IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KOOME, OKWENGU & KANTAI, JJ.A.)

CIVIL APPEAL NO. 93 OF 2018

BETWEEN

MARA ISON TECHNOLOGIES KENYA LIMITED .... APPELLANT

AND

MURIEL OGOUDJOBI ....RESPONDENT

(Appeal from the judgment and orders of the Employment and Labour Relations Court at Nairobi (Wasilwa, J.) delivered on 3rd December, 2015

in

ELRC Cause No. 2089 of 2014

****

JUDGMENT OF THE COURT

It is common ground that the appellant, **Mara Ison Technologies Kenya Limited,** employed the respondent, **Muriel Ogoudjobi** as the Head of its Human Resource Department for Francophone Countries situate in Kenya. The relationship between the employer and employee appears to have been cordial but this changed when the respondent conceived and was to give birth to a child. It would appear that in the course of the development of the pregnancy the respondent was allowed by the then Managing Director of the appellant to be working or operating from home. It is not clear from the record whether “home” for that purpose was Nairobi or France as the respondent is a national of France.

When that Managing Director left his said position the person who took charge of the appellant's management was one **Prashant Singh (Prashant)** whose designation was Chief Human Resource Officer. He demanded that the respondent produce evidence that she had been allowed to work or operate from home during the pregnancy and even after she had delivered a child. Correspondence was exchanged back and forth between the two but the respondent did not produce any document to show permission to work from home. Those events led to termination of the respondent’s employment the circumstances which we will show in this judgment.

For reasons that are not clear from the record but from what we can see at page 301 of the record which is part of the judgment of the Employment and Labour Relations Court, paragraphs 9, 12, 13, 15 and 20 of the Memorandum of Claim filed at that court by the respondent against the appellant on 24th November, 2014 as well as annextures numbered 5, 6, 7, 8 and 9 were expunged from the record. We have not seen any application for expunging those paragraphs of the claim or the said annextures. Despite that order we see in the record of appeal documents that were expunged and some which were exchanged by the parties on “without prejudice” basis which should ordinarily not form part of the record.

Because the relationship between the parties deteriorated to the extent that we have stated, even the document governing the relationship of employer and employee was not agreed. The appellant and the respondent produced different sets of “Letter of Appointment” before the trial court.

It was stated in the Memorandum of Claim that the appellant offered to the respondent employment as its Head of Human Resource of Francophone countries on terms and conditions set out in a contract dated 15th August, 2011. It was stated that the respondent was employed to work in Nairobi with possibility of transfer to the Democratic Repubic of Congo (DRC) subject to business needs. Further, that the employment had commenced on 12th July, 2011 and was subject to termination by either party giving 2 months’ written notice or paying 2 months’ salary in lieu; further that the respondent’s montly salary was US$5,000 and US$1,000 for accommodation and transport; that the respondent was entitled to a return air ticket to France for herself and her family and that the net salary was later increased to US$7,040 per

month. Also that the respondent was entitled to 21 working days annual leave per annum; that the respondent was previously working in France and had to relocate to Kenya to take up the appointment and that she had carried out her duties faithfully, promptly and punctually with utmost diligence and professionalism. It was further stated in the statement of claim that the respondent upon returning from maternity leave on or about 28th April, 2013 was summoned by the said Mr. Prashant Singh and informed that the time she had taken off during maternity leave was unauthorised and that the salary for that period was withheld; that she was further informed that the Francophone Human Resource team would be relocated to a Francophone country, a proposal she had no problem with; that the Human Resource Francophone team would henceforth operate with one resource and in the event the respondent should start looking for another job because her position would be affected. She was asked to resign, a request she rejected. The respondent further alleged in the claim that after her refusal to resign, by a letter dated 10th June, 2014 the appellant purported to terminate her contract of employment on the grounds that she had been employed on a fixed term contract which was ending on 11th July, 2014. She responded to that letter on 13th June, 2014 denying that she was on a fixed term contract stating that her employment was on a permanent basis. On 24th July, 2014 the respondent was summoned to a meeting in the appellant's offices where matters discussed were subject of the paragraphs of pleadings and annexed documents were expunged. It was thus said that the appellant had breached the contract and had failed to comply with provisions of the Employment Act pertaining to redundancy. When the respondent resisted the appellant's actions her contract was terminated on account of redundancy and in the letter dated 21st August, 2014 payments to be made to the respondent were set out which the respondent did not agree with. It was further alleged in the claim that the respondent had paid for telephone expenses amounting to US$12,699 which she had incurred between August 2012 and October 2013 in the course of her employment and while carrying out official duties for the appellant. These expenses according to the respondent were to be reimbursed to her because she had incurred them while carrying out her official duties. There was also a claim regarding shares in a program called ESOP which was designed to reward employees of the appellant for their performance and the respondent claimed to be entitled to 800 ordinary shares in the scheme. For all that the respondent claimed US$7,040 being her net salary from 25th July upto 25th August, 2014; US$7,040 being one months net salary pursuant to **section 40 (1) (a)** of the Employment Act; US$14,080 being two months net salary in lieu of notice pursuant to **section 40 (1) (f)** of the said **Act**; US$13,845 being pay for accrued leave of 59 days; US$10,560 being severance pay computed at 15 days pay for each year worked; US$ 12,699 being telephone expenses reimbursements; expatriate relocation expenses US$5,000; a return ticket to respondent's country of origin (France) for the respondent and family, or an equivalent amount based on the costs of the tickets as at the date of payment; the market value of the ordinary shares of the appellant allocated to the respondent based on their value as at the date of payment; a certificate of service as per **section 51** of the **Employment Act**; 12 months salary being damages for unlawful termination plus costs and interest.

A witness statement made by the respondent dated 20th November, 2014 was filed with the statement of claim. It rehashes the history we have already given.

In a memorandum of reply the appellant denied the respondent's claim. According to the appellant the appointment of the respondent as Head of Human Resource was by a letter dated 8th April, 2011 where the respondent was employed to work in Kenya for an initial 6 months and thereafter her services would be transferred anywhere in Africa; that the employment was commenced on the date of joining being 15th June, 2011 for a period of 3 years but that she had commenced official duties on 15th August, 2011; the tax free salary of US$5,000 per month and US$1,000 for accommodation and transport was admitted; the letter of appointment produced by the respondent dated 15th August, 2011 was denied it being stated that the same was signed by a person who occupied a parallel position to that of the respondent whereas all contracts were signed by the Head of Human Resource globally. It was further stated in the memorandum of reply that the respondent was entitled according to the appellant's policies and procedures to 3 months full pay for maternity leave; that the respondent had been absent from work for 5 months from 27th November, 2014 to 28th April, 2014. It was stated that the extended maternity leave was without the requisite approval of the appellant and that the said work from home arrangement was without approval. Further, that from the end of 2012 to the early 2013 the appellant had lost major business contracts within the francophone hubs necessitating a reduction of employees within those areas where the respondent was involved in executing the human resource functions. It was denied that the respondent had been asked to resign but it was admitted that negotiations to find an amicable solution had been attempted. The appellant further stated that from the 24th July, 2014 the respondent left her place of work and continued to absent herself from work and duties over the subsequent days; that the appellant had served the respondent with a redundancy notice dated 21st August, 2014 indicating reasons for redundancy but that the respondent did not accept that position; that the respondent's position was then abolished and no person had been employed to take that position. On the issue of the telephone expenditure claim, the appellant stated that it was its policy and practice to settle phone bills within 2 months from the date the bill had been incurred; that the decision to reimburse was at the discretion of the appellant pursuant to the appellant's Business Use Phone Policy; that claim was denied as it was presented over two years after the bills were incurred; and that the claim was unprocedural and inflated. On the ESOP programme, it was the appellant's position that employees upon termination were not entitled to participate or benefit from that programme. The trial court was therefore asked to dismiss the claim with costs.

The matter was heard by Wasilwa, J. who in a judgment delivered on 3rd December, 2015 found for the respondent granting her all the claims that were set out in the prayers in the memorandum of claim. Those are the orders that provoked this appeal.

Being a first appeal from a decision of the Employment and Labour Relations Court we are required to reconsider the evidence and reappraise the same as required by **Rule 29** of the rules of this Court and come to our conclusions - in other words we should give the parties in the case a retrial of the case – see the case of **Selle v Associated Motor Boat Company Limited [1968] EA 123** where the following passage appears:

> ***"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."***

That we shall proceed to do.

The memorandum of appeal is drawn by **Messs Oraro and Company Advocates** for the appellant and there are 13 grounds of appeal numbered (a) – (m).

In summary the trial judge is faulted for what the appellant says is not considering the appellant's genuine reasons for terminating the respondent's employment on account of redundancy and for finding that the reasons for declaring the respondent redundant was not justified; that the judge was wrong for relying exclusively on the respondent's evidence and ignoring the evidence of the appellant; that the judge was wrong not to find that procedural fairness was employed by the appellant in terminating the respondent's employment and for not considering factors in **section 49** of the **Employment Act, 2007** in determining available remedies for unfair termination; the judge did not justify the awards made and exercised her discretion wrongly in awarding the respondent 12 months gross salary compensation without laying any legal basis for the same; that it was not open for the judge to award monetary compensation to the respondent beyond the statutory limit of 12 months gross salary. There is an attack on the findings of the judge that the respondent was entitled to salary from 25th July, 2014 to 25th August, 2014 when according to the appellant there was no evidence that the respondent had worked during that period. The judge is also faulted for not finding that telephone expenses had been irregularly submitted as no final approval had been given by the appellant for that expenditure. It is also alleged that the judge was wrong to award the respondent relocation expenses and, finally, that the judge erred by awarding the respondent shares in the appellant despite evidence by the appellant that such shares had never been realised and had not been allocated to former employees. We are therefore asked to allow the appeal and set aside the judgment and orders of that court.

When the appeal came up for hearing before us Messrs Oraro and Company Advocates for the appellant had filed written submissions and a list and digest of authorities, while Messrs Anne Babu and Company Advocates for the respondent had similarly filed written submissions and a list of authorities. What remained was a highlight of the same.

Learned counsel **Mr. Chacha Odera** teamed up with **Mrs. G. Ogalo Omondi** in urging the appeal. Mr. Odera identified as a central issue the nature of separation between the appellant and the respondent. He submitted that there were business changes in the operations of the appellant leading to redundancy. According to counsel, there was no basis for the trial judge to believe evidence of the respondent that after she had left employment there were two officers occupying her previous position. Counsel conceded that the respondent was an employee of the appellant and submitted that the Employment Act provided for what was awardable to an employee whose services were terminated. Counsel conceeded that in a separation by redundancy an employee who is declared redundant is entitled to severance pay. According to counsel, if an employer does not follow the procedure set out where a redundancy is declared by an employer, the employee would still not be entitled to be awarded maximum award as the judge did. On the prayers in the memorandum of claim, Mr. Odera challenged the award of 12 months compensation and the award for a period that the respondent did not work. He also conceded the award of 2 months salary in lieu of notice, but challenged the award in respect of accrued leave, severance pay, and telephone reimbursement usage. Likewise, he challenged award for relocation expenses, the return air ticket for the respondent and family, and award in respect of market value of ordinary shares of the appellant given to the respondent by the Judge. He concluded his submissions by stating that the purpose for an award of damages is not to punish a wrongful party, and maximum awards should not be made unless there was proper justification for doing so. He submitted that damages representing one month salary as compensation was adequate in the circumstances.

Miss Babu relied on the procedure set out in **section 40** of the **Employment Act** that an employer is required to give a notice to the employee and to a labour officer if a redundancy is to be declared; and that there was no evidence that the appellant had served a notice on the relevant labor officer. According to counsel, the respondent had been targeted thus leading to her being declared redundant. Miss Babu further submitted that even at the time of judgment 12 months after termination the respondent had not secured another job, and thus the award of 12 months salary as compensation was justified. On the award in respect of reimbursement for telephone expenses, counsel relied on some emails on record showing that the same had been approved. Counsel concluded her submissions by stating that the respondent had been allowed to work from home and the appellant was not justified in questioning that process which had been approved by the then Managing Director of the appellant.

In a brief rejoinder it was Mr. Odera's submission that there was no basis in the judgment for award of 12 months salary as compensation.

We have considered the whole record, the submissions made and cases cited by both parties and having done so this is what we think of the issues raised in this appeal.

One of the complaints raised by the appellant in the Memorandum of Appeal is that the trial judge considered the case of the respondent but ignored that of the appellant. Although we have already restated the whole case substantially let us see what evidence was placed before the trial judge by either side and how the judge dealt with that evidence.

The respondent testified on 13th July, 2015, that she was employed by the appellant on 15th August, 2011 and produced the contract of employment. She was the head of the Human Resource for francophone countries as the employee of the appellant which operated in 17 countries in Africa. She was based in Nairobi and had commenced workon 8th of July, 2011. She gave her starting salary that we have already stated was increased in the course of time, and explained that according to the contract she was eligible to receive a return air ticket to her home in France for herself and her immediate family. She produced various documents in support of her case. She proceeded on maternity leave, and when she resumed work on 28th April, 2014 she had discussions with her supervisor Mr. Prashant Singh who informed her that a lot of changes had occurred in the operations of the appellant during her absence. She was informed that she may have to move to DRC and she had no issues with that. According to the respondent she had medical complications during the period of her pregnancy and had to travel to France for that to be attended to. She received a letter terminating her employment on grounds of redundancy on 25th August, 2014. She denied that the operations of the appellant had reduced and denied that the appellant was entitled to declare her redundant. She had not been paid the payments which were in the letter declaring her redundant. She produced various telephone bills in support of her claim for reimbursement of expenditure on telephone. In respect of shares in ESOP programme she stated that she was entitled to 800 shares.

She had alot to say in cross-examination in respect of her extended maternity leave and how that had been dealt with and also on the issue of separation agreements that had been sent to her by the appellant, but those appear to be the subject of the documents produced and paragraphs of the memorandum of claim that had been expunged. She stated that she was owed a sum of Shs.1,114,943 for telephone expenses and in respect of the shares she maintained that she was entitled to 800 shares.

Prashant testified on behalf of the appellant. According to him the respondent was employed as head of Human Resource on the 12th July, 2012. The respondent reported to Prashant as line manager when he took over on 2nd September, 2013 as Chief Human Resource Officer. According to Prashant the contract of employment produced by the respondent was not the correct one because it was signed by one Priscilla,

while the respondent's contract should have been signed by “India Human Resource Officer”. He stated that the respondent was entitled to go on maternity leave for 3 months but had gone for 5 months without approval and without extension of leave. He also denied that the respondent was entitled to work from home.

On the issue of termination of contract and which of the employment contracts was the valid one Prashant said:

> ***“I then gave her a formal termination of contract (MA4). Her contract was to end on 11.7.2014. When claimant received the termination, she showed us another contract dated August, 2011 which we didn't know of. She then stayed away from the office. We did some negotiations but they did not go well. So we decided to declare her redundant as under MA6. (page 40)......"***

He denied that the respondent was entitled to reimbursement of telephone bills claiming that she did not produce receipts for the same. He denied approving reimbursement of the same. On the claim for shares it was his testimony that employees were paid shares upon joining the company which was later listed on the stock exchange. Prashant insisted that the respondent's services were properly terminated. On the issue of refund of telephone expenses he said:

> ***“On telephone bills – on further list of documents – page 3 Muriel sent an email saying she attached invoices and receipts and asked for approval for reimbursement. In email of February, 2014, I approved.”***

It was his further testimony that telephone expenses were reimbursed monthly. According to him there was no formal approval of the extended maternity leave for the respondent.

That was the totality of the evidence placed before the judge by the parties.

Was the termination of the respondent’s employment justified or lawful?

There can be no doubt that the relationship between the parties in the suit before the trial court deteriorated to a very large extent. There was no agreement even on issues that should be common like when the employment of the respondent with the appellant began. The parties produced different correspondence on this issue but common to them were various terms of the employment:

The nature of employment the respondent was to perform was head of Human Resource for Francophone countries – this is agreed by the parties. Also common was that the respondent was employed at the appellant’s premises in Nairobi but could be transferred to DRC, the francophone hub should business need arise. There is no agreement when employment commenced but there was no clause making it a fixed term contract. The contract could be terminated by either party giving 2 months notice or payment of 2 months’ salary in lieu of notice. The remuneration is agreed and annual leave is agreed at 21 working days per annum.

There is correspondence mainly through email evidence of the frosty relationship that arose when the respondent became pregnant. According to her prior to her maternity leave she had been allowed by the appellant’s managing director to work from home which she did and this continued even after the period of her materinty leave had ended. When the respondent was asked by Prashant (who had taken over after the Managing Director had left employment) to produce documentary evidence to show that she had been allowed to work from home or to extend her maternity leave she was not able to do that as it appeared that she had been allowed to operate that way in a loose arrangement that was not documented. There was alot of push and shove between the respondent and Prashant Singh on the issue of whether she had been allowed to operate from home or to extend her maternity leave. The respondent was not able to produce a document because in any event there was none. The issue received alot of attention through emails. In one email exchanged between the respondent and Prashant on 13th June, 2014 the respondent addresses him as follows:

> ***“Dear Prashant,***
>
> ***As mentioned during our meetings, the employment offer letter you referred was not the last version that I signed after joining MI. Several amendments were negotiated and agreed upon by management including Bill, Shalini, and Priscilla, in order to align my contract with the standards of Kenyan hub. One example of this is my salary adjustment.***
>
> ***As discussed, kindly see the copy of the contract that I have scanned and attached for your review.***
>
> ***Secondly, as we discussed, I need your confirmation on two items:***
>
> ***1. That my phone bill payments will be refunded no later than this month.***
>
> ***2. That my work from home debate has been closed based on all the available circumstantial evidence, and therefore there will be no impact and/or deductions on my salary as a result.***
>
> ***Regards***
>
> ***Muriel.”***

That communication elicited a response from Prashant on 19th June, 2014 where he stated that he had given the respondent flexibility to work from home the preivous week after their discussions. So the issue was not resolved.

In a letter dated 10th June, 2014 under the hand of Prashant Singh Deo, Chief Human Resources Officer of the appellant addresed to the respondent, which is headed “Termination of Contract of Employment” the appellant informed the respondent that her employment contract signed between the parties on April 8th 2011 would end on 11th July, 2014; that the appellant was not in a position to renew the contract, and that the respondent’s emoluments would be paid.

The respondent resisted that communication through various emails indicating that she she was not on a fixed term contract but was employed on permanent terms.

This led to exchange of various correspondence which culminated in a letter from the appellant dated 21st August, 2014 addressed to the respondent headed “Termination of Contract of Employment on account of Redundancy”, in which it it was stated amongst other things, that the appellant's business in the francophone hubs had not grown and that it had become necessary to downsize the appellant’s operation in some of the francophone hubs like Gabon where a large project had been lost. The respondent was thus informed:

> ***“Based on the aforesaid, the Company regrets to inform you that your position as Human Resource Francophone Countries with the Company is no longer required in relation to the Company’s operational needs. We advice that there is no immediate position available within the company to consider you for having taken due regard of your skills and abilities and regrettably this is to give you two (2) months notice of termination of your contract of service effective the 25th of July 2014. The company has however decided that you be paid salary in lieu of service of the notice......”***

The letter proceeded to enumerate what in monetary terms was due to the respondent according to the appellant’s calculation.

The two letters of 10th July, 2014 and 21st August, 2014 have much substance to the matter that was before the trial court. In June, 2014 the appellant was taking the position that there was a fixed term employment contract that was ending in July, 2014 while 2 months later in August, 2014 the appellant changed its position dramatically to now declare that its business operations had been adversely affected and that the respondent's services were no longer required.

The learned trial judge analysed the position as regards redundancy and found that the appellant had not followed procedure in declaring the respondent redundant.

Considering the history of the relations betwen the respondent and the appellant after the previous managing director of the appellant left employment there can be no doubt that the new boss or bosses who came on the scene made a determined decision to have the respondent leave employment. If further evidence is required of that it is the shifting of positions as we have shown from the position taken by the appellant in June 2014 and the position taken in August 2014 reproduced in the letter of 21st August, 2014. Considering all the circumstances of the case and further considering how Prashant dealt with the issue of extended maternity leave for the respondent when he took over management from the previous managing director, we agree with the trial judge that the procedure adopted by the appellant in declaring the respondent redundant was not proper and was not in accordance with the law. The appellant looked for reasons to terminate the respondent’s employment, first, by insisting that a fixed term contract was coming to an end by effluxion of time, and when this was resisted by the respondent who insisted that she served as a permanent employee, the appellant through its manager devised the reason of lack of business need and thus declared the respondent redundant. The process was wrong and in the event we come to the conclusion that the respondent was entitled to compensation.

Because of the nature of the claim we think it would do justice to the case if we consider each of the prayers in the memorandum of claim which prayers were granted by the judge en masse without an analysis of whether each of the prayers was deserved.

i) U$7,040

This was in respect of the respondent’s net salary from 25th July to 25th August 2014. We have spoken of the termination letter dated 10th June, 2014 where the appellant informed the respondent that it was not possible to renew her contact. That position shifted through the letter of 21st August, 2014. We have reproduced part of that letter in this judgment and in the relevant part, the appellant gives the respondent 2 months notice of termination of the contract and it is stated that the notice takes effect on 25th July, 2014. So the letter is written nearly one month after the said termination notice of 25th July, 2014. The appellant has not satisfied us that it could terminate the contract by a letter dated 21st August, 2014 and the effective date of the termination be retrospective. There was no authority to do that under the employment laws. To that extent the respondent was entitled to salary for the period 25th July, 2014 to 21st August, 2014 the date of that letter.

ii) US$7,040

This is in respect of one months net salary pursuant to **section 40(1)(a)** of the **Employment Act.** Under the said section of the said Act an employer who is to declare an employee redundant is required to give a one month notice to such employee and to the labour officer of the relevant area. The said **section (40)** was the subject of consideration by this Court in the recent case of **Freight in Time Limited v Rosebell Wambui Munene [2018] eKLR** where it was held:

> ***“In addition, Section 40(1) of the Employment Act prohibits, in mandatory tone, the termination of a contract of service on account of redundancy unless the employer complies with the following seven conditions, namely:***
>
> ***a. if the employee to be declared redundant is a member of a union, the employer must notify the union and the local labour officer of the reasons and the extent of the redundancy at least one month before the date when the redundancy is to take effect;***
>
> ***b. if the employee is not a member of the union, the employer must notify the employee personally in writing together with the labour office;***

c. in determining the employees to be declared redundant, the employer must consider seniority in time, skill, ability, reliability of the employees;

d. where the terminal benefits payable upon redundancy are set under a collective agreement, the employer shall not place an employee at a disadvantage on account of the employee being or not being a member of a trade union;

e. the employer must pay the employee any leave due in cash;

f. the employer must pay the employee at least one month's notice or one month's wages in lieu of notice; and

g. the employer must pay the employee severance pay at the rate of not less than 15 days for each completed year of service."

There is a claim made by the respondent under **section 40 (1) (f)** which we will address shortly.

We do not think that the respondent was entitled to claim for notice under **section 40(1) (a)** and again claim the same under **section 40(1) (f)** of the **Employment Act.**

iii) US$14,080

This is in respect of 2 months net salary pursuant to **section 40 (1) (f)** of the **Employment Act** which is a duplication.

Section 40(1) (a) of the said Act requires an employer who declares an employee redundant to give 1 month notice of such intention to the Union and to the labour officer of the relevant area. **Section 40 (1)**

(f) of the said Act requires that an employer who declares an employee redundant must give to the employee 1 month's notice or one month's wages in lieu of notice. The respondent made claims under both **sections 40 (1) (a)** and **40 (1) (f).**

As we have seen the said **section 40(1) (a)** and **40(1) (f)** requires an employer who declares an employee to be redundant to pay such employee 1 month salary in lieu of notice. The appellant in its letter dated 21st August, 2014 where the respondent's services were terminated stated:

"We advise that there is no immediate position available within the company to consider you having taken due regard of your skills and abilities and regrettably <u>this is to give you two (2)</u> <u>months' notice</u> <u>of termination</u> of your contract of service effective the 25th of July 2014. The company has however decided that you be paid salary in lieu of service of the notice ….." (emphasis added).

The appellant proceeded in the said letter to tabulate what was, in its view, payable to the respondent which included 2 months salary in lieu of notice at US$14,080.

The appellant was by that conduct acknowledging that the contract of employment governing the employment contract between the parties provided for 2 months' notice of termination of employment (by either side) or payment of salary in lieu of notice. The contract of employment relied on by the appellant dated 8th April, 2011 (this "contract" was disputed by the respondent) recognized 60 days as the applicable period for giving of notice. Although the Employment Act requires giving of 1 month notice or payment of salary in lieu thereof, the appellant gave respondent 2 months' notice and set out in monetary terms what that notice amounted to. This claim was properly pleaded and proved and the respondent is entitled to the same.

iv) US$13,845

This was in respect of accrued leave of 59 days. In the termination letter dated 21st August, 2014 amongst the items tabulated as due from the appellant to the respondent is the following:

"4. Payment in lieu of your earned leave fifty nine (59) days is US$13,845."

This sum is therefore admitted by the appellant and should not be subject to debate as it is in accord with **section 40** of the **Employment Act**. The respondent is entitled to the same.

v) US$10,560

This is in respect of severance pay computed at the rate of 15 days pay for every year worked. Again set out in the termination letter dated 21st August, 2014 the appellant sets out severance pay at the rate of 15 days for each completed year of service in the sum of US$10,560. Again this is not subject to debate.

vi) US$12,699

This is in respect of telephone expenses reimbursement.

The respondent testified before the trial judge that in the course of her work (we accept her testimony that the previous managing directorhad allowed her to work from home) she incurred various expenses in respect of telephone usage in her official capacity. She produced into evidence various telephone bills issued by Airtel Networks Kenya Limited detailing usage of a telephone number 0786xxxx12.

Mr. Prashant Singh denied this claim in evidence stating that it was the policy of the appellant that phone bills be presented within the month for payment.

Although as we have seen in this judgment through an email that the claim was approved we have difficulty in entertaining this claim because the law requires that it being a special damage claim the same be specifically pleaded and strictly proved – see **Moses Onchiri v Kenya Ports Authority & 4 Others [2017] eKLR.** What was produced before the judge were invoices without proof of payment and this claim should not have succeeded and hereby fails.

vii) <u>US$5,000</u>

This was in respect of ex patriate relocation expenses.

The respondent testified that she was entiteld to the sum of US$5,000 she being a national of France from where she had relocated to take up the appointment. Even if we were to accept the contract of employment to be the one produced by the appellant dated 8th April, 2011 the same has a provision under "remuneration" giving the respondent 30 days leave with return ticket to her country of origin for her and her immediate family each year after completion of the initial 9 months. This appears at page 179-182 of the record of appeal.

In the employment contract produced by the respondent dated 15th August, 2011 it is stated that:

> ***"As an expat you are also eleigible to a return ticket to your country of origin for you and your family each year after completion of the initial 9 months."***

Therefore the claimant was entitled to relocation expenses. The problem here is that no evidence was placed before the trial judge to show what those relocation expenses amounted to and it was not shown how the sum of US$5,000 was arrived at. This again was a special damage claim which required proper pleading and strict proof. It should not have been allowed in the absence of proof and we disallow it.

viii) <u>Return air ticket for respondent and family</u>

This was claimed but no proof was placed before the trial judge and again this claim should not have been allowed as it did not meet the required standard of proof for a special damage claim to be allowed.

ix) <u>Market value of ordinary shares of the appellant</u>

The respondent testified that she was entitled to 800 ordinary shares in the appellant in a scheme called ESOP. The respondent did not lead any evidence to show how she was entitled to this. The claim was denied by the appellant. Without evidence and specific proof that prayer should not have been allowed.

x) <u>Certificate of service</u>

The respondent was entitled to this as the Employment Act specifically provides for it.

xi) <u>12 months salary</u>

The respondent claimed 12 months salary being damages for unlawful termination. The trial judge awarded it.

We have already found that the decision reached by the appellant in declaring the respondent redundant was improper and the respondent was entitled to compensation. The judge gave 12 months compensation. No reasons were given by the judge for giving maximum salary compensation. While we recognize that the trial Judge used her discretion to make that award we find that a reason or reasons should have been provided to justify why she reached the decision to make a maximum award.

This Court in the case of **Olpejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR** in considering whether the maximum award of 12 months' gross salary compensation by the trial court was justifiable had this to say of the award:

> ***"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. Given that the respondent has received compensation for racial discrimination in terms of salary at his work station, we think that an award of 6 months' gross pay … would be appropriate."***

In the **Olpejeta** (supra) case the Court considered the fact that the respondent had not offered any reason to justify a claim of maximum salary award of 12 months and also considered that the trial Judge had not given any reason for making a maximum award. The award was

reduced to 6 months' salary compensation.

Although we have found that the appellant did not follow the law properly and looked for a reason to terminate the respondent's employment we do not think that the conduct was callous or capricious to entitle the trial judge to award 12 months' salary compensation. In any event the trial Judge should have assigned a reason why she reached the decision to make an award for the maximum allowed by the Employment Act.

The procedure for declaring the respondent redundant was not properly followed and this led to unlawful termination. Although we should not interfere with the discretion of the trial judge we find in this case that award of maximum compensation was uncalled for. We set that award aside and award 4 months salary compensation for unlawful termination.

In sum therefore we set aside the judgment of the trial judge where it does not accord with this judgment and substitute thereof the following orders as prayers that the respondent was entitled to and which we hereby grant:

i) US$7040 being salary for the period 25th July, 2014 to 21st August, 2014.

ii) US$14080 being two months' salary in lieu of notice.

iii) US$13845 for accrued leave.

iv) US$10560 being severance pay.

v) Four (4) months' salary being compensation for unlawful termination.

The appellant has partly succeeded in the appeal and will have ¼ costs of the appeal.

Dated and delivered at Nairobi this 6th day of December, 2019.

M.K. KOOME

....

JUDGE OF APPEAL

HANNAH OKWENGU

....

JUDGE OF APPEAL

S. ole KANTAI

....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

<u>DEPUTY REGISTRAR</u>