IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MUSINGA & KIAGE, JJ.A)

CIVIL APPEAL NO. 127 OF 2015

BETWEEN

THE POSTAL CORPORATION OF KENYA.....APPELLANT

AND

ANDREW K. TANUI.....RESPONDENT

(An appeal from the Judgment and Decree of the Employment and Labour Relations Court of Kenya (J. Riika, J.) dated 31st March, 2014

in

Cause No. 606 (N) of 2009)

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JUDGMENT OF THE COURT

The appellant is a State corporation under the parent 'Ministry of Information and Communication'. Between the years 2006 and 2008, the appellant started experiencing serious financial losses, variously characterized as: *"substantial and intolerable loss"*, *"massive hemorrhage"*, and likened to a *"sinking Titanic"*. The ministry was also alarmed and it ordered a forensic audit of the appellant's operations. The Kenya National Audit Office was called in, but it advised that external auditors be engaged. M/s Delloitte and Touche were then appointed and undertook a forensic audit between April and July, 2009. They identified the major source of the financial hemorrhage as a product of the appellant christened **"Postapay".**

Postapay was conceived in the year 2003 as an electronic funds transfer (EFT) product to facilitate instant transfer of money nationally and internationally, much in the same mould as the internationally acclaimed Western Union and Money Gram. But the appellant needed an external partner to handle the international transactions. And so, they advertised for tenders and eventually picked Afripayments (K) Ltd **(Afripayments)** which had American parentage (Afripayments LLC). Unfortunately, there was no due diligence carried out, and international best practices were not followed, in setting up the operational systems between the appellant and Afripayments. When the project commenced operations in September 2006, all systems were controlled by Afripayments, including hosting the server, and it is no wonder that by June 2008 there was a debtor balance due to the appellant in the region of Sh.117 million and a gaping hole of unaccounted for amount of Sh.44 million.

The appellant's Board of management then took a decision to suspend the entire top management team of seven officers, including the Postmaster General. All of them were first sent on compulsory leave from 30th April, 2009. They were called back in July 2009 when each was sent home basically for what the Board considered negligence of duty and mismanagement. Some of them have since gone to court and succeeded in their cases, but the appellant does not appear to have appealed the decisions. See ***Fred Odhiambo vs the Postal Corporation & The Attorney General [2013] eKLR*** and ***Ken Aluoch vs Postal Corporation of Kenya Ltd [2016] eKLR.*** The case before us concerns one of those officers, who is the respondent before us. At the time, he was the General Manager incharge of Finance and Strategy, having been offered the position on 2nd October, 2007 for a three year term, and reported for work on 12th November, 2007. By that time the Postapay contract had been in existence for about three years, and in actual operation for 16 months. The discovery of irregularities in the system had been made six months earlier, in March 2007. Upon joining the appellant the respondent, amongst other things, embarked on

pursuing payments due from Afripayments and managed to recover Sh.619,744,319 between July 2008 and April 2009. He also raised issues of the system integrity and controls with the project managers, and addressed the weaknesses in the manual accounting system by proposing automation and taking charge of the ERP implementation project to that end, piloted by Price Waterhouse Coopers (PWC). His overall performance review for the year 2007/2008 was *"very good"*.

All that, however, did not stop the appellant from charging the respondent with dereliction of duty and mismanagement, after suspending him on 30th April, 2009. In their letter dated 2nd July, 2009, the appellant catalogued eight transgressions which it summed up as "NEGLIGENCE OF DUTY AND MISMANAGEMENT OF THE POSTAPAY PRODUCT". The specific charges were as follows:

> *"(a) Prejudicial amendment of the contract between Postal Corporation and Afripayment [K] Limited.*
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> *(b) Failure to ensure the Respondent gets reimbursement for International Monetary Transfer.*
>
> *(c) Doing business with a firm Afripayment [K] Limited with doubtful financial stability.*
>
> *(d) Failure to take action to ensure the Respondent does not suffer losses through EFT System.*
>
> *(e) Poor maintenance of records for PostaPay.*
>
> *(f) Failure to maintain accurate debtor balance.*
>
> *(g) Unexplained debtor balance of Kshs.44 million.*
>
> *(h) Failure to do regular bank reconciliation for central accounts".*

The respondent was given seven days to advance reasons in his defence and show cause why his contract should not be terminated. He did so by his letter dated 10th July, 2009, giving extensive answers to each count and denying any impropriety on his part. He was subsequently summoned to a Board meeting on 17th July, 2009, where he was asked whether he wanted to 'add or subtract' anything from his written response. He was then released and told he would be recalled if the Board needed any clarification. He never was. According to him, he took less than five minutes with the Board.

On 31st July, 2009, the respondent was served with a letter dated 22nd July,

2009 summarily dismissing him for gross misconduct. It stated in part:

> ***"This is to inform you that the reasons you advanced in your defence letter and your oral presentation to the Board on 17th July 2009 have been carefully considered but found unacceptable. The Board has therefore approved your dismissal from service on grounds of Gross Misconduct. The dismissal is effective from the date of this letter".***

The respondent reacted by instructing his lawyers to demand compensation for termination of the contract of employment, terming the process of summary dismissal as unlawful and unjustified. When liability was not admitted, the respondent filed suit on 12th October, 2009 contending that the termination of his contract was malicious and without due regard for his welfare and rights in that there was no notice of the intended termination; no fair hearing; and it was based on false and unjustified accusations. He claimed:

> ***"(a) Reinstatement to his previous position without loss of benefits;***
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> ***(b) Salary arrears for the entire period the Claimant has been out of employment;***
>
> ***(c) Damages for wrongful and/or unfair termination;***
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> ***(d) In the alternative he is paid terminal benefits comprising 3 months' salary in lieu of notice at Kshs.1,066,500, Pay in lieu of leave of 39.15 days at Kshs.279,252, Gratuity for 3 years at Kshs.1,953,000, salary for the period 23rd July 2009 to 11th November, 2010 at Kshs.355,500 per month amounting to Kshs.5,566,059 - total Kshs.8,864,811;***
>
> ***e) Maximum compensation of 12 months' salary for wrongful dismissal; and***
>
> ***f) Costs with interest."***

The appellant resisted the claim, contending that it was entitled to terminate the contract if the services of the respondent were not satisfactory. According to them, the respondent had been offered a high level management position on the basis of his impressive credentials and previous work experience with another state corporation. He was, above all, expected to offer powerful leadership in the area of finance and strategy, but he had performed his obligations in an incompetent and negligent manner, thus occasioning loss and damage to the appellant. He had been given ample opportunity to explain himself but instead he passed the buck to his colleagues. His dismissal with loss of all benefits was therefore fully warranted and his claim did not lie.

Both Parties were orally heard and their evidence was tested in cross examination. They also filed written submissions. In the end, after minutely reviewing the charges laid against the respondent and the responses he gave on each of them, and upon considering the oral and documentary evidence on record, the trial court **(Rika, J.)** found that the appellant had not discharged its onus under ***Sections 43*** and ***45*** of the **Employment Act 2007**, to show valid reason or reasons justifying the termination of the contract of employment. The court was persuaded that most of the complaints related to the period before the respondent was employed and he could not therefore take responsibility. In any event, they were systemic or institutional weaknesses which the respondent had little, if anything, to do with. As for the period the respondent was in employment, the court found that he worked diligently and honestly in the discharge of his duties. On credibility of witnesses, the trial court found that the respondent *'came out across (sic) as an honest and truthful witness, who conceded when he made mistakes, and gave clear evidence on the actions he took in remedying such mistake'.*

On procedural fairness, the trial court found that the appellant did not give to the respondent the reasons for sending him on compulsory leave; that the forensic audit report which the Board relied on to frame the charges against the respondent was never shown to him; that the invitation to appear before the Board on 17th July, 2009 simply gave him the time and place, not the reason of invitation; that there was no evidence that the appellant was advised on his right to be accompanied at the meeting by an employee of his choice in terms of ***Section 41*** of the **Employment Act, 2007;** and that no significant hearing was carried out at the Board meeting. The court concluded as follows:

> ***"Ultimately, the Court is satisfied that the Claimant's dismissal from service was lacking in substantive justification and was procedurally unfair. The Respondent did not follow the fair termination law laid down under Section 41, 43, and 45 of the Employment Act 2007. Termination was unfair."***

Following those findings, the court considered the remedies sought by the respondent and rejected reinstatement as impracticable or unreasonable due to the time lapse of 4 years and the short remaining tenure of the contract. As there was no gross misconduct, termination of the contract would follow under the terms stated therein which the court awarded on the basis of the evidence on record as follows:-

> ***"(a) The Dismissal of the Claimant from Employment was unfair;***
>
> ***(b) The Respondent shall pay to the Claimant 12 months' gross salary in compensation at Kshs.4,266,000; gratuity pay for 21 months at 25% of the basic pay at Kshs. 1,139,250; Kshs.279,252 in annual leave pay; and 1 month basic salary in notice pay at Kshs.217,000 - total Kshs.5,901,502;***
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> ***(c) This amount shall be paid within 30 days of the delivery of this Award; and,***
>
> ***(d) No order on the costs and interest."***

The appellant was aggrieved by those findings and orders. It sought to challenge them on ten grounds listed in the memorandum of appeal, but in the written submissions, which were orally highlighted, learned counsel for the appellant **Mr. Anthony Maruti**, instructed by M/s Simba & Simba Advocates, reduced them into four broad issues as follows:-

> ***"(a) Whether the Learned Judge erred in making an award based on erroneous computation (Ground 4).***
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> ***(b) Whether in any event, the Respondent could be entitled to a full gratuity payment as part of the Award made by the Trial Court. (Grounds 5, 6, 7 and 8).***
>
> ***(c) Whether in any event the Respondent was entitled to be paid all allowances as part of the Award made by the Trial Judge. (Grounds 4 and 7).***
>
> ***(d) Whether the Learned Judge erred in finding that the Termination of the Respondent was Substantively and Procedurally Unfair and/or Unlawful. (Grounds 1, 2, 3, 5, 6 and 10)".***

We shall consider and decide on the grounds of appeal in the manner laid out by counsel. In so doing, we shall discharge our duty as the first appellate Court, to re-evaluate the evidence afresh in order to reach our own conclusions in the matter. See ***Rule 29 (1) (a)*** of the Rules of this Court. We must also defer to the findings of fact made by the trial court, especially where they are based on the credibility of witnesses because that court had the added advantage of hearing and seeing the witnesses. Nevertheless, we are entitled to interfere with those findings if they are based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the findings. See ***Mwangi vs Wambugu [1984] KLR page 453.***

The first issue is based on the finding by the trial court that the gross salary of the respondent was Sh.355,500, and that therefore the compensation would be pegged on it. Counsel referred to the letter of offer dated 2nd October, 2007 which specified the remuneration as a consolidated salary of Sh.348,000 comprising of the basic salary of Sh.217,000; house allowance - Sh.60,000; entertainment allowance - Sh.6,000; Utility allowance - Sh.10,000; Security allowance - Sh.20,000, and car allowance - Sh.35,000; making the total of Sh.348,000. The gross monthly salary was therefore overstated by Sh.7,500.

On the other hand, learned counsel for the respondent, **Ms. Judith Guserwa**, instructed by M/s J. A. Guserwa & Company Advocates, submitted that the trial court relied on the salary slip produced in evidence by the respondent, and his statement on oath that he was earning the gross monthly salary of Sh.355,500 at the time his services were terminated, which evidence was not challenged in cross examination or at all.

We have considered the issue and we think the trial court cannot be faulted in the manner it evaluated the evidence on record. It is true that the initial letter of offer dated 2nd October, 2007 stated the gross salary as Sh.348,000. However, when the claim was filed two years later in October 2009, the respondent stated his gross salary in paragraph 3 as Sh.355,500. In his documents in support of the claim, he specified that there was Airtime allowance paid to him at Sh.7,500 per month, making the total Sh.355,500. Indeed the salary slip attached to the claim by the respondent confirmed that figure, just as the oral evidence adduced by the respondent which was not challenged. The reason for not challenging it was obviously because the appellant had the employment records of the respondent and could have easily challenged the figure at any stage if there was no truth in it. But from the very beginning when filing its defence in January 2010, the appellant admitted paragraph 3 of the claim. Needless to say, parties are bound by their pleadings. It would therefore be idle to raise the issue at this stage, when in reality it was always a non-issue. It is our finding that the issue was raised without any factual or legal basis, and we reject it.

The second issue relates to the gratuity award. Counsel submitted that gratuity was only payable under the terms of the contract at 25% of basic salary but only upon successful completion of the term. In any event, it was not available if the separation was due to gross misconduct. In counsel's submission, it was evident that the respondent served for 21 months only and had 15 months to go. In his view, the appellant was sinking under heavy financial losses and there was no basis for speculating that it would survive until the end of the respondent's contract. Furthermore, he urged, gratuity by definition, was a reward given at the option of the employer and was not a contractual term. He cited the decision of this Court in ***Bamburi Cement Limited v***s ***William Kilonzi [2016] eKLR*** for that definition. The employer could only give the gratuity if there was successful completion of the contract, but there was not.

There was no direct oral response to this issue by Ms. Guserwa who did not file written submissions. But it is still our duty to consider it.

In dealing with the issue, the trial court stated as follows:

> ***"73. The contract provided that the Claimant would be entitled to one-off gratuity at the rate of 25% of the total basic salary during the period served. The payment was subject to successful completion of the contract, and to separation from service other than through gross misconduct. The Court has concluded that the Claimant does not merit reinstatement, and by implication, would not merit the salaries for the period left in his contract which was prematurely terminated by the Respondent. It has also been found that the conclusion by the Respondent, that the Claimant was guilty of gross misconduct, was a wrong conclusion. The effect is that it would be wrong for the Court to interpret the gratuity clause to mean that the Claimant left employment for gross misconduct. The condition that he completes the contractual period successfully to earn gratuity, cannot also be held against him. He was not the cause of the premature termination of the contract. The Court has denied him the salary that he would have earned to the end of the contract in September 2010. It was not because of his fault, that he did not complete the 3 years. He should not be denied the gratuity proportional to the months successfully completed in service. He is granted gratuity for the 21 months served, at 25% of the total basic pay = Kshs.1,139,250."***

With respect, we find no reason to disturb that reasoning. In the letter of appointment, the appellant committed to paying *"gratuity at the rate of 25% of your basic salary earned during the period served".* The appellant also reserved the right to terminate the contract prematurely. Did this mean that gratuity would not be payable just because the employer, out of its own choice, ended the contract? Surely not. In our view, proportionate gratuity would have been earned *'during the period served'* and would be payable. The only reason why it would not be payable was where the employee was guilty of gross misconduct.

The ***Bamburi Cement Limited case (supra)*** which is relied on by the appellant is, in fact, not supportive of the submission made, but in support of the position taken by the trial court which we uphold. This Court stated, thus:

> ***"Turning to the award of gratuity, the first thing that we must emphasize is that gratuity, as the name implies, is a gratuitous payment for services rendered. It is paid to an employee or his estate by an employer either at the end of a contract or upon resignation or retirement or upon death of the employee, as a lump sum amount at the discretion of an employer. The employee does not contribute any sum or portion of his salary towards payment of gratuity. An employer may consider the option of gratuity in lieu of a pension scheme. Being a gratuitous payment the contract of employment may provide that the employer shall not pay gratuity if the termination of employment is through dismissal arising from gross or other misconduct. But where, like here, the dismissal is not justified and is wrongful the employee will be awarded gratuity if it is provided for in the contract of employment."*** [Emphasis added].

The second ground fails.

The third ground urged is whether the respondent was entitled to payment of allowances as part of the award. It arises from the award of compensation of 12 months at the rate of the gross monthly salary of Sh.355,500, which, according to the appellant, ought to be limited to the basic salary of Sh.217,000. In counsel's submission, an allowance is not earned by the employee but is a financial benefit given to the

employee by the employer over and above the regular salary. In other words, it is an expense an employer accepts to incur to facilitate the employee's performance of his duties, and is only payable up to the point of termination, not beyond it. The only exception, in his submission, was house allowance which under ***Section 31 (1)*** of the Employment Act was obligatory in addition to the basic salary.

To drive the point home, counsel referred us to ***Section 3*** of the Employment Act which defines remuneration, as *'the total value of all payments in money or kind, made or owing to an employee arising from the employment of that employee'*; ***Section 18 (4)*** which provides for payment of '*all moneys, allowances and benefits'* to a dismissed employee; and ***Section 49 (1) (c)*** which refers to payment of *"wages or salary not exceeding twelve months based on the gross monthly wage or salary"* as compensation. Counsel observed that the use of different terminology in those provisions confirmed that *'gross monthly wage or salary'* is not inclusive of all allowances. In support of the submission, counsel relied on the High Court case of ***Edward Muthuri vs Airfreight Forwarders Ltd [2007] eKLR*** **(O. K. Mutungi, J.);** and the Industrial Court decisions in ***David Nyagudi Okoth & Another vs Corn Products Kenya Limited & Another [2014] eKLR)*** and ***Fredrick Ngari Muchira and 99 Others vs Pyrethrum Board of Kenya [2013] eKLR***, **(B. Ongaya, J);** all to the effect that allowances are not part of gross wages. On that premise, and assuming that the compensation of 12 months was tenable, it could only amount to Sh.2,604,000 and not Sh.4,266,000, as the trial court found, concluded counsel.

In a brief response, Ms. Guserwa supported the trial court, submitting that ***Section 49 (1) (c)*** of the Act and ***Section 15*** of the **Labour Institutions Act, 2007 (now repealed)** provided for the remedy to be based on the monthly gross salary which, in her view, does not exclude allowances.

We have anxiously considered the issue, for it is not without difficulty. As correctly submitted by learned counsel for the appellant, the definitions of *'wages'* and *'allowances'* are different and they are not interchangeable. Indeed, two learned Judges **O. K. Mutungi, J**. and **B. Ongaya, J.** in the authorities cited before us were of the view that *'gross wages'* or *'gross salary'* was exclusive of allowances. As also correctly observed by counsel, there is no definition of *'gross wages'* or *'gross salary'* in the **Employment Act, 2007**. The only definition is on *"remuneration"* which is the *'total value of all payments in money or in kind, made or owing to an employee arising from employment of that employee'*. The Act, nevertheless, uses the terminology *'wages'* and *'salary'* interchangeably in **Part IV** of the Act -- ***Sections 17*** to ***25***. In ***Section 18,*** it refers to *'wages'* and *'allowances'* as separate payments upon termination of employment**.** But in prescribing the manner of payment of wages and salaries in ***Section 20***, the terminology ***'gross wages'*** is employed for the first time in the Act. The section provides:

> ***"20. Itemised pay statement***
>
> ***(1) An employer shall give a written statement to an employee at or before the time at which any payment of wages or salary is made to the employee.***
>
> ***(2) The statement specified in subsection (1) shall contain particulars of -***
>
> ***(a) the gross amount of the wages or salary of the employee;***
>
> ***(b) the amounts of any variable and subject to section 22, any statutory deductions from that gross amount and the purposes for which they are made; and***
>
> ***(c) where different parts of the net amount are paid in different ways, the amount and method of payment of each part-payment".*** [Emphasis added].

So that, reference to *'wages'*, *'allowances'*, *'gross wages'* or *'gross salary'* are all separate elements of the remuneration of an employee. Our interest in this case is *'gross monthly wage or salary'* which is the terminology used in the Act as the remedy of compensation for unfair termination. In the case of ***Banking, Insurance*** & ***Finance Union (Kenya) vs Maisha Bora Sacco Society Ltd [2018] eKLR,*** decided on 20th December, 2018, Ongaya, J. adopted the following construction:

> ***"Section 49 (1) (c) provides that the employee may be paid, "(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." The Act does not define the meaning of "****gross salary****". The Black's Law Dictionary, 9th Edition defines "****gross income****" as total income from all sources before deductions, exemptions or other tax reductions. Thus the court returns(sic) that "****gross salary****" under the section means the monthly basic salary and allowances as per the contract of service and therefore the 15% monthly house allowance that was found due under the relevant wage order was part of the gross monthly salary that was due. Thus, in computing the 3 months' gross salaries awarded in compensation, the 15% house allowance will be construed accordingly. The Court returns(sic) that the gross salary under the section does not mean the last gross monthly salary actually paid but the last gross monthly salary or wage as per the contract of service. .....In conclusion, the Court returns (sic) that "****gross salary****" in section 49 of the Act means the gross monthly salary per the contract of service and the 15% of basic pay in house allowance as awarded will be reckoned as part of the grievants' gross monthly salary as at the time of termination because the Court found that it was part of their due regular payment under their respective minimum terms and conditions of service."*** [Emphasis added].

It is apparent at once, that the learned Judge had changed his view expressed in the decisions made four years earlier in the two cases cited above. In our view, his construction in the latter case that *'gross monthly wages'* are inclusive of allowances resonates with common sense. In common parlance, **basic salary** is the base income of an individual, the fixed part of one's compensation package; while an **allowance** is the amount received by the employee for meeting service requirements. It is provided in addition to the basic salary and varies from employer to employer. . Some employers may well offer allowances that are clearly predicated on actual performance of the contract but which do not form part of the gross salary of an employee. Good examples were given in the case of ***Pravin Bowry v Ethics & Anti-Corruption Commission [2013] eKLR,*** such as 'telephone allowance; provision of security guards; provision of fuel; cost of medical premium and annual insurance; amounts due for outpatient and medicines; amount in lieu of leave; proportionate AAR premiums for Claimant's wife; cost of AAR cover for the unspent term of contract'. The exclusion of such allowances was affirmed by this Court in the case of ***Richard Erskine Leakey & 2 others v Samson Kipkoech Chemai [2019] eKLR***,

which stated thus:

> ***"55. In our view, there are certain allowances that are dependent on actual performance of the contract of employment. When calculating damages due to an employee in the event of unfair or wrongful termination, it is only the emoluments or gross salary of the employee that should be taken into account not allowances and privileges dependent on actual service and performance of the contract.***

Gross salary would then be the amount calculated by adding up one's basic salary and allowances, before deduction of taxes and other deductions. Each case must be examined to identify the nature of the allowances given and whether they form part of the gross salary. We affirm the construction made by Ongaya, J. in the ***Banking, Insurance & Finance Union*** case (supra). We are not persuaded by the appellant's argument that *'gross wages'* or *'gross salary*' does not include any allowances and that it is the same as the *'basic salary*' or *'basic wages'*. The third ground of appeal fails too.

And now to the last and most important issue -- was the summary dismissal of the respondent substantively justified and procedurally fair?

On the substantive aspect, Counsel for the appellant submitted that the appellant had every reason to dismiss the respondent for gross misconduct. According to him, the contract with the respondent held him to a powerful leadership obligation and the respondent did not provide it in respect of the Postapay product.

Counsel faulted the trial court for ignoring damning admissions made by the respondent during cross examination about systemic failures and the wrongs that were going on under his watch as the leader. On that basis, urged counsel, it cannot be said that the charges laid against the respondent were baseless.

Responding to this aspect, Ms. Guserwa submitted that the trial court had meticulously combed through the evidence on record and there was no reason to disturb its findings of fact. According to her, the respondent had provided good services to the appellant for 21 months and there were no complaints. He evidently gave good advice to the appellant on the matters he was handling and there was no basis for charging him with institutional failures that took place before he was employed.

After assessing the evidence relating to justification for termination of employment, the trial court had this to say:

> "***65. The Court is convinced the allegations against the Claimant were adequately answered by him in his comprehensive letter of 10th July 2009. The Minutes of various Board Meetings support most of the answers contained in this reply. The contract concluded between the Postal Corporation and Afripayments had fundamental flaws that became more visible as it was implemented. There were decisions made by the Respondent with regard to that contract, which gave certain outcomes, which could not be attributed to the Claimant. The accusations made against Tanui appear to this Court to have been calling on him to undo the contract with Afripayments. The Claimant could not rewrite the contract, re-do a due diligence, or rescind the contract. The only person, who could rescind that contract, and take contractual responsibility, was the***
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> ***Postal Corporation of Kenya. Secondly, there were underlying systemic failures. The Respondent did not have the accounting software to run PostaPay EFT Product. The Claimant, to his credit, spearheaded efforts at automation. The primary server was retained by Afripayments, making independent verification of commissions impossible.***
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> > ***66. The Court does not think that the Claimant sold himself to the Respondent for what he was not. He is a highly qualified and competent Finance and Accounting Professional. He presented his credentials, was appointed on the strength of those credentials, and given a job, with a job description. It would be wrong for the Court or the Respondent however, to expect that even with these high qualifications, the Claimant could undo all the problems underlying the contract with Afripayments. The Respondent acknowledged even before the Claimant entered the scene, that there were deep-seated problems with Afripayments. The Court's role is not to look at the job description and the qualifications of the Claimant for that job, in isolation. To determine if the Claimant was negligent in performance of his duty, and in stewarding PostaPay EFT Product, the Court must look at the whole process of the making and implementation of Afripayments contract. The Claimant found the contract signed and dusted. His ability to influence the implementation of the Afripayments' contract was limited. He gave advice within certain demonstrable constraints. It was not the Claimant who concluded the contract with Afripayments, or who could rescind the contract. The Respondent seemed to suggest that the Claimant neglected his duty and leadership role, because he failed to influence the course of the Afripayments contract in these ways. Quite clearly, the Respondent stretched its understanding of the Claimant's job***

description too far, in thinking the Claimant could correct a bad bargain. The Respondent did not show valid reason or reasons for dismissal of the Claimant from service."

We have re-evaluated the evidence on our own and we think there was sufficient basis for the trial court to arrive at those findings and conclusions. The focus of the charges laid against the respondent was his handling of the Postapay product, not his overall leadership of the appellant or the Finance and Strategy docket. But clearly, he laid evidence before the court that he applied himself to mitigating the enormous damage caused by those who had initiated and launched the product without due diligence. He showed that there was only so much he could do as an individual after advising on what needed to be done by the appellant as an institution. There was no allegation that he was involved in any stealing or pilfering of the appellant's funds. On the contrary, he was involved in the process of automating the processes to ensure that there was no pilferage. The trial court, which saw and heard him, found him a trustworthy and credible witness and we have no reason to doubt that assessment.

The onus was really on the appellant to show that the dismissal was justifiable after the response made by the respondent both in his documentary and oral evidence. In the case of ***Pius Machafu Isindu vs Lavington Security Guards Limited [2017] eKLR*** this Court had the following to say on the burden of proof:-

> "***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:***
>
> *"..to declare and define the fundamental rights of employees, to provide basic conditions of employment of employees.."*
>
> ***Those provisions are a mirror image of their constitutional underpinning in Article 41 which governs rights and fairness in labour relations.***
>
> ***14. 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."*** [Emphasis added].
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> ***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."*** [Emphasis added].

In our view, the employer failed to sufficiently discharge the burden of proof placed on it, and we have no reason to disturb the findings of the trial court on that aspect of the case.

On the procedural aspect, counsel submitted that the finding that there was no significant hearing of the respondent was to elevate disciplinary proceedings to standards of a formal trial by judicial officers. In counsel's view, there was no obligation placed on the appellant by law to *'explain the charges to the employee'; call evidence in showing the truthfulness of the allegations'; or allow the claimant the opportunity to question the employer's witnesses'*. Such requirements do not exist. Furthermore, there is no statutory obligation for the employer to advise the employee on his right to be accompanied to the disciplinary hearing, he contended.

In support of that submission he cited the case of ***Kenya Revenue Authority vs Menginya Salim Murgani [2010] eKLR*** where this Court stated that an oral hearing was not necessary for one to be deemed to have been accorded a reasonable opportunity of being heard. Referring to ***Sections 41 (1), 43 (1)*** and ***43* (2)** of the Act**,** counsel submitted that a proper reading of the sections will confirm that the appellant acted within the law, and therefore the trial court misapprehended the law to that extent.

In response, Ms. Guserwa submitted that a proper disciplinary hearing was envisaged under ***Section 41*** of the Act which also requires the employer to ensure that the employee was accompanied by another employee of his choice. She submitted that the ***Kenya Revenue Authority case (supra)*** relied on by the appellant was distinguishable because it relied on other decisions made before the Employment Act, 2007 was enacted.

We have considered the issue. The trial court came to the conclusion that there was no procedural fairness due to the reasons summarized earlier in this judgment. It held as follows:-

"This procedure was flawed. It does not show that the Claimant was advised of his right to be accompanied to the Board hearing. No significant hearing took place. An Employer should not merely recite the grounds listed in a letter to show cause and then ask the Employee if there is anything to add or subtract; the Employer must make an effort to explain the charges to the Employee at the hearing, call evidence in showing the truthfulness of those allegations, and if there are Witnesses, allow the Claimant the opportunity to question the Employers' Witnesses. Evidence contained in documents must be produced. The Forensic Audit should have been supplied to the Claimant before the hearing date, and should have prominently featured at the hearing. Conversely, the Employee must be allowed the opportunity to adduce evidence and call Witnesses. The hearing process is different from the letter to show cause. If these were the same processes, there would be no need of a formal hearing. The hearing itself is not a mere technical appearance before a Disciplinary Panel; the opportunity to be heard means much more than being asked to add, or subtract, any answers that may have been given in responding to the letter to show cause. The Respondent failed the procedural test on these grounds."

It is the appellant's view that such holding had no legal basis. Admittedly, there has been considerable debate as to what amounts to a fair hearing or procedure in disciplinary proceedings. Indeed the appellant has cited the ***Kenya Revenue Authority case*** where this Court held that the fairness of a hearing is not determined solely by its oral nature, and that a hearing may be conducted through an exchange of letters as happened in that case. It also held that whether an oral hearing is necessary will depend on the subject matter and circumstances of the particular case and upon the nature of the decision to be made**.** We believe that is still good law, but not in respect of a hearing before termination as envisaged under ***Section 41*** of the Act.

It is our further view that ***Section 41*** provides the minimum standards of a fair procedure that an employer ought to comply with. The section provides for

"Notification and hearing before termination on grounds of misconduct" in the following manner:-

"(1) Subject to Section 42 (1), an employer shall before terminating the employment of an employee, on the grounds of misconduct; poor to performance or physical in capacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation."

"(2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employer 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, chosen by the employee within subsection (1) make."

Section 42 (1) referred to in ***Sub-section (1)*** relates to employees on probation.

Four elements must thus be discernible for the procedure to pass muster:-

(i) an explanation of the grounds of termination in a language understood by the employee;

(ii) the reason for which the employer is considering termination;

(iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;

(iv) hearing and considering any representations made by the employee and the person chosen by the employee.

In this case, the letter inviting the respondent to appear before the Board was only two lines containing the date and venue. It said nothing about the reasons for such invitation. It said nothing about the respondent appearing with another employee of his choice. The retort that an employer has no obligation to ask the employee to be accompanied does not avail the appellant because the law requires that such other person be present to hear the grounds of termination and if so inclined, make representations thereon. A hearing not so conducted is irregular. At the Board meeting, there is no evidence that an explanation of the grounds of termination was made to the respondent, and if so, in what language. The Board had in its possession the very document that formed the basis of the charges framed against the respondent but kept it away from him. Even in criminal trials, which are more serious in nature, an accused is entitled to the statements that support the charges laid against him. That is the essence of fairness even outside a judicial setting. The respondent faced serious indictments which could torpedo his entire career and destroy his future. In our view, this was a matter in which oral hearing was necessary, but none was held. Instead, all the respondent had was a technical appearance of less than five minutes with the Board, which evidence was not seriously challenged. For all those reasons, we agree with the trial court that the procedure adopted by the appellant was short of a fair one. We so find.

It follows from the findings on the four issues raised before us that the appeal is not meritorious. But that is not the end of the matter. The appellant specifically challenged the award of maximum compensation of 12 months, submitting that there was no proper legal basis for it. The award was made under ***Section 49 (1) (*c**)*** of the Act, that ***"The Claimant is granted 12 months' gross salary at Kshs.355,500 x 12 = 4,266,000 in compensation".***

We are 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 judge proceeded on wrong principles. See ***International Planned Parenthood Federation vs Pamela Ebot Arrey Effiom [2016] eKLR***. But this Court has in several previous decisions decried the awarding of maximum compensatory damages for wrongful or unfair termination without a firm factual and legal foundation for such awards. It

did so in ***CMC Aviation Limited vs Mohammed Noor [2015] eKLR,*** stating:-

> "***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***."

So too, in ***Ol Pejeta Ranching Limited vs David Wanjau Muhoro [2017]***

***eKLR*:-**

> ***"The trial judge did not at all attempt to justify or explain why the respondent was entitled to the maximum award. Yes, the trial Judge may have been exercising discretion in making the award. However, such exercise should not be capricious or whimsical. It should be exercised on some sound judicial principles. We would have expected the Judge to exercise such discretion based on the aforesaid parameters. In the absence of any reasons justifying the maximum award, we are inclined to believe that the trial Judge in considering the award took into account irrelevant considerations and or failed to take into account relevant considerations, which act then invites our intervention".***

See also ***Freight In Time Limited vs Rosebell Wambui Munene [2018] eKLR; National Social Security Fund vs Grace K. Kazungu & Another [2018] eKLR;*** and ***Nzoia Sugar Company Limited vs Francis Oyatsi [2019] eKLR.***

In awarding the compensatory damages, the trial court reasoned, quite correctly in our view, that employees ought to be discouraged from replicating injuries and claiming multiple remedies for what is essentially the same wrong. It stated:

> "***There is hardly any contractual breach in the employment relationship, which would be found to be fair under the law of fair/unfair termination. Essentially, general damages and statutory compensation redress the same economic injury occasioned to the Employee for the singular act of dismissal. Unless an Employee shows exceptional circumstances warranting redress under contract and under the statute, one form of remedy is sufficient."***

The court then proceeded to justify the maximum award in the following

manner:

> ***"The Court does not in any way trivialize the gravity of the economic injury sustained by Mr. Tanui. He was not able to meet his financial obligations after dismissal. He has found it difficult getting another job, as a result of his association with the PostaPay scam. He was about to secure employment with the Interim Boundaries Commission, but could not get the clearance of the Anti-Corruption Commission. His employability suffered, and the Court cannot ignore that. He is confined to teaching and consulting. The dismantling of the Postal Corporation Management was done in the full glare of the Media. The favourable findings in this Award may go some distance in restoring some degree of employability to Mr. Tanui. Termination, was unfair both on substantive and procedural grounds".***

With respect, while those considerations were relevant in the overall award of damages, we think the award lacked a sense of balance. The balance is 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. There is also the relevance of the overall policy in the award of damages which the same trial Judge, Rika, J., articulated in another case and was upheld by this Court in the case of ***Mary Wakhabubi Wafula vs British Airways PLC [2015] eKLR***. The trial court had explained the importance of capping compensatory awards and adopted the reasoning in the case of ***Eastwood & Another vs Magnox Electric PLC; McCabe vs Cornwall County Council & Others [2004] UKHL***, thus:-

> ***"In fixing these limits on the amount of compensatory awards, Parliament expressed its view on how the interests of employers and employees, and social economic interests of the country as a whole, are best balanced in cases of unfair dismissal. It is not for the Courts to extend further, a common law implied term, when this would depart significantly, from the balance set by legislature. To treat the statute as prescribing the floor, and not a ceiling, would do just that….. it would be inconsistent with the purpose Parliament sought to achieve, by imposing limits on compensatory awards payable in respect of unfair dismissal."***

We think it was necessary in this case to have considered not only the effect of the dismissal on the respondent, but the intention of Parliament in capping compensatory awards. It was also relevant to consider other comparable awards made in similar circumstances but none was considered. The respondent had already been given compensatory awards for the wrongful termination of his employment in terms of gratuity, notice, leave, thus converting it to a normal termination. He had only 15 months of his contract to serve and giving him his gross salary for 12 months would virtually be paying him for the term he had not served. At any rate it is doubtful that injured feelings and difficulty to find alternative employment are relevant considerations in determining compensation. Nevertheless, the law provides for compensatory damages for unfair termination of employment which we have affirmed did happen in this case.

In view of what we have stated above, we think the award was inordinately high and was not based on a balanced consideration of the applicable principles. We interfere with it to the extent that it is set aside and substituted with an award of six months gross salary; **Sh.355,500 x 6 = Sh.2,133,000**. It is to that extent only that this appeal succeeds, but is otherwise dismissed. As the appellant is a public institution and its only interest was protecting taxpayers' money, we make no orders as to the costs of the appeal.

Orders accordingly.

Dated and delivered at Nairobi this 19th day of July, 2019.

P. N. WAKI

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR