

TOTAL

Kshs 2,242,562.30

iii) THAT the claims for exemplary damages and pension dues be and are hereby dismissed.

iv) THAT the Respondents do pay the Claimant costs of the cause.”

In spite of the judgment being in his favour, the appellant was dissatisfied with the awards thereof and preferred the appeal before us.

In a memorandum of appeal dated 4th May 2016, the appellant raised 10 grounds of appeal which can be summarized as follows:- that the learned Judge:-

- i. failed to consider legal issues.
- ii. erred in finding that his salary at the time of dismissal was Kshs 225,000/- instead of 249,000/-.
- iii. failed to find that he was entitled to 26 days of leave and not 21 days.
- iv. erred in not awarding him pension
- v. erred in failing to award him compensation equal to 12 months' salary and work.
- vi. failed to determine the issue of discrimination
- vii. failed in not awarding exemplary damages, compensation for loss of income and interest.”

On 15th March 2018, the appeal came before us for plenary hearing. **Mr. Konosi**, learned counsel for the appellant made oral submissions and relied on the appellant's written submissions dated 12th March 2018 and 15th March 2018, his lists of authorities dated 12th March 2018 and 15th March 2018. In opposing the appeal **Mr. Cheluget**, learned counsel on behalf of the respondents made oral highlights and relied on the 1st and 2nd respondents submissions dated 14th March 2018.

In his oral highlights, Mr. Konosi abandoned grounds Nos. 7, 8 & 10. In respect of grounds 1 & 6, counsel urged us to find that the appellant was discriminated against as whereas he was not the only one who handled the accounts of a customer namely, Step Up Holdings (K) Ltd, he is the only one who was singled out for dismissal. For the alleged unlawful dismissal, the appellant asked for an award of Kshs 8.5 Million which the trial court failed to award. On the issue of salary, counsel contended that the appellant's salary was Kshs 249,000/- and not Kshs 225,000/- as stated by the trial Judge; that the appellant was entitled to 3 months' salary in lieu of notice based on his salary of Kshs 249,000/- thus a total of Kshs 774,000/- and not Kshs 675,000/- awarded by the trial Judge (which was based on a salary of Kshs 225,000/- per month); that the appellant was entitled to annual leave of 24 days and not 21 days as found by the trial court; that the compensation of unpaid leave should be based on a salary of Kshs 249,000/- and not Kshs 225,000/-, the difference being Kshs 155,737.70. Further, that the appellant having worked for the respondent for 2 years and 11 months, was entitled to pension of Kshs 824,489.53 as at 21st December 2012 and finally, that the learned Judge failed to award the pension benefits which were pleaded and were not controverted by the respondents.

In ground 5, the appellant contended that the trial court erred in awarding the appellant compensation equivalent to 6 months' salary as opposed to 12 months as provided in Section 49 of the Employment Act.

Finally, in ground 9, the appellant contended that Rule 28(1) of the Labour Relations Court (Procedure) Rules 2016 makes provision for payment of interest. In particular, the appellant cited Rule 29(3) which provides that:-

“Where a suit involves a liquidated amount that is claimed and specified at the time of filing a statement of claim and the court orders that the amount claimed or part of the amount be paid to the claimant, it must in addition to the order, decree that interest be paid on the liquidated amount awarded at court rates.”

Based on the above submissions, the appellant urged us to allow the appeal on the following terms:-

- “a) The appellant's salary per month at the time of dismissal was Kshs 249,000/= and not Kshs 225,000/=;**
- b) Payment of Kshs 72,000/= notice pay being the difference on salary based on Kshs 249,000/= per month instead of Kshs 225,000/=.**
- c) Payment of Kshs 155,737.70 outstanding leave for 24 days for the year 2010 and 21 days for the year 2011 based on Kshs 249,000/= per month instead of Kshs 225,000/=;**
- d) Payment of Kshs 1,638,000/= being the difference between compensation of 12 months at a salary of Kshs 249,000/= per month and 6 months compensation based on a salary of Kshs 225,000/= per month;**
- e) Payment of Kshs 8,500,000/= being general and exemplary damages for discrimination.**

f) Payment of interest on the above amounts;

g) Payment of pension at Kshs 824,489.53 as at 31st December 2012 together with accrued interest; and

h) Costs of the appeal.”

In opposition to the appeal, Mr. Cheluget relied on the respondent's submissions filed on 14th March 2018. He submitted that the appellant's salary as per the letter of 14th May 2010 was Kshs 225,000/=. The said letter is found at page 35 of the record. It reads:

“Private & Confidential

14th May 2010

Peter Muriithi Mwarania

Nakuru – Njoro Hse Branch

NAKURU

Dear Peter,

SALARY REVIEW AND GRADING

Following successful performance review, we are pleased to advise that the Board and Management has approved the review of your salary terms as follows;

Salary This has been adjusted to a consolidated sum of Kshs 225,000.00 with effect from 1st April 2010.

Grade You will serve in Management Grade FBG 5.

Notice While you will be bound by the Bank's policies, procedures and terms and conditions of service including HR manual to be rolled out in due course, the notice period under this grade will be three (3) month pay in lieu of notice.

We take this opportunity to thank you for your efforts in 2009 and look forward to greater productivity and commitment in 2010.

Yours sincerely,

For Family Bank Limited,

Margaret Mburu

For: HEAD OF HUMAN RESOURCES

c.c Personal file

Payroll Officer”

On the issue of 12 months' gross salary, the respondent submitted that the appellant was undeserving of enhancement of the 6 months' awarded by the trial court in view of what it referred to as "gross misconduct" and that we should not interfere with the trial court's discretion. It was the respondent's submissions that it has always been ready to pay the appellant his pension dues, subject to him filing withdrawal forms and that the appellant was informed as much in the letter of summary dismissal.

On the question of discrimination, the respondent contended that it was justified in dismissing him for *“the appellant irregularly opened accounts without a resolution to open accounts as required by the Prudential Guidelines; he allowed directors of an institution open an account styled in the name of an already existing institution; he grossly violated signing instructions by authorizing one director to sign instead of two directors as per the mandate held by the bank; in some instances he even signed on behalf of the customer! These are the grounds upon which he was dismissed and against which he did not appeal to the 1st respondent. These are not grounds relating to his personal characteristics.”*

The respondents refuted the appellant's contention that he was singled out on account of nepotism and that having been summarily dismissed, the appellant was entitled to damages as stipulated in the letter of employment. For this proposition, the respondents relied on this Court's decision in **WALTER MUSI ANYANJE VS. HILTON INTERNATIONAL KENYA LTD & ANOTHER, C.A No. 269 of 2003.**

The appeal before us is a first appeal, hence our duty is to re-analyze and re-assess the evidence and the record and reach our own findings and conclusions on the same. In so doing however, we remind ourselves that unlike the trial Judge, we did not have the benefit of seeing

and/or hearing the witnesses and we should respect the findings of fact by the trial Judge unless those findings are not backed by the evidence or the findings are perverse - see **SELLE VS. ASSOCIATED MOTOR BOAT COMPANY [1968] E.A 123**.

On our part we have considered the record, the rival oral arguments, the written submissions, the authorities cited and the law.

For a start, it is important to point out that the trial in the ELR Court was conducted in absence of the respondents and who inspite of being granted indulgence to file their response to the appellant's statement of claim, failed to do so. In the end the trial Judge summed up the respondents acts of omission as follows:

“The legal consequence of the failure to file a response or attend during the hearing is that the facts put forth by the Claimant in the pleadings and testimony have not been controverted. And the implication is that there are no real issues of fact in dispute.”

The sum effect of the above is that the trial court solely relied on the evidence adduced by the appellant.

On the issue of salary, the letter of offer of employment dated 29th December 2008 stipulated that the appellant's starting salary would be Kshs 190,000/=. On 14th May 2010, the appellant's salary was reviewed upwards to Kshs 225,000/- with effect from 1st April 2010. We have set out *ex-tenso* the letter of 14th May, 2010. These are the two letters that relate to the appellant's initial salary and the review that followed. If indeed the appellant's salary was increased to Kshs 249,000/-, one would expect that there would have been written communication as previously happened and that such evidence would have been put before the trial court. In the absence of such proof, we like the trial judge, find that the salary was Kshs 225,000/- per month and not Kshs 249,000/-. The appellant's contention that his salary was Kshs 249,000/- per month on account of the contents of a letter of summary dismissal that did not speak of the said salary is misleading. The appellant did not tell the court that in the months preceding his dismissal he earned Kshs 249,000/= as opposed to Kshs 225,000/- per month. The appellant seems to have arrived at this conclusion based on the fact that in the letter of summary dismissal he was paid Kshs 188,284.90 for 23 days of work. The appellant computed this to show that his daily pay was Kshs 8,186.30 and hence Kshs 245,589/- per month (8,186.30 x 30 days.) He cannot make heavy weather of this as he had a letter that clearly spelt out his salary. In our view, the trial Judge rightly found that ***“The claimant pleaded that his consolidated salary was Kshs 249,000/- per month but the only evidence is the letter dated 14th May 2010 advising that the salary was Kshs 225,000/-.”*** We agree. There was no other letter and/or pay slip showing the appellant's salary had been increased to Ksh 249,000 per month.

