



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MUSINGA, M'INOTI, J.J.A)

CIVIL APPEAL NO. 291 OF 2014

BETWEEN

STANDARD GROUP LIMITED.....APPELLANT

AND

JENNY LUESBY.....RESPONDENT

(An appeal from the Judgment and Decree of the Industrial Court of Kenya at Nairobi (Mbaru, J.) dated 16th July, 2014

in Industrial Cause No. 137 of 2014

JUDGMENT OF THE COURT

1. Under what circumstances may an employer summarily dismiss an employee? What procedure is to be followed in such event? What damages are payable to an employee who is wrongly dismissed summarily? These and other questions fall for our determination in this appeal. The appeal arises from the decision of the Employment & Labour Relations Court (**ELRC**) (**Monica Mbaru, J.**) in which the learned Judge found that the appellant had summarily dismissed the respondent herein in an *'unlawful, unprocedural and unjustified manner'* and awarded her monetary compensation in excess of Ksh. 20 million, under various heads.
2. The respondent was employed by the appellant as its Group Content and Training editor on a two-year contract commencing on 12th November, 2012 at the initial monthly gross salary of Kshs.600,000, amongst other benefits. Within six months she had worked so well that she was promoted to 'Group Consulting Editor' on 1st May, 2013, with an additional Ksh.150,000 as car allowance. Her relationship with the appellant then went south in the succeeding months until 18th November, 2013 when her contract was summarily terminated and she was dismissed forthwith. She was yet to serve eleven months of her contract.
3. According to the appellant, she had committed an act of gross misconduct and insubordination at a top level meeting of the appellant's editors held on 13th November, 2013, in which she was not invited, where she created a scene and left in a huff. There was also a complaint made on the 4th June, 2013 by the Kenya Union of Journalists (KUJ) that she had harassed and abused other journalists.
4. The respondent denied those accusations as false, malicious and an afterthought. According to her, she attended the editors' meeting in error but when she realized it, she left quietly. Before she did, however, she overheard part of the subject matter of the discussions about redesigning the Standard Newspaper which was part of her docket. She was later informed by the Editorial Director that a significant part of her job would be suspended for one year and her job description would be restricted to training sub-editors and reporters only.
5. The following day, accompanied by the Human Resource Director (**HR Director**) she went to see the Group Chief Executive Officer (**CEO**) who told her that by budging into a meeting she was not invited to, she had committed an act of insubordination for which she could be dismissed. She apologized for the incident and was asked to go home and think about accepting the new job description or resigning, and return on 18th November, 2013. Confused on the turn of events, she wrote to the appellant seeking clarity but there was no response. As she awaited the response, she was served with the termination letter. Before the letter was served, however, the appellant had gone ahead to delete the information on her office computer including personal information on her children, and reassigned her duties. Thereafter, the respondent sent numerous short text messages (SMSs) to the appellant's CEO, the CEO's wife, and the HR Director pursuing her dues but they reported to the police who arrested her.
6. On the 6th February, 2014, the respondent moved to the **ELRC** and filed her claim. She faulted the appellant for failing to formally notify

her of the allegations against her or that her summary dismissal was being considered; raising matters backdated to June 2013 which were not subject to disciplinary action; blocking access to her email and wiping clean her computer memory; preventing her from accessing her place of work; attempting to alter her job description in total disregard of the terms of employment; giving an ultimatum to accept a new job description or suffer dismissal; failing to grant her an opportunity to be heard on her alleged acts of misconduct; subjecting her to humiliation, loss of self esteem, mental anguish and financial strain; causing her to breakdown; and refusing to pay her terminal dues and issue a certificate of service.

7. She claimed the following reliefs:

- "(a) A declaration that the summary dismissal of the claimant was unlawful, unprocedural and unjustified;***
- (b) Damages for wrongful termination equivalent to 12 months' salary at Kshs.790,000.00 per month with a total of Kshs.9,480,000.00;***
- (c) Three months' pay in lieu of notice at Kshs.790,000.00 amounting to Kshs.2,370,000.00;***
- (d) Leave pay for 10 pending days at full-time equivalent, 8 days on the 4-day a week contract being 8 days of the 17.6 days a month worked for her gross salary under her fixed term contract at Kshs.359,090.00;***
- (e) Payment of salary for days worked to 18th November 2013 at Kshs.403,977.00;***
- (f) General damages for causing the claimant emotional distress;***
- (g) Certificate of service;***
- (h) Costs of the suit;***
- (i) Interest on (b) to (e) at court rates from 18th November 2013 until payment in full; and***
- (j) Such other or further relief this court may deem fit."***

8. In its statement of response, the appellant denied all the allegations made by the respondent and contended that the respondent demonstrated hostility and aggression against the appellant's attempt to effect re-organization of the operations of the company, as it was entitled to. The defiance peaked on 13th November, 2013 when she forcefully and without permission or invitation, walked into a meeting of the top executives of the respondent, including the CEO, thereby disrupting the same by unnecessarily interjecting and making remarks she was not entitled to make at the meeting. She acted irrationally and without decorum, authority and respect to her superiors. The actions reflected previous conduct involving other parties including the **KUJ** on which the claimant had been warned. The two incidents, pleaded the appellant, crystallized into summary dismissal for gross misconduct based on the respondent's terms of contract and employment laws. As for terminal dues, the appellant conceded payment for 10 leave days and salary for 17 days worked in November 2013. According to them, there was no basis for any other claims.

9. Upon hearing oral evidence from the respondent and three witnesses tendered by the appellant, the trial court found for the respondent and entered judgment on the following terms:

- "(1) A declaration that the summary dismissal of the claimant was unlawful, unprocedural and unjustified:***
 - (a) Compensation is awarded at Kshs.9,000,000.00;***
 - (b) Notice pay of 3 months at kshs.2,250,000.00;***
 - (c) Salary due for 18 days worked at kshs.403,977.00;***
 - (d) Accrued 10 days of leave at kshs.359,090.00;***
- (2) General damages awarded at Kshs.8,250,000.00***
- (3) The respondent to issue the Certificate of service to the claimant within the next 14 days from the date hereof;***
- (4) Costs of the suit awarded to the claimant; and***
- (5) Interest awarded on all items under (1) above from 18th November to date."***

10. Aggrieved by that decision, the appellant put forth fifteen grounds in its memorandum of appeal to challenge it. It is contended, in summary, that the trial court erred in law and fact in:-

- "(i) finding that the summary dismissal of the respondent was unlawful, unprocedural and unjustified.***

(ii) awarding monetary compensation to the claimant beyond the statutory limit of twelve (12) months wages.

(iii) finding that the claimant was entitled to general damages.

(iv) elevating technicalities over substance by dismissing the overall uncontroverted evidence of the claimant's misconduct at the work place for lack of documentation despite oral evidence from three witnesses of the appellant.

(v) misconstruing the provisions of section 74 (1) of the Employment Act, 2007.

(vi) failing to consider the ex-facie evidence of the procedural steps taken to hear the claimant prior to her dismissal and the claimant's conduct that frustrated the said efforts and thereby arrived at a wrong decision on the procedural fairness of the claimant's termination;

(vii) failing to consider the testimony of the appellant's two (2) witnesses who were present at the meeting of 13th November 2013 and instead exclusively relying on the evidence of the respondent on what transpired at the said meeting without affording reasons for the same and thereby reached the wrong conclusion in her award.

(viii) failing to consider testimony that the respondent was consulted by the appellant before the summary dismissal and had full knowledge of the reasons for dismissal.

(ix) finding that the respondent unilaterally sought to review the claimant's job description without evidence for the same in total disregard of the appellant's evidence to the contrary.

(x) finding that as a result of reorganization or restructuring the respondent's internal structures the respondent's terms and conditions of employment were fundamentally changed and that the claimant should have been consulted.

(xi) finding that the appellant instituted disciplinary action against the respondent for resisting the implementation of unilateral changes to terms and conditions of her employment contract.

(xii) failing to take cognizance of the offence of sending unsolicited text messages hence the reports to the police regarding the claimant's vexatious and unlawful text messages to the appellant's CEO and Human Resource Director and thereby reaching the wrong decision that the said reports were calculated to frustrate the claimant into submission and to cause her emotional distress.

(xiii) finding that the appellant deleted the respondent's computer data and reassigned her duties without an iota of evidence on the same and thereby wrongly concluded that the appellant was intent on dismissing the respondent from employment at all costs.

(xiv) awarding the respondent twelve months gross salary in damages.

(xv) awarding the full amounts claimed on notice pay, salary due for 18 days worked and accrued leave days without considering the amounts deposited by the appellant during the course of hearing of the case."

11. In their written and oral submissions, learned counsel for the appellant, **Mr. Chacha Odera**, with **Ms. Georgina Ogalo Omondi**, instructed by Ms. Oraro & Company Advocates, condensed the grounds under six clusters and urged them as such. The first cluster is on '**evidential issues on the respondent's misconduct**', covering grounds (iv) and (vii). They arise from findings made in paragraphs 78, 79 and 72 of the judgment in which the evidence on the respondent's misconduct was assessed. Counsel submitted that the trial court relied on the technicality of documentation instead of oral evidence given under oath which established the misconduct.

12. He further submitted that the court should have acted without undue regard to technicalities, citing in aid **section 20 (1)** of the Employment and Labour Relations Court Act (ELRCA), and **Article 159 (2)** of the Constitution. He also relied on the case of **Zacharia Okoth Obado vs Edward Akong'o Oyugi & 2 Others Civil Application No. 7 of 2014 (2014) eKLR** where this Court held that the essence of **Article 159 (2) (d)** of the Constitution is that the courts should not allow the prescriptions of procedure and form to overshadow the primary object of dispensing substantive justice to the parties.

13. The cases of **Barclays Bank of Kenya Limited vs Evans Ondusa Onzere Civil Appeal No. 236 of 2008 (2015) eKLR**, **Mbogo & Another vs Shah (1968) EA 93**, **Linus Nganga Kiongo & 3 Others vs Town Council of Kikuyu (2012) eKLR**, and **Karuru Munyoro vs Joseph Ndumia Murage & Another HCCC No. 95 of 1988** were also cited for the submission that the trial court failed to take into consideration what it ought to have done, including the uncontroverted testimony of the appellant's witnesses who were present at the scene where the respondent misconducted herself. It was asserted that uncontroverted and unchallenged evidence was credible and the kind of evidence a court of law should act upon. It was further submitted that the trial court merely relied on the respondent's evidence and failed to give reasons for its decision, contrary to law. The case of **English vs Emery Reimbold & Strick Ltd (2002) 3All ER** was relied on for that submission.

14. Moving on to the second cluster on '**procedural fairness**', covering grounds (vi) and (viii) which arose from findings made under paragraphs 72 and 73 of the judgment, counsel submitted that the trial court failed to consider the evidence of the procedural steps taken to hear the respondent prior to her dismissal and the respondent's misconduct that frustrated the said efforts, hence arriving at a wrong decision. Counsel observed that after the incident of misconduct during the editors' meeting on the 13th of November 2013, the respondent tendered an apology, hence acknowledging her misconduct. That is when she was requested to leave the appellant's premises and report back on 18th

November, 2013 which she failed to. She was then summarily dismissed vide a letter date 18th November, 2013 in accordance with **sections 41, 43 and 44** of the Employment Act. According to counsel, no notice was required for summary dismissal, and the appellant was not obliged to hold a hearing session once the respondent had admitted her misconduct. As for the reasons for dismissal, counsel pointed out that the letter of dismissal specified the same. He faulted the trial court for failing to make a wide inquiry into the circumstances of the case so as to determine whether a reasonable employer could have decided to dismiss on those facts, as was decided in the case of **CFC Stanbic Bank Limited vs Danson Mwashako Mwakuwona, Civil Appeal No. 3 of 2014 (2015) eKLR.**

15. The next cluster was on the '**terms and conditions of employment**', covering grounds (ix) and (x). Counsel submitted that the trial court misdirected itself in finding that the appellant unilaterally sought to review the respondent's job description. According to him, the finding was based on no evidence, on a misapprehension of the evidence on record, or in total disregard of the appellant's evidence to the contrary. The only evidence on record was the discussions held on 13th November, 2013 about the possible changes in the respondent's job description due to the arrival of the new Editorial Director. There were no steps taken prior thereto to unilaterally change her job description or to reassign her projects, it was asserted.

16. On the issue of '**malice/ulterior motives**', raised in grounds (xi), (xii) and (xiii), counsel submitted that the trial court erred in failing to take cognizance of the offence of sending unsolicited text messages to the appellant's CEO, his wife and the HR Director, forcing them to seek police protection from such vexatious and unlawful acts. The trial court found instead that the report to the police was calculated to frustrate the respondent into submission, cause her emotional distress, and coerce her to withdraw her claim. Such finding, he submitted, was misconceived. Citing **section 60 (1) (o)** of the **Evidence Act**, counsel submitted that courts are enjoined to take judicial notice of all matters of general or local notoriety even if they are not formally brought to the attention of the court. In this case, it was submitted, it was notorious that the respondent was charged with the offence of harassment and tendered written apology for it. He relied on among other cases the case of **Republic vs Simon Wambugu Kimani & 20 Others, Criminal Revision No. 1 of 2015 [2015] eKLR.**

17. According to counsel, there was a misconceived finding that the appellant's intention to dismiss the respondent was manifested by the act of erasing the respondent's computer memory even before serving her with the dismissal letter. In counsel's view, such finding of fact, and therefore of malice, was based on no evidence on record. In his submission, for malice to be established, there must be evidence of intent to commit a wrongful act, reckless disregard of the law, and ill-will or wickedness of heart, which were never established.

18. A major plank of the submissions rested on grounds (ii), (iii) and (xv) which were clustered as '**monetary reliefs granted**'. In counsel's view, the monetary compensation made to the respondent was beyond the statutory limit of 12 months' gross salary. Relying on several decided cases including **Abraham Gumba vs Kenya Medical Supplies Authority, Industrial Cause No. 1073 of 2012 [2014] eKLR,** he submitted that the rationale for capping monetary compensation at 12 months was to indemnify an employee for the loss of his or her employment where the employer was on the wrong; it should not be abused as an avenue for profit-making or personal enrichment on the part of an employee.

19. He further contended that the further award of two month's salary *in lieu* of notice for termination was not justified. He cited the case of **CMC Aviation Limited vs Mohammed Noor, Civil Appeal No. 199 of 2013 [2015] eKLR** in which the Court held that where a contract does not provide for notice before termination, the court must consider what would be a reasonable period of notice. Counsel observed that the respondent's contract explicitly provided that in a case of grave misconduct the respondent would be liable to termination without notice or payment *in lieu* of notice.

20. As for the award of general damages, which counsel sought to be set aside, he cited the case of **Peter Gachenga Kimuhu vs Kenol Kobil Ltd, Industrial Court Cause No. 628 of 2012 [2014] eKLR** where it was held that:

“There is no justification in seeking compensation for unfair termination as well as general damages for unlawful termination for victimization. The court explained in the Industrial Court of Kenya Cause Number 611 (N) of 2009 between Maria Kagai Ligaga vs Coca Cola East and Central Africa Limited (UR) and Cause Number 1227 of 2011 between G. V. M. vs Bank of Africa Kenya Ltd (2013) that it offends the principle of a fair go all round, to award general damages for breach of contract in addition to statutory compensation for unfair termination. There is in issue, one economic injury, and Employees must not replicate injuries and multiply remedies.”

Counsel reinforced that argument by citing the South African Supreme Court of Appeal in the case of **South African Maritime Safety Authority vs Mckenzie (017/09) [2010] ZASCA 2** where the court opined that it was not a proper exercise of the judicial function to develop the common law to give a parallel remedy which is not subject to any limit.

21. He further submitted that the learned judge erred in law and fact by awarding the respondent the full amounts claimed on notice pay, salary due for 18 weeks worked and accrued leave without considering the sum of Ksh. 452,730 transferred to the respondent's bank account as confirmed in evidence by the appellant's HR Director. In so doing, the trial court failed '*to consider and evaluate the entire evidence on record placed before it*' to avoid '*unlawful enrichment or double payment*' as stated in the case of **Barclays Bank of Kenya Ltd vs Evans Ondusa Onzere, Civil Appeal No. 236 of 2008 [2015] eKLR.** According to counsel, such award of damages amounted to double payment and unjust enrichment and ought to be set aside.

22. Finally, counsel dealt with the issue of the '**proper interpretation of section 74 (1) of the Employment Act, 2007**' raised in ground (v). He submitted that while it is acknowledged that **section 74 (1)** requires that an employer keeps records of warning letters or other evidence of misconduct of an employee, the court must also consider the provisions of **Article 159 (2) (d)** of the Constitution and **section 20 (1)** of ELRCA both of which eschew technicalities. He cited the case of **William Kiplang'at Maritim & Anor vs Benson Owenga, Civil Appeal No. 180 of 1993 [UR]** where it was held that documentary evidence should not be preferred over oral evidence if there is no difficulty in calling a witness. He contended that there was ample evidence showing that the respondent was given a verbal reprimand following the incident with KUJ, and an opportunity to be heard in connection with her misconduct during the editors' meeting of 13th November, 2013. There were thus fair and valid reasons for her dismissal.

23. In response to those submissions, learned counsel for the respondent, **Mrs. Cosima Wetende**, instructed by M/s Kaplan & Stratton, submitted on the matter of '**evidential issues on the respondent's misconduct**' that the onus was on the appellant to prove that its decision to dismiss the respondent on grounds of the misconduct set out in its dismissal letter was justified and warranted, but there was no proof. On the contrary, it was the respondent who was able to show, by adducing documentary evidence, that the two grounds of dismissal were an afterthought, unjustified and actuated by ulterior motives. She showed it was a smokescreen to achieve a predetermined objective. On the totality of such evidence, counsel submitted, the trial court made no error in finding that the summary dismissal was unlawful, unprocedural and unjustifiable.

24. Counsel further submitted that the appellant's defence pleaded that the respondent stormed into a meeting, while the dismissal letter alleged that she created a scene and walked out of a meeting. There was a contradiction. She cited **section 43 (1)** of the **Employment Act** which provides that an employer is required to provide the reason(s) for termination, failure to which such termination shall be deemed to have been unfair within the meaning of **section 45**. As for **section 74 (1)** which mandates an employer to keep all records pertaining to an employee's relations, term and/or period of service with such employer including a record of warning letters or other evidence of misconduct, she submitted that it was not a technicality that should have been overlooked by the trial court but a requirement of the law. No justifiable reason was given by the appellant as to why it did not keep the documentation relating to the respondent.

25. In counsel's view, there was no evidence adduced to support the claim of insubordination, hence the correct finding made that the actions of the appellant were unreasonable and unfair. Citing the case of **Rafiki DTM (K) Ltd vs Ng'ang'a Mbugua [2015] eKLR**, she submitted that the mandatory procedural guidelines set out in **section 41** of the **Employment Act** were contravened. The appellant did not notify the respondent of the impending dismissal; did not give the respondent reasons for the summary dismissal; and did not grant the respondent a hearing before making the decision to dismiss her.

26. On '**procedural fairness**' she submitted that it was not pleaded in the appellant's defence. The oral evidence tendered on it was at best an acknowledgment of the absence of documentary evidence to support it. Furthermore, observed counsel, the evidence of the HR director (DW3) confirmed that there was neither notice issued to the respondent prior to her dismissal nor a hearing. The witness was not even aware that such procedure must be followed. The witness also affirmed the respondent's claim that her computer data was deleted before the dismissal letter was issued; that the respondent's terminal dues were withheld without cause; that the respondent was not given an opportunity to have a co-employee present in any disciplinary proceeding; and that no warning letters were issued to the respondent on the KUI complaint which remained unsubstantiated.

27. Ms. Wetende relied on the cases of **International Planned Parenthood Federation vs Pamela Ebot Arrey Effiom [2016] eKLR** and **Kenfreight (E.A.) Limited vs Benson K. Nguti [2016] eKLR** for the proposition that the dismissal letter ought to have given an opportunity to the respondent to respond to any allegations made on her conduct, and therefore the unfairness in the dismissal.

28. On the issues of '**terms and conditions of employment**' and '**malice/ulterior Motives**', counsel submitted that malice on the appellant's part was manifested by the surreptitious attempt to review the respondent's terms of service; changing her job description; reassigning her work to other employees; deleting her computer data, all happening before the dismissal letter was served on her.

29. With regard to the award of '**general damages**', it was submitted that it was justified on the basis that the appellant unlawfully withheld the respondent's dues despite her desperate financial needs and persistent follow up with the appellant's CEO, who in turn involved the police to the extent of detaining the respondent in order to extract a settlement. On those proved facts, she submitted, the text messages sent to the CEO did not amount to harassment but a desperate attempt to seek payment that was unjustifiably held. It was also relevant, in her view, that the respondent and the CEO were family friends.

30. As to other '**monetary reliefs**' which were said to have exceeded the statutory limit of twelve (12) months; counsel submitted that the respondent's claims were based on two distinct and separate wrongs; that is, wrongful and unfair termination as envisaged in **section 49 (1) (c)** of the **Employment Act**; and emotional distress arising from the withholding of her terminal dues despite her desperate family situation which was well known to the appellant, as well as the distress caused by involving the police in the matter. The trial court, in counsel's view, was right to invoke the wide discretion at its disposal under **Article 162 (2) (a)** of the **Constitution** and **section 12 (3)** of the **Employment and Labour Relations Court Act, 2011** to award compensation and any other appropriate relief deemed fit.

31. Finally, counsel opined that the awards given were nett of the amount payable, and in fact paid by the appellant into the respondent's bank account.

32. We have given careful consideration to the record of appeal and the submissions of counsel in the manner of a retrial, as we must on a first appeal under **Rule 29 (1) (a)** of the Rules of this Court. We must, of course, defer to the findings of fact made by the trial court, especially where they are based on the credibility of witnesses because that court had the added advantage of hearing and seeing the witnesses. Nevertheless, we are entitled to interfere with those findings if they are based on no evidence or on a misapprehension of the evidence or the judge is shown demonstrably to have acted on wrong principles in reaching the findings. See **Mwangi vs Wambugu [1984] KLR page 453** where it was also 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."

33. In our view, the determination of the following two issues is dispositive of the appeal before us:

(a) Whether the summary dismissal of the respondent was unlawful, unprocedural and unjustified.

(b) If so, what reliefs is the respondent entitled to.

34. As a preamble to the first issue, the law applicable when the dispute was filed on 6th February, 2014 was the *Constitution of Kenya, 2010*, the *Employment Act, (No. 11 of 2007)* ('the Act'), and the *Employment and Labour Relations Court Act (No. 20 of 2011)*. The Constitution declares emphatically as an overarching principle in **Article 41**, that 'every person has the right to fair labour practices'. That theme is carried forward in the preamble to the Act which spells out its object as: 'to declare and define the fundamental rights of employees, to provide basic conditions of employment of employees, to regulate employment of children, and to provide for matters connected with the foregoing.' As regards the main focus of the appeal, that is, "**Termination and Dismissal**", and the consequences thereof, the Act has elaborate provisions in **Part VI in sections 35 to 51**. So that, the existing law carefully ring-fences matters employment, a clear departure from the 'employment at will doctrine' where employment could be terminated for good cause, bad cause or no cause at all.

35. In this case, the appellant relied heavily on the contract of service which gave it the leeway to terminate the services of the respondent summarily. It stated as follows:

"9. **Termination:**

Your contract may be terminated at any time in the event of any of the following:

(a) Be deemed guilty of any grave misconduct.

(b) Fail to give your whole time and personal attention to the business of the Company.

(c) Absent yourself from work without leave or permission except in cases of illness or accidents.

Then in each and every such case the Company may determine your employment forthwith without any notice or payment in lieu of notice AND UPON such determination, you shall not be entitled to claim any compensation or damages for or by reason of such determinations.

This contract may otherwise be terminated by either party giving the other three month's notice or paying three month's basic salary in lieu of notice without any further obligation arising on either party with respect to the remainder of the contract period. [Emphasis added].

36. The ground of summary dismissal relied on was 'gross misconduct' as particularized in the letter of dismissal dated 18th November, 2013 stating:

"Ms. Jenny Luesby...

RE: DISMISSAL FOR GROSS MISCONDUCT

The decision to dismiss you is based on the incident that happened on 13th November 2013 where you unsubordinated (sic) the CEO in an editors meeting. You created a scene and walked out of his meeting which contravenes section 9(a) of the Employment Contract between Standard Group and yourself. Your conduct is also a ground for summary dismissal under section 44(d)(sic) of the Kenyan Employment Act, 2007.

Prior to the above, we received a protest letter dated 4th June 2013 from the Kenya Union of journalist (KUJ), intimating that you harassed and abused other journalists. In light of the aforementioned, your employment contract is terminated with immediate effect from the date of this letter.

Upon clearance you will be paid for the days you worked up to the date of termination including any pending leave days and any other dues owed to yourself".

37. **Section 44** of the Employment Act which was invoked covers 'Summary Dismissal' and in **subsection (3)** thereof allows an employer to dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligation arising under the contract of service. **Subsection (4)** then sets out various acts that may amount to gross misconduct so as to justify summary dismissal. **Section 44 (4) (d)**, which was specifically invoked by the appellant as a 'justifiable or lawful ground' to dismiss the respondent states:

"(d) an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer."

38. The Act goes further in **section 41** to lay out the procedure to be followed in matters of termination of employment, thus:-

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

2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on

the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.” [Emphasis added].

That procedure has been construed by the Industrial Court in the case of **Kenya Union of Commercial Food and Allied Workers vs Meru North Farmers Sacco Ltd, [2013] eKLR**, as a mandatory process and the holding was approved by this Court in the case of **CMC Aviation Limited vs Mohammed Noor [2015] eKLR**.

39. Furthermore, the Act provides for the burden of proof where the issue of wrongful dismissal arises. **Section 47 (5)** states:

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer.” [Emphasis added].

40. The trial court examined some of the above provisions of the law and applied them to the facts. It examined the evidence surrounding the misconduct imputed to the respondent and was not satisfied that it was proved. It stated:

“If indeed the claimant was insubordinate on 13th November 2013 against the respondent CEO, there is no evidence from the CEO stating what instructions he gave that were disobeyed by the claimant. What the court is left to extrapolate are the perceptions of those present, those he talked to after the fact and their general imagination and approach to the stated incident. This evidence as regards how the said incident occurred was vehemently disputed by the claimant. The offended party being the respondent CEO was never called to state his case as he, being the senior in authority present at this meeting, is the one whose authority was said to have been undermined.”

41. The court added that the incident giving rise to the alleged misconduct was not recorded in any document, which made it difficult to authenticate the allegation. It stated:

“The keeping of records for such a position is vital not only to the running of the affairs for the respondent, but for matters as this one now in court. So crucial is such records as where a dispute arises as to what transpired at the meeting, scenes and incidents the claimant is alleged to have misconducted herself, that record would have shed light as to the subject and resolutions thereto. It is also a legal requirement that all employment records, forming matters material to an employment relationship should be in writing. This is the essence of section 73 and the entire part IX of the Employment Act.”

42. Those findings were attacked by the appellant on the main ground that the evidence of the witnesses present at the editors' meeting testified on what they heard and it was unfair to ignore their evidence or question the absence of the CEO who did not testify. We have examined the proceedings and have noted that one of the editors who was present at the meeting, **Andrew Kipkemboi, (DW1)**, gave lengthy evidence on how the respondent happened in the meeting uninvited and how, in the course of his powerpoint presentation, the respondent made numerous interjections and interruptions of the proceedings, and eventually stormed out before the meeting ended. The Managing Editor, **Kimathi, (DW2)** gave similar evidence, adding that the respondent 'was unsettled and kept on mattering and fiddling in her chair' and the meeting had to stop at each interruption. The last witness was the HR Director, **Pauline Kathure Kiraithe, (DW3)**, who was tasked by the CEO to investigate the incident and proceeded to interview some of those present at the meeting as well as the respondent. The cross examination of these witnesses did not break them down.

43. We think, in our own assessment, that the trial court gave short shrift to the evidence tendered by the appellant on the incident of 13th November, 2013 and thereby made a perverted finding. On our part, we are prepared to give the benefit of doubt to the appellant and find that the respondent may well have misconducted herself before the top executives of her employer, who were her seniors. But that is not the end of the matter.

44. The trial court further found that the appellant never gave the respondent the opportunity to explain herself before serving her with the termination letter. On the contrary, the court found, the appellant had, by the overt acts of deleting her computer data and reassigning her portfolio before the formal dismissal, constructively terminated her contract in advance. The court stated:-

“73. There are no exceptional circumstances that have been established by the respondent that the case against the claimant was so severe that she could not be accorded the basic minimum. That is notice and a hearing made before the summary dismissal. That hearing is as important as the law made it mandatory even in the worst case scenario where an employee grossly misconduct oneself. The right to hearing is what amounts to meeting the true tenets of natural justice. Such a hearing in an employment relationship should be conducted in the presence of the affected employee together with another employee of her choice as this is the true meaning of a fair hearing. However senior an employee is, where the case is that of misconduct, the seniority is not justification for failure to meet the mandatory provisions of the law. It remains a sacrosanct duty for an employee to uphold. This was denied of the claimant and I find this to be an unfair labour practice.”

45. With respect, we think the trial court was on firm ground in such finding. As stated above, the procedure under **section 41** of the Act is mandatory. Apart from a mere assertion that there was an attempt made on 14th November, 2013 in a meeting with the HR Director and respondent in the CEO's office, where the incident was discussed and the respondent is said to have apologized, there was nothing on record to show that the requirements of **section 41** were complied with. Indeed, the HR Director admitted in evidence that:

“We did not write to claimant that we were considering termination and call her for hearing. We did call the claimant to collect dismissal letter.”

It follows that the act of summarily dismissing the respondent without giving her an opportunity to be heard amounted to unfair termination

as defined in **section 45** of the Act. The burden was on the appellant to prove 'that the employment was terminated in accordance with fair procedure.' See **Kenfreight (E. A) Limited vs Benson K. Nguti, [2016] eKLR**. As this Court stated in the **CMC Aviation case** (supra):

"Unfair termination involves breach of statutory law. Where there is a fair reason for terminating an employee's service but the employer does it in a procedure that does not conform with the provisions of a statute, that still amounts to unfair termination. On the other hand, wrongful dismissal involves breach of employment contract, like where an employer dismisses an employee without notice or without the right amount of notice contrary to the employment contract."

We similarly so find in this case.

46. On the second issue, the trial court awarded compensation for unfair termination in the sum of Ksh.9 million and justified it as follows:

"92. The claimant is seeking damages for wrongful termination. On the finding that there was unfair termination this court is guided by the provision of section 49 (1) (c) where the court can grant the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal. This being a case where both substantive and procedural requirements were not met and despite the claimants having served for only 11 months, she was under a contract of employment that was negated by the unilateral act of the respondent. I will therefore award twelve (12) months' pay based on the gross monthly salary the claimant had at the time of dismissal at Kshs.750,000.00 x 12 amounting to Kshs.9,000,000."

That award is attacked by the appellant as excessive and not in compliance with the law. We think there is some merit in that complaint. The learned judge was not right in saying that the respondent had served for only 11 months. The correct position is what she had stated at paragraph 89 of her judgment that:

"the claimant had served her contract for one year and 18 days.

There were only 11 months pending..."

47. The remedies for wrongful dismissal and unfair termination are provided for in **section 49** as read with **section 50** of the Act. Among them is an award of "the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal." This is what the trial court awarded under **section 49 (1) (c)**. But **section 49 (4)** sets out several factors which should be taken into account in deciding whether to recommend the remedies under **49 (1)**; among them:

"(a) the wishes of the employee;

(b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and

(c) the practicability of recommending reinstatement or re-engagement;

(d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;

(e) the employee's length of service with the employer;

(f) 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;

(g) the opportunities available to the employee for securing comparable or suitable employment with another employer;

(h) the value of any severance payable by law;

(i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;

(j) any expenses reasonably incurred by the employee as a consequence of the termination;

(k) any conduct of the employee which to any extent caused or contributed to the termination;

(l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and

(m) any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee." [Emphasis added].

48. In our view, the factors emphasized above were relevant for consideration in this matter but were not considered. As correctly noted by the trial court itself, this was a fixed contract of two years and only 11 months had not been served. The respondent would not have served beyond that period unless the contract was extended but there was no evidence of such extension. It was wrong therefore for the court to make an award in excess of the period of contract. Furthermore, we have found that the respondent may well have contributed to the

termination, although it was evident that the reorganization mooted by the appellant would inevitably affect her employment. The only liability that attached fully to the appellant was thus the procedural unfairness for which reasonable compensation is due.

49. In the case of Abraham Gumba vs Kenya Medical Supplies Authority [2014] eKLR, which was cited with approval by this Court in Mary Wakhabubi Wafula vs British Airways PLC [2015] eKLR, Rika, J. stated as follows:

"The rationale for capping was explained in the House of Lords cases of Eastwood & Another vs Magnox Electric PLC; McCabe vs Cornwall County Council & Others [2004] UKHL 35, where the Court stated:

"in fixing these limits on the amount of compensatory awards, Parliament expressed its view on how the interests of the Employers and the Employees, and the socio-economic interests of the country as a whole, can best be balanced in cases of unfair termination. It is not for the Courts to extend further a common law implied term, when this could depart significantly from the balance set by legislature. To treat the legislature as creating the floor, and not the ceiling, would do just that...it would be inconsistent with the purpose Parliament sought to achieve by imposing compensatory awards payable in respect of unfair dismissal."

This Court is of the view that in general, judicial restraint must be exercised in exceeding the capping of 12 months' salary, in compensating Employees for the wrongful acts of their Employers. The proliferation of monetary damages above the equivalent of 12 months' salary will only disturb the equilibrium intended to be achieved by Parliament, in placing the capping. The Industrial Court [Procedure] Rules 2010 expressly state that the Court should not award exemplary or punitive costs in employment cases, and this Court would like to believe this is intention even in the area of damages."

We agree with those sentiments. Compensatory awards are not meant to be a punishment for the employer, but rather an attempt to offset the financial loss resulting from the wrongful act of the employer. See also Palluci Home Depot (Pty) Ltd vs Herskowitz & Others (CA21/13) [2014] ZALAC 81.

50. In all the circumstances, we determine the reasonable compensation due to the respondent as the equivalent of two months' salary based on the gross monthly salary of Ksh.750,000; that is, **Ksh.1,500,000** on that head of claim. The award of Ksh.9 million is accordingly set aside.

51. The trial court also awarded general damages for emotional distress, as claimed, in the sum of Ksh.8,250,000. It hinged its jurisdiction to award such damages on **Article 162 (2)** of the Constitution as read with **section 12** of the Employment and Labour Relations Court Act (**ELRCA**) which donates exclusive powers to the ELRC to handle matters relating to employment. Among the orders that the court may make under **section 12 (3)** are:

(vi) an award of damages in any circumstances contemplated under this Act or any written law;

(vii) any other appropriate relief as the court may deem fit.

The court also relied on the case of Irene Naserian Kabrolo vs Kenya Aids Consortium, Cause No. 1937 of 2011 (UR) where compensation for unfair termination was awarded together with general damages for discrimination.

52. In this case, the trial court found that the respondent suffered emotional distress because, amongst other things: she was a single mother with two children who faced an uncertain future due to the termination; the review of the terms of her job was sudden, unexplained and shocking; the CEO who was a family friend and who had headhunted her for the job was being unhelpful in giving answers to the situation; the CEO reported her to the police and caused her arrest for pursuing her rights; and her terminal dues were delayed and only paid out during the hearing of her case. For those reasons, the court calculated and awarded the salary for the remaining 11 months of her contract and awarded it as general damages.

53. The main challenge to the award by the appellant is that there was no jurisdiction, in a contractual relationship, for the court to award general damages for emotional distress and, in any event, there was no factual basis for awarding any extra general damages in addition to Ksh.2,250,000 awarded as three months' notice pay. It would be double compensation. Reliance was made on the case of Sonye vs Siaya Teachers Co-operative Savings and Credit Society & Another [1999]2 E. A. 310 where the claim was made for wrongful termination as well as damages for defamation, but this Court, relying on the English House of Lords decision in Addis vs Gramophone Co. Ltd [1907]1 AC 488, held that "no damages for distress, mental anguish and injured feelings may be awarded". That decision was rendered on 25th November, 1999.

54. The case of Peter Gachenga Kimuhu vs Kenol Kobil Limited [2014] eKLR was also relied on where Rika, J. opined that:

"There is no justification in seeking compensation for unfair termination as well as general damages for unlawful termination for victimization. The Court explained in the Industrial Court of Kenya Cause Number 611 [N] of 2009 between Maria Kagai Ligaga vs Coca Cola East and Central Africa Limited [UR] and Cause Number 1227 of 2011 between G. M. V. vs Bank of Africa Kenya Limited [2013] eKLR, that it offends the principle of a 'fair go all round', to award general damages for breach of contract in addition to statutory compensation for unfair termination. There is in issue, one economic injury, and Employees must not replicate injuries and multiply remedies."

55. We have considered the issue and the authorities relied on. We think for ourselves that in view of the express jurisdiction granted to the ELRC under **Article 162 (2)** of the Constitution as read with **section 12** of the Act, the Sonye case (supra) is of doubtful authority. It was decided 11 years before the new Constitution, 8 years before the Employment Act, and relied on the House of Lords decision in the Addis case (supra) made more than 100 years ago. So long as an employee can plead and prove breach of a constitutional right within the context

of the employee's contract of employment or demonstrate that he is entitled to damages in circumstances as contemplated under the Employment and Labour Relations Court Act (ELRCA), over and above those awardable for unlawful termination, we see no impediment for the trial court granting such relief. There are many cases, for example, where wrongful or unfair termination is intertwined with breaches of the Bill of Rights and there is no argument that different reliefs will ensue. The caution must, however, be borne in mind that a balance should be maintained between the interests of the employer and employee and the socio-economic interests of the country as a whole.

56. The issue in this case is whether there was cogent proof of the claim for general damages. We have revisited the evidence on record and, in our assessment, the trial court took an exaggerated view of the tribulations undergone by the respondent. The meeting called by the CEO for senior editors of the appellant was not targeting the respondent but was for the benefit of the corporate whole. The CEO, as every other corporate chief executive, had a duty to the investors/shareholders to maintain profitability in the company and it is clear from the evidence that the meeting of the 13th November, 2013 had that objective. It is also difficult to justify the incessant electronic messages sent to the CEO and HR Director by the respondent, ostensibly in pursuit of her rights. Friendship, even a close one with the CEO, as the respondent pleaded, ends where contractual rights are trashed and one takes legal action, as indeed the respondent eventually did. The CEO and HR Director had rights to privacy too and we do not find it strange that they sought the assistance of the police to investigate what they perceived as harassment. The respondent's seniority and intelligence does not allow us to accept that she became a mere pawn in police hands and was manipulated. If the police were at fault or in breach of the law, we shall never know as they were never sued.

57. It is clear, however, that the appellant was in breach of the respondent's rights when it failed, refused or neglected to settle her terminal dues timeously. The belated payment made into her account in the middle of the proceedings in this case does not absolve them from liability. They caused considerable anxiety bordering on emotional distress as pleaded, and we agree with the trial court on the assessment of the evidence in that regard.

58. In all the circumstances, we find the general damages of Ksh.8,250,000 awarded under this head had no basis and we set it aside. We substitute therefor a nominal award of **Ksh.100,000**.

59. That leaves the awards made for 'notice pay of 3 months', 'salary due for 18 days worked', 'accrued 10 days of leave', and 'certificate of service'. We perceive no serious challenge to these awards and we have no intention of disturbing them. The only complaint by the appellant is that the amount paid over to the respondent during the proceedings was not taken into account or deducted from the overall award. The respondent on the other hand submits that the overall award was nett of the payment.

60. The amount admittedly paid into the bank account of the respondent in the sum of Ksh. 452,730 covered:

(i) 18 days' salary due -----	Ksh.360,000
(ii) 8 days of leave due -----	Ksh.192,000
(iii) Car allowance due by 18 th November, 2013-----	Ksh. 90,000
(iv) News contribution (x2) -----	Ksh. 20,000
	Total Ksh.662,000
	Less tax Ksh.198,000
	Less iPad Ksh. 10,669
	Net due Ksh.452,730

It is clear to us that the amounts that could be said to have been awarded doubly was the salary due and the leave due, both amounting to Ksh.552,000, less pro rata tax. The net amount should be deducted from the overall award.

61. The upshot is that this appeal succeeds in part, but is otherwise dismissed. We make the following **Summary of final orders**:

(a) We find and hold that although the termination of the respondent's employment may not have been wrongful, it was procedurally unfair.

(b) We find and hold that the damages awarded in compensation for unfair termination in the sum of Ksh.9 million is excessive. The award is set aside and substituted with an award of Ksh.1,500,000.

(c) We find and hold that the award of general damages at Ksh.8,250,000 is excessive. The award is set aside and substituted with an award of Ksh.100,000.

(d) The award of notice pay of 3 months at Ksh.2,250,000 is not disturbed.

(e) The award of salary due for 18 days worked at Ksh.403,977 is not disturbed.

(f) The award of Accrued 10 days of leave at Ksh.359,090 is not disturbed.

(g) The order for issuance of certificate of service is not disturbed.

(h) A sum of Ksh.552,000, less pro rata tax on that sum, shall be deducted from the final decree.

(i) Each party shall bear its own costs of the appeal, but the appellant shall bear the costs of the suit before the lower court.

Orders accordingly.

Dated and delivered at Nairobi this 3rd day of August, 2018.

P. N. WAKI

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR