resumed duty on 10<sup>th</sup> February, 2014, worked for over two (2) months until 14<sup>th</sup> April, 2014 when he was sent home. The court was thus urged to dismiss the appeal and uphold the award of Kshs.7, 781, 450/=.
29. We have carefully considered the records, the rival written and oral submissions, the authorities cited and the law. This appeal is a first appeal and our mandate as a 1<sup>st</sup> appellate court is as set out in *Selle v Association Of Motor Boat Co. Of Kenya & Others* [1968] EA 123 wherein it was stated:
- “An appeal to this court from a trial by the High Court is by way of a re-trial 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 the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* [1955]22 EACA 270”.
30. In so far as discrimination is concerned, Article 27(4) of the Constitution provides:
- “27. Equality and freedom from discrimination:
4. The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth”.
- In order to ensure the full realization of this Constitutional right, section 5 of the Employment Act provides:
- (3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee: –
- (a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status.”
31. The respondent was hired by the appellant as an Operations Manager w.e.f. 1<sup>st</sup> January, 2010, at a monthly salary of Kshs 129,000 Unfortunately for the respondent, in November, 2013, he was



diagnosed with a spinal cord tumour that necessitated his admission at Max Health Care in India on 16<sup>th</sup> November, 2014.

32. He resumed work on 10<sup>th</sup> February, 2014 and due to his good work, his salary was increased to Kshs 198,675. At his place of work, the respondent had difficulties in movement and he could not walk unaided. On 14<sup>th</sup> April, 2014, the appellant asked the respondent to take time off to recuperate. He was also asked to provide a medical report of his condition. On 22<sup>nd</sup> May, 2014, the appellant wrote to the respondent complaining that it had not received a medical report on his condition and informed him of its intention to suspend him. On 27<sup>th</sup> May, 2014, Dr. Kiboi Julius Githinji submitted a report. He stated that the respondent “currently is improving remarkably with aggressive physiotherapy and is now able to walk with walking frame and with assistance. However, he still has lower limb weakness which after current review looks like will have progressive motor power improvement in two to six months. After two (2) months, we shall review and advise on outcome or prognosis. I recommend that after two (2) months, he resumes his duties and work. Kindly assist.”
33. The doctor’s report notwithstanding, on 23<sup>rd</sup> June, 2014, the appellant wrote to the respondent suspending his employment. This was followed by the appellant’s letter of 1<sup>st</sup> August, 2014 terminating the respondent summarily after alleging that he was in breach of his employment contract.
34. Given the sequence of events as stated above, it is not in dispute that the respondent suffered an ailment that caused him to be out of the office whilst seeking treatment outside the country. Upon the respondent’s resumption of duty on 10<sup>th</sup> February, 2014, his productivity was not optimal as he still needed to seek medical help by way of physiotherapy. He also could not move around unaided.
35. In particular, it was difficult for him to climb stairs. After a barrage of letters addressed to the respondent, the respondent was subsequently dismissed by the appellant on 1<sup>st</sup> August, 2014. The respondent viewed the appellant’s action of his dismissal as discriminatory. If the respondent’s ill-health affected his performance at his place of work, in what way can the appellant be said to have been discriminatory? The fact of the matter is that the respondent was unwell and he still needed medical attention that hampered his performance. It was on account of ill-health that the respondent could not perform like other employees who enjoyed good health. It is not that all employees of the appellant were sick and that the respondent was singled out for dismissal vis-à-vis other sick employees.
36. The respondent was not given differential treatment from other sick employees, and being the only one who was sick, he cannot be heard to say he was discriminated against. In our view, there was no discrimination. If anything, it would appear that the appellant supported the respondent in the course of his treatment. Upon resumption of duty, it was expected that the appellant as a business entity would want to know the respondent’s medical condition. It is noteworthy that this report was not forthcoming in spite of the appellant’s request vide the letter of 14<sup>th</sup> April, 2014. On 24<sup>th</sup> May, 2014, the appellant once more wrote to the respondent and reiterated that it had not received the medical report.
37. It was this letter that caused the Doctor to write a “Report” which on the face of it did not answer the appellant’s concerns. In dealing with the aspect of the respondent’s illness, in her judgment at par.31, the learned judge stated:
38. In *Kennedy Nyaguncha Omanga v Bob Morgan Limited* [Cause No. 1983 of 2011] this Court stated the following”:

“while employers are entitled to terminate employment on the ground that an employee is too ill to work, they must exercise sensitivity. First, the employer must show support to the employee to recover and resume duty. Second, once the employer begins to consider



termination, they must subject the employee to a specific medical examination aimed at establishing the employee's ability to resume work in the foreseeable future ... Third, the employer must give specific notice of the impending termination."

39. On the aspect of discrimination, she concluded:

"From the medical reports availed to the court, it is clear that the claimant had been attacked by a debilitating disease and by the time I took his evidence, he was on a wheelchair. Such a disease, coupled with the loss of a job are as severe as a bereavement and in handling the case of such an employee, the employer must not only follow due process but must also facilitate the employee to come to some form of closure".

We have cited the above excerpts to show that the trial court appreciated that the respondent was unwell and that ill-health can lead to termination of service.

Be that as it may, in the letter of termination issued on 1<sup>st</sup> August, 2014, it was clear that although the respondent was blamed for financial misappropriation, he was not given an opportunity to defend himself. He was also not subjected to a disciplinary process. Section 43 (1) of the *Employment Act* provides:

43(1) in any claim arising out of termination of a contract, the employer shall be required to provide 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"

40. Under Section 45(2) an unfair termination occurs when an employer fails to prove:

- (a) that the reason for the termination is valid:
- (b) that the reason for the termination is a fair reason-
  - (i) related to the employees conduct, capacity or compatibility; or
  - (iii) based on the operational requirement of the employer; and
- (c) that the employment was terminated in accordance with fair procedure".

40. In the case of *Kenfreight (E.A) Limited v Benson K. Nguti* [2016] eKLR, this Court held:

"Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken".

41. As stated above, although the respondent was blamed for certain transgressions relating to financial misappropriation, the letter of 1<sup>st</sup> August, 2014 gave a final verdict, summary dismissal. It follows therefore that the respondent was not subjected to due process. It is on account of this that the trial judge awarded compensation equivalent to twelve (12) month's salary. Under the law, the twelve (12) months' salary is the maximum amount of compensation. In our view, the circumstances leading to the summary dismissal were of a progressive nature. Here is a situation where the appellant demonstrated a lot of goodwill towards its employee, the respondent. However, over a period of time, the good will waned, more so when it appeared that the respondent was not cooperating in terms of availing a medical report as required by the appellant. The doctor finally submitted the report which we have



reproduced above in extenso. In our view, the respondent should not have been awarded the maximum number of twelve (12) months' salary, which we hereby reduce to eight (8) months' salary.

42. As for the rest of the claims, we find that the contract of employment provided that upon dismissal, the respondent was entitled to one (1) month's salary in lieu of notice. He was also still on the appellant's employment upto 1<sup>st</sup> August, 2014.

43. He was not paid salary for the month of July, 2014.

44. The upshot of the above is that we partially allow the appeal and set aside the award of Kshs 5,000,000 being damages for discrimination. In place of twelve months' salary in compensation, we substitute therefor eight (8) months' salary, a sum of Kshs 1,589,400. The respondent is also entitled to one (1) month's salary in lieu of notice as well as salary for the month of July, 2014.

45. Given the circumstances of this case, we direct that each party shall bear his/its own costs.

It is so ordered.

**DATED AND DELIVERED IN NAIROBI THIS 19<sup>TH</sup> DAY OF JULY, 2019.**

**N. WAKI**

**JUDGE OF APPEAL**

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**A. MAKHANDIA**

**JUDGE OF APPEAL**

.....

**F. SICHALE**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**