As for the leave days, the appellant claimed Kshs 431,599. He however laid no evidence on how he arrived at this figure. His evidence in the trial court did not speak to this. Under the head of ***“annual leave/pro rota leave”***, the learned Judge found that the appellant ***“in his testimony, the claimant did not lay on (sic) evidential basis for how he arrived at the figures pleaded”***. Again, we agree. It is apparent that the appellant computed leave days pegged on a salary of Kshs 249,000/- per month as opposed to Kshs 225,000/- per month. According to his letter of employment, he was entitled to 24 days of leave for every completed year. He was summarily dismissed on 23rd November 2011 before the end of the year. We are in agreement that he was therefore entitled to 24 leave days and not 26 as unsubstantiated by him.

In respect of the compensation, the trial court awarded the appellant a total sum of Kshs 1,350,000/-. The court stated:

“This is one of the primary remedies for unfair termination. It is a discretionary remedy. The Court's discretion is however fettered by the factors set out in section 49(4) of the Employment Act, 2007.

The claimant served the 1st Respondent for about 3 years. He stated that he has not been able to secure alternative employment despite having served in the banking sector for over two decades.

Considering the length of service and that the Claimant has not been able to secure alternative employment, the Court would award him the equivalent of 6 months' salary as compensation assessed in the sum of Kshs 1,350,000/=-.”

Section 49(4) of the Employment Act 2007 which was relied upon by the trial Judge stipulates as follows:

“(4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following-

(a)

(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) ...

(d) ...

(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) ...

(i) ...

(j)

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

- ...

(m) ...”

In the matter before us, the letter of dismissal outlined the anomalies attributed to the appellant as follows:

- **“Opening an account without a Resolution to Open an account as stipulated in the Prudential Guidelines.**
- **Directors irregularly opened an account styled in the name of an institution.**
- **The signing instructions were grossly violated whereby only one signatory would sign as opposed to two as per the mandates held by the Bank.**
- **Some of the signatures used to transact were perpetually different from what was in the mandate.**
- **In one instance you and your Operation Managers' signed on behalf of the customer.**
- **You failed to correct the anomalies in the request to open the account of an institution by people who are not supposed to use the institutions name, and went ahead to allow transaction in the said account without following due processes thus exposing the bank to possible law suits and losses.”**

In **SAMSUNG ELECTRONICS EAST AFRICA LTD VS. KOKI MUIA CIVIL APPEAL NO. 57 of 2017**, this Court held:

“The decision of how many months' worth of compensation a litigant ought to get under Section 49(1) (c) is left to the courts' discretion. Also important is that this court (the Court of Appeal) can only sparingly interfere with discretionary decisions.”

For the foregoing reasons, we have no reason/s to interfere with that award of 6 months of Ksh.1,350,000/-. In our considered view, the learned judge did not consider factors which he should not have considered and he did not ignore factors which he should have considered, the judge, probably used his discretion and, in the premises, we should not interfere.

As for the pension, the respondents did not challenge the appellant's claim on this. However, in the letter of summary dismissal dated 23rd November 2011, the appellant was advised as follows:

“Pension dues will be paid as per the rules of the Scheme. In this regard, you are required to fill in the Pension withdrawal form (available in Human Resources Office) to facilitate payment.”

Although the appellant laid no basis on the claim for pension dues thus leading to the court's conclusion that, **“no evidential basis was put before court for this kind of relief. It is also rejected,”** in their submissions, the respondents concluded that **“The 2nd respondent was at all times willing to pay the appellant his dues, but for his ignorance.”** It would appear that the appellant is a man who has refused to help himself inspite of clear instructions that all he needed to do was to fill forms to facilitate payment of his pension dues. He has failed to do so. Perhaps this is why the respondents in their submission likened the appellant with:

“A football club which secures a walkover in a match since the opponents did not show, but then appeals the win in the match and seeks to win the entire league;

A man who shakes a mango tree to see that which will fall. When it falls, he cries foul and argues that coconuts should have instead fallen.

A man whose neighbor is willing to give back to him a calf he is owed, but who runs to the village elder to ask him to compel the neighbor to give back the calf.”

The upshot of the above is that we find no merit in this appeal. It is hereby dismissed with costs.

Dated and delivered at Nakuru this 18th day of October, 2018.

D. MUSINGA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR