IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, MURGOR & KANTAI, JJA)

CIVIL APPEAL NO. 281 OF 2018

BETWEEN

CENTRE FOR AFRICAN FAMILY STUDIES (CAFS).....APPELLANT

AND

JONATHAN SPANGLER.....RESPONDENT

(***Being an appeal from the judgment and decree of the Employment and Labour Relations Court***

at Nairobi (M. Mbaru, J) dated 23rd March, 2017

in

ELR Cause No. 108 of 2015

****

JUDGMENT OF THE COURT

The Centre for African Family Studies (CAFS), the appellant, is aggrieved by the decision of the Employment and Labour Relations Court (ELRC) which found that the appellant had unfairly terminated ***Jonathan Spangler (the respondent's)*** employment and violated his constitutional rights, and after so finding, for awarding him punitive damages totaling US$ 259,013.90.

The facts of the dispute before the trial court were that the appellant, a non-governmental organization in Kenya employed the respondent, a United States national on a two year contract to the position of Knowledge Management Specialist (KMS) vide a letter dated 22nd May 2008 effective 1st July 2008, the terms of which the respondent accepted.

The contract of employment specified that he would be paid an annual salary of US$ 57,281.00 and would also be entitled to participate in a provident fund where the appellant would contribute 7.5% of his basic salary and the respondent's 5% of his basic salary. The contract also provided for payment for relocation expenses upon hiring and termination of his employment, which included costs incurred for shipping his household goods and personal effects to his home country upon termination of his contract. The contract was renewable for a further two years upon the expiry of each contract.

At the expiry of the initial period, by a letter dated 7th July 2010, the respondent's contract was renewed for a further two years effective 2nd August 2010 to 31st July 2012 at an increased annual salary of US$ 59,657. An attempt to have the respondent's contract renewed for a third period, bore no fruits as though the respondent claimed to have signed and forwarded it to the appellant for signature, the same was never signed.

Between January and early February 2009, the appellant begun to experience grave financial hardship. This prompted it to request senior members of staff to accept a salary reduction. In a letter dated 6th May 2009, the respondent was requested to take a salary reduction which request he acceded to on 30th June 2009, by appending his signature to the letter thereby accepting a reduction of 30% of his salary of US$ 4,222 from May to July 2009.

When the financial challenges persisted, the appellant embarked on a restructuring exercise. It identified certain managerial positions for redundancy. The strategy was aimed at ensuring that the appellant would be better placed to pay wages of its staff members. Of the

managerial positions identified, the employees in those positions were given the option to either resign or to be declared redundant.

On 25th April 2014, the appellant notified the respondent that it would not be renewing his contract as the Director of Operations & Business Development/ Knowledge Management Specialist after its expiration on the 30th June 2014 for reasons that it was facing severe financial challenges. Interpreting the non-renewal of his contract in light of the appellant's Personnel Policies and Procedures Manual (PPPM) which stated that; *"Redundancies can arise due to a decline in activity, funding, change in program direction or organizational change,"* the respondent considered himself to have been declared redundant.

On 26th January 2016, the respondent instituted a claim in the ELRC against the appellant dated 26th January, 2015 subsequently amended on 27th May, 2015 and further amended on 11th December, 2015 Complaining that his salary was not paid for the months of March, April, May, June 2014 contrary to the express terms of his contract; that he was not paid the unremitted portion of his salary from 2009 to 2014. He also complained that he was not subjected to a performance appraisal as required by the appellant's PPPM and the Performance Review and Evaluation Policy and consequently, his salary was not also reviewed. As a consequence he demanded a 4.2% salary increase for the period of employment from August 2012 to September 2014.

Further, the respondent claimed that, contrary to the terms of the contract, the appellant had refused to remit the agreed contributions to the provident fund, and had also failed to pay his repatriation and relocation expenses contrary to the agreed terms of the contract. As a consequence, his personal effects were never shipped back to the United States as requested by him on 26th June 2014, and they had remained in storage in the appellant's offices since 28th June 2014 to date.

The respondent further claimed that his rights to fair labour practices, freedom from inhuman and degrading treatment and torture, and from servitude and slavery, were violated; that he had suffered unequal treatment and discrimination at the appellant's hands in that he was regularly paid late, or not paid in full, that his employment was terminated because he was a US national, he was denied a salary raise, forced to accept a 30% reduction of his salary, subjected to an increase in responsibilities without an equivalent increase in salary, and was denied a house and transport allowance.

Based on the above averments, the respondents in the amended Memorandum of Claim dated 5th February, 2016 sought for;

a) a declaration that the appellant is in breach of the respondent's contract of employment and that his termination of employment was unfair and wrongful;

b) a declaration that the appellant violated the terms and conditions expressed under Article 8 of the respondent's International Headquarters Agreement with the Government of Kenya.

c) in the alternative to prayer (i), a declaration that the respondent was declared redundant in April 2014.

d) the respondent also prayed for the court to order the appellant to pay the sum of US$ 261,539.47 as particularized in the Claim together with interest thereof from 1st January, 2011 until payment in full.

e) in the alternative to the prayer for un-remitted pension contributions, the appellant pay the respondent service pay for six years worked at US$ 20,700.

f) The respondent also claimed;

a. Damages for the contravention of his constitutional rights provided for under ***Articles 27, 28, 30, 41*** and ***47*** of the Constitution of Kenya;

b. compensation of US$ 59,657.00 being 12 months of the respondent's basic salary for unfair and wrongful termination;

c. in the alternative, compensation of US$ 29,828.50 being 6 months of the respondent's basic salary as his contractual redundancy benefit;

d. Issuance of a Certificate of Service from the appellant; and

e. costs of the suit.

In a rebuttal to the respondents claim; the appellant denied that it had terminated his contract unlawfully, instead, it contended that the employment had lapsed due to effluxion of time; that the respondent being a member of the appellant's Senior Management Team (SMT) participated in the decisions reached by the appellant, and therefore he could not purport to disown those decisions. It further denied that he was entitled to redundancy and severance pay, and also denied that it had violated his rights. The appellant also denied owing him the allowances and expenses claimed in the amended Memorandum of Claim.

Upon consideration of the pleading, the facts and the parties submissions, the trial court found that not only was the respondent unfairly terminated from his employment but, his constitutional rights were also violated when the appellant engaged in unfair labour practices against him, tortured him and subjected him to inhuman and degrading treatment, as well as to servitude and slavery. Upon so finding, the court awarded the respondent *inter alia* a sum of US$ 59,657.00 being 12 months compensation for unfair termination of employment; US$ 145,773.00 in damages for constitutional breaches, violations and abuse. The court also found that he was declared redundant and awarded

him a US$ 6,700 being severance pay.

In addition to the above awards, the trial court also ordered a raft of other awards including but not limited to, payment of the reduced portion of his salary, unremitted salary, cost of home leave flights of US$ 7,689.40, relocation shipping costs of US$ 11,097.41 together with interest from 2014 until payment in full; accommodation costs of US$ 2,340; relocation flights costs of US$ 499, and home leave gratis of US$ 10,580.

Dissatisfied and aggrieved by the trial court's decision the appellant lodged this appeal, where the Memorandum of Appeal raises an astounding 25 grounds of appeal which when summarized are that the learned judge fell into error*;*

1. In finding that the respondent was rendered both redundant and unfairly terminated;

2. by failing to rely on the various documents that were filed in court that showed the true nature and circumstances of the appellant's position and decisions of which the respondent was part and parcel;

3. by failing to appreciate the nature, purport, tenor, the limits and or qualifications imposed on the implementation of the rights under Articles 27, 28, 29, 30, 41 and 47 of the Constitution of Kenya, 2010 in relation to the respondent's amended claim.

4. in awarding the following;

a. Compensation for unfair termination of employment to the respondent as per a ruling dated 17th January 2018 reviewing the judgment herein ***US$ 59,657.00****;*

b. in damages for constitutional breaches, violations and abuse ***US$ 145,773.00****;*

c. unremitted salary ***US$ 4,866****,*

d. cost of home leave flights, *US$* *7,689.40*

e. accommodation costs ***US$*** ***2,340***

f. relocation flights costs ***US$*** ***499;***

g. home leave gratis ***US$*** ***10,580;***

h. severance Pay ***US$*** ***6,700;***

i. compensatory leave ***US$ 7,130;***

j. for breach of Section 51 of the Employment Act ***US$ 971.80****.*

5. Interest at court rates from 30th July 2014 until payment in full save for damages and compensation awarded in 2(a) and (b) above.

6. Cost of the suit

At the hearing of this appeal learned counsel ***Mr. Oyatta*** appearing with ***Ms. C. Nyabundi*** were present for the appellant while learned counsel ***Ms. N. Kamau*** held brief for Dr. Kuria for the respondent. Both parties informed us that they would rely on the written submissions and lists of authorities that had been filed.

In the submissions the appellant urged on the question of unfair termination; that this Court should find that the notice of 25th April 2014 did not constitute a notice of redundancy, but rather a notice of non-renewal of contract; that the trial court was wrong in concluding that the respondent was declared redundant, and that were it not for the appellant's financial constraints his month to month employment would have subsisted. As regards the alleged violation of his rights, counsel asserted that the respondent failed to prove that the appellant acted in contravention of his constitutional rights under ***Article 27, 28, 29, 30, 41*** and ***47*** of the ***Constitution*** and that the trial judge wrongly concluded that his rights were violated.

On its part the respondent submitted that the learned judge could not be faulted for finding that the respondent's employment was unfairly terminated, and that he was also declared redundant; that the learned judge rightly found that the respondent's rights were violated, and in awarding the respondent 12 months compensation and severance pay, damages for rights violations, and for the outstanding amounts claimed.

We have given careful consideration to the record of appeal and the submissions of counsel in the manner of a retrial, as is our duty on a first appeal under ***Rule 29 (1) (a)*** of the Rules of this Court. In so doing, we must, defer to the findings of fact made by the trial court, especially where they are based on the credibility of witnesses since 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 where the judge is shown demonstrably to have acted on wrong principles in reaching the findings. See ***Mwangi vs Wambugu [1984] KLR***

page 453 where it was stated:

> ***"An appellate court is not bound to accept a trial judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."***

This appeal is premised on whether the learned judge was right in concluding that the respondent's employment was unfairly terminated; that he was declared redundant, and his fundamental rights were violated and, on whether he is entitled to the award of 12 months compensation, severance pay, and damages. In addition, we will interrogate whether he was entitled to awards for the unpaid expenses complained of in the Memorandum of Appeal which are;

a. Unremitted salary from 2009 to 2014 US$ 4,866;

b. Cost of home leave flights US$ 7,689.40;

c. Accommodation costs US$ 2,340;

d. Relocation flights costs US$ 499;

e. Home leave gratis US$ 10,580;

f. Compensatory leave US$ 7,130**.**

We begin by addressing the question of whether the respondent's contract was unfairly terminated. Before addressing this issue, it will be necessary to establish whether, by the time his services were terminated, an employment contract existed between the parties.

Addressing this question, the learned judge had this to say;

> ***"It is not in dispute that the Claimant was under two written contracts of employment- one going back to 2008 and covering the 2 years starting 1st July 2008 to June 2010. The second contract commencing July, 2010 and covering two years thus lapsing on 31st July 2012…However, from 1st August the Claimant remained at work with the respondent. The Claimant submitted his signed contract but there was no response by the respondent….***
>
> ***Thus each written contract of employment issued for the period 1st July 2008 and 1st July 2010 were for a fixed term and each came with new terms. Upon the lapse of each contract, the Claimant was engaged afresh on his employment. This was until the lapse of the 2nd contract on 31st July 2012. Onwards, the Claimant had no written terms of employment. He however continued to work with the respondent. This was until his employment was terminated vide notice of 25th April 2014…"***

The learned judge then concluded that;

> ***"In this case, what the Claimant got was a termination notice dated 25th April 2014 stating that his employment contract would terminate on the due date as at 31st July 2014. However there was no such contract that had a fixed term limit for the Respondent to make such inference. As such, the Claimant remained under a month to month contract of employment and a protected employee in terms of section 37 of the Employment Act."***

We are in agreement with the learned judge's conclusions that by the time the respondent's employment was terminated, there was no contract in existence between the parties. The record shows that after the lapse of the second contract, the respondent made every effort to enter into a third contract with the appellant which he signed, but it was not signed by the appellant. On its part, the appellant purported to rely on that contract to terminate his employment, but which was not produced in evidence. In effect, the respondent having demonstrated that he had signed a contract, and submitted it to the appellant, the burden shifted to the appellant to prove its existence. When it did not, the preponderance of probabilities reached is that, no formal contract existed; with the result that a month to month contract governed by ***section 35*** of the ***Employment Act*** came into existence.

In its submissions before Court, the appellant stated that it was not challenging the finding by the trial court that the respondent was serving a month to month employment contract in which case, this brings us to the determination of whether that contract was properly terminated in accordance with the provisions of the Employment Act. Whether it was terminated in accordance with the law is to be determined by the contents of the letter of 25th April 2014 which stated in relevant part that;

> *"…I must inform you that your contract of employment as Director, Operations & Business Development/Knowledge Management Specialist with the Centre for African Family Studies (CAFS) will not be renewed after its expiry on 30th June 2014.*
>
> *As you already know, the Board of Directors deliberated at length the fate of the organization's employees at a special board session in light of the severe financial constraints the organization is facing. Your position, as well as other positions, automatically became the subject to the board committee recommendations…*
>
> *…Unfortunately, you as well as all the other staff whose contracts are being prematurely terminated are simply a reflection of financial constraints that CAFS has been experiencing."*

In light of the above, we have no doubt in our minds that the letter sought to terminate the respondent's month to month employment contract, and which termination is governed by ***section 35*** of the Act. In particular, ***section 35 (1)*** specified;

> ***A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be—***
>
> ***(a) …***
>
> ***(b) where the contract is to pay wages periodically at intervals of less than one month, a contract terminable by either party at the end of the period next following the giving of notice in writing; or***
>
> ***(c) where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.***

In effect, ***section 35 (1) (c)*** is clear that a contract can be terminated by either party giving not less than twenty eight days notice in writing. In the instant appeal, the letter dated 24th April 2014 specified that the respondent's contract would not be renewed, and would stand terminated on 30th June 2014. The letter therefore provided the respondent with a notice period well in excess of that stipulated by the provision. To that extent, we are satisfied that the appellant provided the respondent with sufficient notice of termination of the contract. The requirements of ***section 35*** of the Act were hence satisfied. In addition to the above, ***section 43 (1)*** and ***(2)*** of the Act also required to be complied with. They stipulate;

> ***"(1) In any claim arising out of termination of a contract, the employer shall be required 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;***
>
> And
>
> ***(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee."***

In this appeal, the appellant gave the reason for termination of the respondent's employment as the acute financial difficulties it was facing. Neither party has disputed this fact. Accordingly, we find the reason for termination having been disclosed as of financial challenges, we conclude that a valid reason for terminating the respondent's services was duly provided in accordance with the applicable law.

A further question for consideration is whether upon termination of the service contract the appellant complied with ***section 18 (5) (a)*** of the Act which specifies;

> ***"Upon the termination of a contract of service "…by effluxion of time, it shall be the duty of the employer to ensure that the employee is paid the entire amount of the wages earned by or payable to the employee and of the allowances due to him as have not been paid…"***

From the evidence the appellant fell short of this requirement after it terminated the respondent's contract and failed to pay the respondent's wages for the months of March, April, May and June 2014, a position admitted by the appellant and duly paid in the course of the proceedings. In our view, notwithstanding the financial challenges it faced, the appellant was obliged to pay the respondent his terminal dues upon termination of his employment, or at the very least take necessary steps to pay the outstanding amounts. By neglecting to comply with ***section 18 (5) (a)*** a finding of unfair termination of his contract was inescapable, and we so find.

The learned judge also found that alongside the unfair termination of his services, the appellant had also declared the respondent redundant, owing to the financial constraints it was experiencing. This takes us to the next issue for determination which is, whether the notice of 25th April 2014 also served as a notice of declaration of a redundancy.

After due consideration of the record on this issue, the learned judge concluded that, the letter of 24th April, 2014 was a declaration of redundancy situation which the appellant had *"…failed to address within the confines of the law...";* and that the letter of termination was intended *"… to avoid meeting the legal requirements of a redundancy…"*

The trial court found that, *"…What then led to the Claimant being terminated from his employment despite all effort made by the Claimant to keep the employer afloat was a redundancy situation. His month to month employment would have subsisted had there been no financial constraints…,"* so that, *"Whether the employee had written contracts of employment or not, the Respondent simply did not have the finances or financial base to pay the due wages or salaries."*

> ***Section 2 (1)*** of the Employment Act, defines '*redundancy*' as;
>
> ***"the loss of employment, occupation, job or career involuntary means through no fault of the employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office and loss of employment."***
>
> ***Section 40*** of the ***Employment Act*** goes on to provide that;

"***(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions –***

a….

b. ***were an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;***

c. ***the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;***

d. …

e. ***the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;***

f. ***the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and***

g. ***the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service.*** (emphasis ours)

In the case of ***Aoraki Corporations Limited vs Collin Keith McGavin, CA 2 of 1997 [1998] 2 NZLR 278*** the Court of Appeal of New Zealand outlined the strictures of a redundancy thus;

"Redundancy is a special situation. The employees have done no wrong. It is simply that in the circumstances the employer faces, their jobs have disappeared and they are considered surplus to the needs of the business. Where it is decided as a matter of commercial judgment that there are too many employees in the particular area or overall, it is for the employer as a matter of commercial judgment to decide on the strategy to be adopted in the restructuring exercise and what position or positions should be dispensed with in the implementation of that strategy and whether an employee whose job has disappeared should be offered another position elsewhere in the business."

When considered alongside the above, the facts surrounding this case, do not fall within the remit of a redundancy. We say this because the appellant did not at any time declare the respondent redundant. His position did not come to an end. All it did was to terminate the respondent's month to month contract. It is not disputed that the appellant was facing serious financial challenges and had embarked on a process of internal restructuring. Employees who were to be declared redundant were identified, as were those who would be retained at a lower salary. Still others were offered the option of resigning. The respondent's position was not one of those earmarked for abolition. He retained his position and later entered into a further contract with the appellant, which contract lapsed, and gave way to a month to month contract, which the employer was entitled to terminate within the provisions of the law.

We would add that though the letter of termination specified the reason for termination as being occasioned by the financial constraints, this did not mean that he was declared redundant by his position coming to an end. It merely meant that the appellant could no longer afford to pay the respondent's onerous salary. It was for this reason alone that his services were terminated. From the above it becomes apparent that the learned judge misdirected herself in concluding, of her own accord that by terminating the contract of employment for financial reasons the respondent was also declared redundant.

We now turn to the allegations that the respondent's rights were violated. The respondent claimed that his rights under ***Articles 27, 28, 29, 30, 41*** and ***47*** of the ***Constitution*** were violated as he was subjected to physical and psychological torture and to inhuman and degrading treatment, slavery and servitude as he was deprived of his salary, exposed to financial hardship and emotional distress since he was unable to meet his financial obligations, he was forced to seek financial assistance from his parents in the United States, and when the appellant neglected or refused to ship his personal effects home.

It was further claimed that he was denied the right to fair labour and administrative practices since he went without his salary and entitlements, his contract of employment was arbitrarily varied severally, he was denied a written contract, subjected to unreasonable working conditions, denied an opportunity to negotiate his terminal benefits and dues following his redundancy, the unilateral nullifying of his employment with three months notice between April and June 2014, and the appellant's failure to adhere to the PPPM, failing to provide him with a fair hearing, and failing to invoke the redundancy procedures.

Other claims of violations were with respect to the right to equality and freedom from discrimination and the subjugation to unfair labour practices, where he claimed that he was denied a written contract, benefits and allowances; that he received his salary late and when paid, he was not paid in full; that he was denied a salary raise and was instead condemned to a reduction in salary; that he was assigned additional responsibilities and positions without receiving a commensurate salary; that his employment was terminated on the basis of his nationality and he was denied his redundancy benefits.

As pertains to the allegation that the respondent was tortured and suffered inhuman and degrading treatment, and subjected to servitude and slavery, the learned judge summed up the allegations thus;

"Such is degrading, inhuman and tortuous. Such should not be visited upon any employee who has offered their labours and instead of receiving a salary is instead reduced to inhuman conditions. Such cannot be defined in any other words as the context

within which slavery and servitude were conceptionalized such were the circumstances envisaged. That no employee should be subjected to slavery and servitude as conditions specifically prohibited under the constitution and conditions that there should be no derogation…"

Whether the respondent's claims amounted to torture and inhuman and degrading treatment, the ***Black's Law Dictionary, 10th edition,*** defines ***"torture"*** as: *"The infliction of intense pain to the body or mind to punish, to extract a confession or information, or to obtain sadistic pleasure"*.

At ***Article 1*** of the ***Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, "torture"*** is defined as;

"any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions".

Black's Law Dictionary, 10th edition, defines *'slavery"* as the condition of a slave; that civil relationship in which one man has absolute power over the life, fortune, and liberty of another.

When the definitions are applied to the circumstances of this case, we are not satisfied that the allegations are founded. This is because no particulars or instances of torture or inhuman or degrading treatment demonstrating that physical or mental pain and suffering was inflicted on the respondent so as to extract information or confessions from him or to punish him. No medical reports or evidence of medical treatment were produced to prove the injuries or trauma suffered—physical, psychological or mental distress. It was not enough for the respondent to present the allegations, and expect a court to conclude that he was tortured. These had to be proved to the required threshold.

The same fate would befall the allegations of servitude and slavery. The respondent remained in the appellant's employment voluntarily and without coercion. He was at liberty to terminate his employment, decline to renew his contract or accept a reduction in salary. The respondent exercised free will to attempt to make a success of the difficult situation in which he found himself. He was not bound 'hand and foot' to the appellant without the liberty to resign if he so wished. In finding that the respondent was placed in bondage, loaded with additional duties and forced to perform his duties without pay was a misconception on the part of the judge. We therefore find that in applying the aforegoing factors to this case, the learned judge misconstrued the meaning of torture, servitude and slavery as envisioned by the Constitution and the law.

Regarding the allegations of discrimination, the concerned provisions under the Bill of Rights are ***Article 27 (4)*** and ***(5)*** of ***the Constitution*** which provide that;

"(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".

"(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified in clause

(4)".

According to ***section 5 (3)*** of the ***Employment Act,*** 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, marital status or HIV status;

b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment".

Subsection (7) stipulates;

"In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discrimination act or omission is no based on any of the grounds specified in this section.

With respect to the allegations of discrimination, the learned judge concluded that this was established by the denial of his one month's compassionate pay upon redundancy, the denial of benefits and allowances such as transport and housing allowances, impact pay and annual salary increments unlike the other employees; the denial of his salary in full whilst other employees were paid theirs; that his employment was terminated due to his nationality; that he was not provided with an employment contract; that he was denied a salary increase, and that because he received a higher salary he was not entitled to the same treatment as junior employees who were treated more

advantageously.

Based on the above reasons, the learned judge concluded thus;

> ***"It is not the amount or the figures here that should justify the separate and different treatment against the Claimant by the principle applied in this regard. This rationale looked at vies-a-vies (sic) the constitutional threshold under article 27 and the provisions of section 5 of the Employment Act, there is confirmation by the respondent's own actions that there was discrimination against the Claimant. Such I find not justified through any law, practice or policy of the respondent. Such discrimination is prohibited and damages are due on the finding that the Respondent deliberately and without any due cause engaged in a practice prohibited under the constitution and the Employment Act".***

As to whether discrimination was founded requires that the claims be considered in the context within which they are made. For instance, the claim for payment of redundancy dues was unwarranted. This is because, as seen earlier, his position was not the subject of a redundancy. As concerns non payment of benefits and allowances such as transport allowance, we consider that this would have required to be addressed within the framework of the appellant's policies and the terms of his engagement and not in isolation.

But more particularly, the allegation of discrimination would require to be considered within the contextual construction of the Constitution as read together with the Employment Act. In other words, whether the violations alleged were grounded inter alia, on sex, gender or race.

In the case of ***Ol Pejeta Ranching Limited vs David Wanjau Muhoro [2017] eKLR,*** this Court agreed with ***Adolph A. Landman's*** article "***The Anatomy of Disputes about Equal Pay for Equal Work"*** it was stated that;

> ***"The mere existence of disparate treatment of people of, for example, different races is not discrimination on the ground of race, unless the difference in race is the reason for the disparate treatment. Put differently, it must be shown that the difference in salaries is because of sex, gender, race, and so on".*** (Emphasis ours)

Furthermore, this Court, in the case of ***Federation of Women Lawyers Kenya (FIDA) & 5 others vs The Attorney General & another [2011] eKLR*** cited the case of ***State of Kerala and another vs Thomas and Others, Civil Appeal No. 1160 of 1974*** where the question of parity of circumstances was discussed in the following terms;

> ***"The principle of equality does not mean that every law must have a universal application for all persons who are not by nature, attainment or circumstances in the same position, and the varying needs of different classes of persons require special treatment. The Legislature understands and appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds. The rule of classification is not a logical corollary of the rule of equality, but the rule of differentiation is inherent in the concept of equality. Equality means parity of treatment under parity of conditions. Equality does not connote absolute equality. A classification in order to be constitutional must rest upon distinction that are substantial and not merely illusionary. The test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into that category."***

In effect, what the above cases emphasis is that for discrimination to be established, it should be shown that firstly, the reasons or grounds for difference in treatment is based amongst other grounds on race, sex, gender or nationality, and, secondly, that the impugned unequal treatment occurred amongst persons within the same class or rank, or in circumstances that involved equal or similar conditionality.

In this case, the only claims that would bear any relevance to the allegation of discrimination is the assertion that by virtue of his senior position, his nationality, and that because he earned a higher salary, he was not entitled to the same treatment as junior employees who were treated more favourably, in that they regularly received their salaries whilst he was denied his, and when he did receive his salary, it was not paid in full.

However, an analysis of these allegations does not disclose discriminatory treatment because, the reasons for the different payment models adopted arose from the appellant's financial difficulties. It had nothing to do with his nationality. Equally, the appellant explained that the SMT, of which he was a member, agreed that junior staff be paid as a priority to cushion them from the hardship of having to go without their salaries; the rationale being that if senior management staff with higher salaries were paid first there was the likelihood that the junior staff members employees would have to go without their salaries for longer periods.

As such, not only were there no racial connotations behind the appellant's actions, but also the decision to prioritise payments to junior members of staff could not be considered as an arbitrary or unreasonable policy in view of the appellant's financial predicament prevailing then. The respondent was a member of the SMT and earned a higher salary that was incomparable to that of junior members of staff. He could not therefore equate his position with theirs and demand that he be treated as an equal to the junior staff. Their disparate classifications entitled the appellant to treat them differently, and to pay them on differentiated terms. As such, we do not find that discrimination was established.

As concerns the assertion that he was subjected to unfair labour practices, it was alleged that these arose from the appellant's failure to immediately pay his salary, failure to pay for the period of notice of termination from 25th April to 30th June 2014, and also failure to declare him redundant when it ought to. Having regard to the nature of the dispute and the conclusions we have reached above, we are of the view that the alleged violation was inapplicable to the circumstances of this case. The learned judge therefore wrongly found that the appellant had engaged in unfair labour practices.

In light of the conclusions reached above, the questions of unfair termination, and the alleged violation of his rights, we turn to the quantum

of damages awarded by the trial judge. We are cognisant that we only do so after reaching a finding that either the judge acted upon some wrong principle of law, or that the amount awarded was so inordinately high or so inordinately low as to make it an erroneous estimate of the damage for which the claimant was or was not entitled. See ***Butt vs Khan*** ***[1981] KLR 349*** where Law, J.A said:

> ***"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low".***

We also bear in mind that, the ***Industrial Court [Procedure] Rules 2010*** expressly provide that the court should not award exemplary or punitive costs in employment cases, since compensatory awards are not intended to punish the employer, but rather are an attempt at offsetting the financial loss that were as a result of the employer's wrongful act. See also ***Palluci Home Depot (Pty) Ltd vs Herskowitz & Others (CA21/13) [2014] ZALAC 81.***

On the question of the severance pay and the damages for violation of his rights the trial court awarded the respondent US$ 6,700 and US$ 145,773 respectively. Since we have found that the respondent was not declared redundant, and that the claims of violations were unfounded, it would follow that he was not entitled to the sums awarded, and we so find.

Turning to the question of compensation for unlawful termination of employment, we have found that the respondent's employment was unfairly terminated. And to compensate him, the learned judge awarded him 12 months' compensation. In this regard, the appellant's grievance is that the trial court's compensation award was manifestly excessive. To ascertain whether it was indeed excessive, we turn for guidance to ***section 49*** of the Employment Act which provides the remedies for both wrongful dismissal and unfair termination. ***Subsection (4)*** sets out the factors that the labour officer or the ELRC should take into account in deciding on appropriate remedies. Of relevance to this appeal is ***section 49 (4) (f)*** of the Act which requires the court to take into account *"…the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination"*. Due to the appellant's persisting financial problems, and its continued inability to pay his salary, all indications were that the respondent's contract would have been terminated at some point in time, in that, it was not expected that his employment would have continued indefinitely, but for the termination. The respondent was well aware that the financial difficulties would lead to the termination of his services.

Despite appreciating the dire financial quagmire in which the appellant had found itself, the learned judge declined to take this factor into account when awarding compensation. Without doubt, being cash strapped, and constrained to continue paying his onerous salary, the appellant had no choice but to terminate his employment. With this in mind, we think that the award of 12 months compensation was too high and injudicious, and we are inclined to interfere with it and order instead that the respondent be awarded compensation of 6 months basic salary.

Next we will address the respondent's claims for reimbursement or payment of costs incurred. To begin with, we are cognaisant that in the course of the proceedings, the appellant conceded the respondent's balance of his salary for March to July 2014 of US$ 14,568; repatriation flights two one-way tickets of US$ 2,000 and the claim for remaining vacation days of US$ 2,523.11, all of which have since been duly paid. And as stated above, we are limited to addressing only those claims identified in the Memorandum of Appeal, which are as follows;

1. Claim for retained portion of salary from 2009 to 2014 of US$ 9,166.87.

This claim is made up of two components. The first being US$ 4,229 which arises from the respondent's complaint that he was forced to accept a reduction in his salary from May to July 2009. The other is for US$ 4,944 for alleged unspecified deductions.

With regard to US$ 4,229, it is our observation that, the claim being one for a fixed point in time during the contract, and the respondent having neglected to consistently to pursue the claim, we consider it to be statute barred having been caught up by the provisions of ***section 90*** of the ***Employment Act.***

The aforegoing notwithstanding, we think it efficacious to address this complaint for purposes of the record. By a letter of 6th May 2009 the appellant's director, Mark A. Okunnu, Sr. on behalf of the appellant requested the respondent to accept a three month salary reduction from 1st May 2009 which was aimed at reducing the appellant's operating costs. The respondent says he agonized over the request for two months and then, on 30th June 2009, signed the letter accepting a 30% reduction in his salary equivalent to US$ 4,229. It was his case that the acceptance was signed under duress, and that infact, he was unwilling to accept a reduction in salary.

In the case of ***Pius Kimaiyo Langat vs Co-operative Bank of Kenya Ltd*** ***[2017] eKLR***, the Court in addressing the issue of contracts between parties expressed itself thus;

> ***"We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, Fraud or undue influence are pleaded and proved."***

Our analysis of the evidence makes it clear that there is nothing on record that demonstrates that the respondent was coerced into accepting a reduced salary or that he signed his acceptance whilst being held over a barrel. To the contrary, he did not sign his acceptance immediately, but signed it two months later, which gave him ample opportunity to weigh out the benefits or pit falls of accepting a salary reduction of 30%. On the basis of these facts it is unconscionable for him to now turn around and declare that he signed the letter under duress, or that it placed him in a position of servitude or slavery. Without evidence to support such an allegation, we find that the agreement was valid and binding, and the claim for US$ 4,229 fails.

As regards the unsubstantiated claim for the balance of US$ 4,944, the respondent merely contended that other deductions were made, but he did not produce anything showing the nature of the deductions made, and when and how the sum of US $ 4,944 was arrived at. In our view,

this fell into the category of a special claim. The law is that such a claim must not only be specifically pleaded but it must also be strictly proved. See ***Hahn vs Singh***;-

> ***"4. Special damages must not only be specifically claimed but also strictly proved. The degree of certainty and the particularity of proof required depends on the circumstances and the nature of the acts themselves. The judge was right in holding that the appellant had failed to prove his claim for the depreciation of the vehicle after the accident."***

Without documentary proof giving particulars showing how the deductions amounted to US$ 4,944, we find that the claim was unsubstantiated, and it therefore also fails.

2. Claim for accommodation expenses US$ 2,340.

In respect of this claim the learned judge concluded that because this was a right spelt out in his employment contract, such amount should be paid in accordance with the contract. We disagree, the trial court having already found that a month to month contract had come into existence on –1st August 2012, it would follow that by the time the respondent's employment was terminated, there was no contract that governed this claim. Instead, the dictates of the PPPM policy would prevail in determining the manner of payment.

> ***Clause 9.3*** of the ***PPPM*** stipulated;
>
> ***"CAFS will pay a lumpsum of one (1) month's per diem at the current rate of per diem for the country of relocation and one half per diem for each dependant actually on site to cater for a new staff member taking up a post in CAFS. This payment will cover accommodation, meals and incidentals.***
>
> ***CAFS will pay for actual full- board hotel accommodation expenses for a departing staff member including his/her dependants after the last working day for a maximum period of five (5) days. This benefit is to cater for the welfare of departing staff after shipment of goods and vacation of residential premises prior to actual date of departure, provided that the staff member worked up to the last working day as stipulated in the letter of termination."***

Accordingly, for the respondent to benefit from this facility he would have been required to confirm that he had vacated his rented premises, and had taken up residence in a hotel where the appellant enjoyed credit facilities on a full board basis, and thereafter submitted the expense incurred. In so far as the PPPM expressly stipulates that a departing member of staff and their dependants be accommodated in the manner specified, any other claim was unauthorized. This claim accordingly fails.

3.Claim for relocation flights for 2008 US$2,858.

This claim is for reimbursement of flight costs incurred in 2008. The appellant contends that the claim is time barred within the meaning of ***section 90*** of the Act. But after finding that US$ 1,841 was reimbursed to the respondent on 4th July 2008 being part of the cost, the learned judge awarded him the outstanding amount of US$ 499 being the cost of his daughter's air ticket. The record does not however disclose that after the portion of US$ 1,841 was paid to him, the respondent continued to pursue payment of the balance so as to keep the claim alive. In the result, the claim cannot be revived at this stage, as it is time barred under ***section 90***.

4.Home leave flights US$ 7,689.40.

The appellant's complaint in so far as this award is concerned is that part of the claim was time barred as it is concerned with the period before 2011; that the court could not claim to have jurisdiction over a period that was barred by limitation; that in any event the amount was incapable of being paid since the respondent had failed to take any steps to claim this amount during his employment as he did not submit the travel requisitions together with copies of stamped passports or boarding passes in the manner stipulated.

Once again, these being one off claims, it was incumbent upon the respondent to continue to pursue these claims for as long as they remained unpaid. As such any claims outside the limitation period specified by ***section 90*** are time barred. This would include the claims for 2011 and before.

Regarding the later claims, Clause 12.17 of the PPPM sets out the appellant's Travel Policy. It specifically provided for a round trip economy airfare for staff on official mission and their immediate dependants proceeding on home leave using the most direct route between the employee's duty station and the country of domicile. And after travel, it was a requirement that the air ticket be submitted together with *'an MCG tag'*. It is clear from the evidence that the respondent did not adhere to the laid down procedure as he failed to submit the air tickets as stipulated. What stands out however is that the provision does not provide a time frame for their submission. This would mean that they could be submitted at any time, provided the claim was not time barred. But the aforegoing notwithstanding, it is evident from the record that the claim did not particularize the individual cost of the air tickets in respect of his leave. We appreciate that though various air tickets were produced, it was not possible to ascertain the air ticket that was specific to the leave period in question, or the amount payable. On that basis, this claim consequently fails.

5. Home leave gratis entitlement 2008 to 2014 at 46 days at US$ 10,580.

The appellant is aggrieved by the award of US$ 10,580 for two reasons, the first is that the respondent did not prove that any transit days in lieu of home leave, were deducted from his leave so as to warrant this payment, particularly as he had failed to submit the requisite claim in the manner specified for by the PPPM, and the second is that, the amount initially claimed was US$ 1,380, but was amended to US$ 10,580 after the close of pleadings and the proceedings, which amounted to an ambush on the appellant as it was not accorded an opportunity to

respond to the enhanced claim. It was further argued that, if indeed the claim for US$ 10,580 were to be sustained then, US$ 2,070 was time barred by statue since it was made after the expiry of the three year limitation period specified by ***section 90***.

The learned judge's finding on this issue was that though the appellant's Acting Executive Director, Victor Baraza asserted that the respondent ought to have submitted a claim and explained how 6 days transit was arrived at, it was unreasonable to require him to do so after terminating his employment. Upon reaching this conclusion the judge proceeded to award the respondent the amount of US$ 10,580 for home leave gratis for 6 days.

From the record, it is observed that the amendment of the transit claim from 6 days to 46, and the attendant amount claimed from US$ 1,380 to US$ 10,580, being a special claim required to be specifically pleaded and strictly proved. This could not be done in the submissions as was the case here. This mode of procedure in our view deprived the appellant of the opportunity to rebut the computation leading to the award of US$ 10,580. As a consequence, the court ought not to have awarded the revised amount.

Having said that, we turn now to consider the original claim of US$1,380.

> ***Clause 11.2*** of the ***PPPM*** is specific. It provided;
>
> ***"Expatriate staff are entitled to home leave to enable them maintain cultural and family ties, and to attend to any personal commitments they may have at home. Home leave accrues every two years.***
>
> ***CAFS will pay the cost of a round- trip economy air fare for the employee and his/her immediate dependants using the most direct route between the employee's duty station and the country of domicile. The time spent in transit to the point of entry and return is not chargeable to annual leave but will be given gratis."*** (emphasis ours)

What is clear from the above provision is that home leave gratis paid only in respect of the intervening transit period during the employee travel to or from their home country while proceeding and returning from home leave, and does not include the actual leave days taken.

To begin with, if the respondent had submitted a claim, it would have indicated the specific leave dates in question, the number of leave days, the dates of travel, the number of days in transit, the location or locations of transit, amongst other particulars.

Without submitting his claims, it was difficult to particularise with certainty the number of transit days to be computed. Our view is buttressed by the evidence which shows that though an array of airline tickets and boarding passes were produced, they do not disclose whether they relate to travel for home leave or for work assignments. They do not also disclose with certainty the transit location, how many days the respondent spent on transit or the destination. And without sufficient documentation to support this claim, we find that it was not proved to the required standard, and therefore was incapable of being awarded.

8.Claim for compensatory leave days accrued from 2008 to 2013 of US$ 6,900.

Under this claim the learned judge found that even though the respondent was required to complete forms for compensatory leave so as to be paid his dues, since the appellant was not in any position to pay the claim due to its financial difficulties, to demand that he complete the forms was an unfair labour practice and was not justified. On this basis the judge found that the amount of US$ 7,130 was due to the respondent as claimed. Our view is that this was a misdirection. The learned judge ought not to have disregarded the appellant's internal procedures and processes when determining the validity of a claim such as this.

Clause 6.6 of ***the PPPM*** required the applicant to apply for compensatory days off, the grant of which was to be awarded at the discretion of the Director. There is nothing in the evidence that shows that he applied for and was granted compensatory days off. Our view is that having failed to comply with the requirements of the PPPM, he was not entitled to the amount claimed, particularly when he did not produce the Director's consent or documentation in support. This claim is also without merit.

10.Clearance Certificate penalty of US$ 971.80

Relying on ***section 51 (3)*** of the Employment Act regarding the appellant's failure to issue the respondent with a Certificate of Service, the learned judge sanctioned the appellant to pay Kshs. 100,000. But the appellant has argued that the fine of Kshs. 100,000 or US$ 971.80 is concerned with a criminal charge or conviction, none of which applied to this case so as to warrant the fine.

In this regard ***section 51 (3)*** of the ***Employment Act*** provides;

> ***"An employer who willfully or by neglect fails to give an employee a certificate of service in accordance with subsection (1), or who in a certificate of service includes a statement which he knows to be false, commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand shillings or to imprisonment for a term not exceeding six months or to both."***

In the case of ***Said Ndege vs Steel Makers Limited [2018] eKLR*** Rika, J amply clarified the application of ***section 51 (3)*** of the Employment Act thus;

> ***"There is no reason shown by the Claimant why the Court should declare that failure to issue him a Certificate of Service attracts penal consequences under Section 51 of the Employment Act. Section 51 [3] states such default is an offence, punishable upon conviction. Why does the Court have to re-declare what the law has declared with no ambiguity? What would be the benefit***

of such a declaration to the Claimant? If the Claimant has not received his Certificate of Service, he ought to simply ask for an order for release of his Certificate of Service under Section 51[1] and [2] of the Employment Act. If he desires the Court to find the Respondent guilty of an offence under Section 51 [3], he ought to make a complaint to the Police or an authorized Labour Officer, and instigate a criminal trial against the Respondent, at the right platform."

We would agree with and adopt the learned judge's position as expressed above regarding issuance of the Certificate of Service. In this case, despite the learned judge having appreciated the appellant's explanation for not having issued the Certificate of Service, which was that the respondent should clear with it which he had yet to do, without any application being made to have the appellant convicted under ***section 51 (3),*** the learned judge nevertheless went ahead to issue a fine. We find this to be in excess of, and in non-conformity with the requirements of the above provision of the Employment Act. As such, we quash the sanction and instead substitute it with an order that the appellant issue to the respondent a Certificate of Service within the next thirty (30) days from the date hereof.

The final complaint was that the interest rate allowed at court rates of 12% did not take into account the fact that the decretal amount was specified in US Dollars.

In the case of ***Charles Thys vs Herman Steyn [2006] eKLR,*** Ojwang, J (now Supreme Court Judge) stated thus;

> ***"…On this principle, and in relation to the instant matter, I would hold that interest on a dollar decretal amount as from 19th June, 1989 ought in principle to be held to be 12% of a decretal amount*** *standing in Kenya Shillings****, the Kenya Shilling being the first expression of the monetary jurisdiction of the Kenyan Courts…"*** (emphasis ours).

In other words, to compute interest at court rates, the dollar decretal amount will have to be converted into the Kenya Shilling equivalent as at the date of the judgment by the computing officer.

In summary, the appeal partially succeeds. We find that the respondent's employment was unfairly terminated, and dismiss the claims for redundancy and violation of the respondent's rights.

For the avoidance of doubt we make the following orders:

1. The respondent to be paid six (6) months basic pay as compensation for unfair termination **US$ 29,828.50.**

2. The fine of Kshs. 100,000 of US$ 971.80 is hereby quashed and instead the appellant is ordered to issue the respondent with a Certificate of Service within the next thirty (30) days from the date hereof.

3. Interest on the judgment sums specified in US Dollars payable from 2014 until payment in full be and are hereby directed to be computed by the computing officer of the court by converting the Dollar decretal amount into its equivalent Kenya Shillings as at the date of the Judgment.

4. Due to the peculiar nature of this appeal as demonstrated above, each party to bear their own costs in the Employment and Labour Relations Court and in this Court.

Dated and delivered at Nairobi this 20th day of September 2019.

R. N. NAMBUYE

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR