IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, W. KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 57 OF 2016

BETWEEN

SAMSUNG ELECTRONICS EAST AFRICA LTD. …….. APPELLANT

AND

K M ……..……. RESPONDENT

(An appeal from the judgment of the Employment and Labour Relations Court at Nairobi (Makau, J.) dated 23rd July, 2015 in ***E&LRC Cause No. 1583 of 2013)***

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JUDGMENT OF THE COURT

1. This is an appeal against the judgment of the Employment and Labour Relations Court (ELRC) wherein Makau J., found the respondent's employment with the appellant was not only terminated unfairly, but also the respondent was subjected to racial and sexual discrimination during the tenure of her employment. The respondent was awarded one month's salary in lieu of notice, 22 days payment for the month of August 2013, bonus earned for the first quarter of 2013, 12 months' salary as compensation for sexual and racial discrimination, with costs and interest at court rates from the date of filing the suit.

2. Dissatisfied with the said judgment, the appellant filed the instant appeal and our primary role as a first appellate Court is to re-evaluate, re-assess and re-analyze the evidence before the trial court so as to determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. In **Kenya Ports Authority vs. Kuston (Kenya) Limited** (2009) 2EA 212 the Court succinctly put it;

> **"On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."**

3. By way of brief background, K M (the respondent) was employed on 24th January, 2011 as the Head of the Service Department for East & Central Africa by the appellant and her services were terminated on

20th August, 2013. During her tenure, and owing to her experience, at least as far as the respondent was concerned, she claimed that she was able to revamp the appellant's service department which was almost non-existent into a fully operational department. Despite her expertise, as was customary with the appellant, the appellant hired a Korean National by the name Mr. II-Gyu Choi *alias* Mr. Nicki Choi to supervise and monitor the respondent. The respondent did not take this kindly because she believed the said Mr. Choi was incompetent and had no experience in running a service department and was purposely brought to undermine her. Thus, according to the respondent, instead of facilitating smooth operations in the department, Mr. Choi caused hurdles due to lack of requisite experience and operational knowledge. The working environment became toxic, and having had enough, the respondent registered her grievances with the appellant's Managing Director, one Mr. Chongo Yi who was reluctant to address Mr. Choi's incompetency. Eventually, Mr. Yi directed the respondent to be reporting directly to him instead of Mr. Choi.

4. The respondent and Mr. Yi butted heads on several occasions due to what she deemed as resoluteness on her part to follow the appellant's proper procedure and guidelines in executing her duties. One such scenario is when she accepted to the chagrin of Mr. Yi, the resignation of a service partner whose performance was below par. Since Mr. Yi had vested interest in the said service partner he overruled the respondent and reinstated the service partner contrary to the laid down procedures. Be that as it may, an appraisal of the respondent's quarterly performance was carried out by Mr. Yi and to the best of the respondent's knowledge he was impressed by her performance.

5. Thereafter, the respondent applied for annual leave which was at first rejected because she had sought to take her entire leave of 22 days at once. As per the respondent, the appellant's management would only approve leave in respect of Kenyan staff intermittently for seven days at any given time. Eventually, she proceeded on leave from 5th July, 2013 and resumed duty on 29th July, 2013. The first thing the respondent noticed upon resumption of duty was change of password as she could not access her office email address. She consulted the IT department and was advised to leave her office issued laptop with them.

6. On 6th August, 2013 she was served with a notice to show cause why disciplinary action ought not to be taken against her for issuing verbal instructions to procure service cancellations at the Global Service Network Platform. The letter read in part as follows: -

> **Re: SHOW CAUSE LETTER–SERVICE JOB CANCELLATION**
>
> **It has come to our knowledge that over the last seven months we have had increasing cases of irregular job cancellations which reflected low LTP (Long Term Pending) rate. Ordinarily this would reflect good performance of the service centre. However, on further investigation we have confirmed that this is not a real reflection of the situation which would suggest an intention to deliberately inflate performance.**
>
> **Our investigations have revealed that these cancellations were done following your verbal instructions to your team. This is a serious infraction on your part as the Business Leader in charge of the Service Division and the company holds you accountable.**
>
> **……**
>
> **In view of the foregoing, please reply in writing to the undersigned on or before Wednesday 14th August, 2013 showing cause why stern disciplinary action should not be taken against you.**
>
> **…….”**

7. The respondent sought legal advice and by a letter dated 13th August, 2013 through her advocates, Okoth Kiplagat Advocates, they wrote on her behalf asking to be furnished with further particulars

regarding the allegations made. She particularly, asked for details of when and to whom she had instructed to make the alleged cancellations. In turn, the appellant's advocates, Ochieng, Onyango, Kibet & Ohaga, by a letter dated 14th August, 2013 informed the respondent's advocates they were taking instructions and would revert as soon as possible. Subsequently, on 22nd August, 2013 the appellant's advocates informed the respondent's advocates that her services had been terminated vide a letter dated 20th August, 2013 which had been served upon her.

8. In the respondent's view, there was no basis for her termination. Prior to the letter to show cause, she had not received any warning in relation to her performance or the allegations in question. She was convinced that the allegations leveled against her were trumped up to justify an illegal and unfair termination. She was of the view that the underlying reason for her termination was her unwillingness to compromise on standards of the appellant coupled with discrimination on the basis of her race and gender. Consequently, she filed suit in the ELRC seeking *inter alia*, a declaration that her termination was unfair and illegal, an order of reinstatement and damages totaling to Kshs. 8,940,000/=.

9. In its defence, the appellant averred that the respondent's termination was lawful and justified. The proper procedure had been followed in terminating her services. Contrary to the picture painted by the respondent, her performance was wanting and due to her highhandedness, several employees working under her had tendered their resignation. A case in point was that on 27th June, 2013, a meeting was held between the members of her team and the Human Resource Manager, one Ms. Irene Gikemi wherein grievances against the respondent were highlighted. In addition, the respondent was served with a warning letter dated 16th June, 2013 which indicated a pattern of mismanagement of work and staff.

10. The final nail in the coffin was sealed when the respondent's integrity was brought to question. The appellant discovered that the respondent had instructed her team to cancel jobs within the Global Service Partner Network (GPN) with the aim of creating a false impression that her section's performance had improved. Due to the seriousness of the allegations, a meeting was organized on 6th August, 2013 to discuss the same and the respondent was called upon to give an explanation. She failed to do so and became defensive. Upon conclusion of the meeting, the respondent was served with a show cause letter tabulating the allegations against her and requesting her for written explanations. However, the respondent engaged an advocate and feigned ignorance of the allegations which were made against her. She once again failed to respond to the allegations and the appellant terminated her services on 20th August, 2013.

11. The learned Judge (Makau, J.) considered the evidence before him and entered judgment in favour of the respondent on 23rd July, 2015. In doing so, he found that the respondent's termination was unlawful and unfair as she was subjected to racial and sexual discrimination during the tenure of her employment. In the end, he issued the following orders: -

> **One month's salary in lieu of notice Kshs. 596,000/=. Payment for the 22 days she was still in employment in August, 2013 Kshs. 437,066.60/=. Bonus payment duly earned in the first quarter of 2013 being equivalent to her monthly salary of Kshs. 596,000/=. 12 months compensation for sexual and racial discrimination as well as unlawful termination of Kshs. 7,152,000/=.**
>
> **Costs of the suit.**
>
> **Interest at court rates from the date of filing suit until payment in full.**

13. It is that decision that has provoked this appeal which is premised on the grounds that the learned Judge erred in-

> **Holding that that the appellant is in breach of ILO Convention 111 and that the appellant does not conform to international labour standards.**

Holding that the appellant does not permit the ascension of Kenyans to high offices and instead sends incompetent Korean nationals to supervise and oversee more qualified Kenyans.

Holding that the respondent was mistreated and discriminated upon by the appellant.

Holding that the practice of employing Koreans by the appellant encourages racial division and is contrary to international norms.

Holding that the appellant failed to prove that it does not practice racial and sexual discrimination.

Awarding damages for sexual and racial discrimination.

Holding that the termination of the respondent was unfair and wrongful.

Awarding quantum of damages to the tune of Kshs. 7,152,000/= which was excessive.

Awarding interest on damages from the date of filing suit.

14. The appeal was disposed of by way of written submissions and oral highlights. Mr. Ochieng' Oduol appeared for the appellant while Mr. Akello appeared for the respondent. Mr. Oduol submitted that it was clear from the pleadings that the learned Judge was required to determine the respondent's claim as pleaded; that is a determination of whether the contract of service was unfairly and wrongfully terminated; whether the respondent was entitled to a reinstatement and a claim for damages. According to counsel for the appellant, the issue of sexual or racial discrimination was not pleaded nor did the respondent lead evidence to the effect that her termination was based on sexual or racial discrimination. It was a fundamental error for the learned Judge to make findings on matters not pleaded.

15. Moreover, counsel for the appellant stated, there was no basis for finding the appellant practiced sexual or racial discrimination against its employees. Referring to **Section 47(5)** of the **Employment Act**, it was submitted that the onus was on the respondent to prove the alleged racial discrimination by the appellant. The respondent gave no evidence to support her claim and it was not enough that she imputed or pleaded discrimination in her pleadings. The basis of her contention was that she reported to Mr. Choi who was a Korean national; she did not demonstrate how the same amounted to discrimination on her part. Strangely, and in contradiction of her pleadings, the respondent testified that she had no problem with the appellant's management and reporting to the said Mr. Choi. Mr. Oduol added that the learned Judge erred by shifting the burden of proof to the appellant by holding that it had not proved that it did not practice racial and sexual discrimination. Even so, the appellant had demonstrated through its witnesses that it was an equal opportunity employer and accorded respect and equal treatment to all.

16. Further, the appellant contended that due procedure as enshrined under **Section 41** of the **Employment Act** was followed before the termination of the respondent's services. It was established that the respondent had issued verbal directions for manipulation of the GPN system; she was given an opportunity to defend herself which she refused to do so. In the circumstances, her termination was justified because she lacked integrity and breached the appellant's code of conduct. In that regard, the Court was referred to **CFC Stanbic Bank Limited vs. Danson Mwashako Mwakuwona** [2015] eKLR wherein this Court quoted with approval **Halsbury's Laws of England, 4th Edition, Vol. 16(1B) para 642** which provides:-

"...In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one

view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted . If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair."

17. Appreciating that an appellate Court could only interfere with quantum of damages issued by the trial court in exceptional circumstances, reliance was placed on **Kemfro Africa Ltd. vs. Lubia & Another (No.2)** 1987 KLR 30 wherein Kneller J.A in his own words stated,

"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quatum of damages awarded by the trial judge were held by the former Court Of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of damages."

18. According to the appellant, the learned Judge in awarding damages considered irrelevant matters which were not proved. The learned Judge was faulted for not giving reasons for awarding the maximum compensation under **Section 49(1) (c)** of the **Employment Act**. To buttress that argument, reliance was placed on the case of **United States International University vs. Eric Rading Outa** [2016] eKLR where this Court observed-

"In the instant appeal the learned trial judge gave a maximum award of 12 months' salary without assigning any reason for doing so at all. We have noticed a trend by the Employment and Labour Relations Court where maximum awards are made without assigning any reasons for doing so and without carrying out any evaluation of the effect such awards have on employers and to the economy in general. Awards such as the one made by the trial judge in the judgment appealed from are made without any consideration of principles on assessment of damages and without assigning any reasons why a particular award is made.

Although we have found, like the learned judge, that the appellants' termination of the respondents employment was wrongful, we find, on our own consideration of the matter, that the learned judge erred in making a maximum award. He did not assign any reason for doing so and in the event he fell into error by not considering any or any relevant factor that should have guided him to make an award of compensation for wrongful termination of employment."

19. Mr. Oduol also submitted that the learned Judge did not subject the compensation to statutory deduction as required by law. In the alternative andassuming that the learned Judge correctly found that the respondent's termination was unfair, the Judge ought to have granted damages equivalent to the notice period as per the contract. In support of that argument **CMC Aviation Ltd. vs. Captain Mohammed Noor** [2015] eKLR was cited. Lastly, counsel for the appellant maintained that the learned Judge ought not to have awarded interest from the date of judgment and reliance was placed on this Court's decision in **Barclays Bank of Kenya Ltd. vs. William Mwangi Nguruki** - Civil Appeal No. 21 of 2014 (unreported).

20. As expected, the appeal was opposed; in supporting the learned Judge's holdings, Mr. Akello argued that the appellant in terminating the respondent's services failed to follow the procedure under **Section 41** of the **Employment Act**. Elaborating further, he stated that no explanation was given for the reason(s) the appellant was contemplating the respondent's dismissal; she was not given an opportunity to defend herself. Failure to follow due process rendered the respondent's termination unfair and illegal. It was further contended on behalf of the respondent that the appellant had failed to prove the reason(s) for her termination. The appellant had alleged the respondent issued verbal instructions to her team to manipulate the GPN system. Nevertheless, John Kamonde (DWI), who took over after the respondent was terminated, testified that he was not aware of the verbal instructions which were allegedly given by the

respondent. Furthermore, Peninah Wangari Mwangi (DW2), the then customer manager confirmed that only the appellant's service partners had access to the system in question and other employees including the respondent could not alter any entries therein. Performance review carried out on the respondent did not indicate any shortcoming on her part. It followed therefore that the reasons for the respondent's termination were made up and could not stand the test under the Employment Act.

21. Counsel for the respondent went on to state that his client had proved that she had been discriminated through her affidavit evidence which was unchallenged. Besides, the burden of disproving discrimination lay with the appellant as stipulated under **Section 5 (7)** of the **Employment Act**. Mr. Akello submitted that the two witnesses called by the appellant did not testify as to whether the respondent was discriminated; rather they testified to the effect that they had not been discriminated. He added that the learned Judge did not make any finding on sexual harassment but found that there was gender discrimination.

22. According to the respondent, there was no reason for the Court to interfere with the assessment of damages. Counsel argued that the learned Judge exercised his discretion under **Section 49(1) (c)** of the **Employment Act** judiciously having taken into account that firstly, the appellant had not followed proper procedure; secondly, the appellant had acted oppressively; and thirdly, termination had affected the respondent's ability to get employment from similar companies in the industry. This Court's decisions in **International Planned Parenthood Federation vs. Pamela Ebot Arrey Efflom [2016] eKLR** & **C.P.C Industrial Products vs. Angima –** Civil Appeal No. 197 of 1992 were cited in support of the above propositions.

23. Based on the foregoing summary, we have distilled the following issues which fall for our determination: -

> **What issue(s) arose for determination before the trial court?**
>
> **Was the respondent's termination unfair and wrongful?**
>
> **Was racial and sexual discrimination pleaded and established against the appellant?**
>
> **Where the remedies issued appropriate in the circumstances?**
>
> **Did the learned Judge err in awarding interest from the date of filing suit**?

24. It is trite that issues for determination by a court flow from pleadings. A court cannot make pronouncement on issues not raised in the pleadings filed by parties as to do so would be tantamount to acting outside its mandate. The same point was succinctly restated by this Court in **Independent Electoral and Boundaries Commission & another vs. Stephen Mutinda Mule & 3 others** [2014] eKLR -

> "**As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score."**

See also **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others** [2013] eKLR.

25. In this case, it is clear from the respondent's statement of claim that her cause of action was based on wrongful termination. Apart from pleading that there was no valid reason for her termination, the respondent also pleaded that her termination was also based on racial and gender discrimination. It is important to note that the appellant's counsel used the terms sexual discrimination and sexual harassment

interchangeably. The two terms have different connotations. On one hand, discrimination is defined in **Black's Law Dictionary, 9th Ed. at page 534** as-

> **"The effect of a law or established practice that confers privileges on a certain class or that denies privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion, or disability."**

27. On the other hand, **Section 6** of the **Employment Act** defines sexual harassment in the following manner: -

> **"6**
>
> **1. An employee is sexually harassed if the employer of that employee or a representative of that employer or a co-worker—**
>
> **a. directly or indirectly requests that employee for sexual intercourse, sexual contact or any other form of sexual activity that contains an implied or express—**
>
> **i. promise of preferential treatment in employment;**
>
> **ii. threat of detrimental treatment in employment; or**
>
> **iii. threat about the present or future employment status of the employee;**
>
> **b. uses language whether written or spoken of a sexual nature;**
>
> **c. uses visual material of a sexual nature; or**
>
> **d. Shows physical behavior of a sexual nature which directly or indirectly subjects the employee to behavior that is unwelcome or offensive to that employee and that by its nature has a detrimental effect on that employee's employment, job performance, or job satisfaction."**

28. Going by the respondent's pleadings, sexual harassment was neither pleaded and no evidence was led in regard to the same. We are not at all persuaded that an allegation of gender and racial discrimination is synonymous with sexual harassment. Nonetheless, the respondent alleged that she was subjected to racial and gender discrimination. Consequently, what was not pleaded was the allegation of sexual harassment and in our view, nothing turns on it but the allegations of racial and gender discrimination which was pleaded calls for further evidential re-evaluation of the material before the learned trial Judge.

29. In a claim such as this, the burden of proving there was an unfair termination of employment or wrongful dismissal rests on the employee, while the burden of justifying the grounds for the termination of employment rests on the employer.

See **Section 47(5)** of the **Employment Act**. Whether or not a termination is considered fair will depend on whether the reason(s) for termination and the procedure for dismissal was fair. See **CFC Stanbic Bank Limited vs. Danson Mwashako Mwakuwona** [2015] eKLR. Due process is a fundamental aspect of the rule of law. It is the right to a fair hearing. The right to a fair hearing is encapsulated in the *audi alteram partem rule* (no person should be condemned unheard) and founded on the well-established principles of natural justice. It is this right that the legislature secured under **Section 41** of the **Employment Act** which stipulates: -

> **"41**
>
> **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."

30. In the instant case, the respondent was served with a show cause letter that contained some allegations that were couched in a general manner. Perhaps, that is why the respondent, through her advocate asked for further particulars before putting in her response. This Court in **County Assembly of Kisumu & 2 others vs. Kisumu County Assembly Service Board & 6 others** [2015] eKLR while discussing what a proper notice should contain expressed itself as thus;

"Whereas the right to a fair hearing varies from one case to another depending on the subject of the matter in issue, its irreducible minimum is now well settled. In granting that right, the court or the administrative body or person concerned should not make it a charade by taking perfunctory actions for the sake of running through the motions to be seen to have complied with it. The person charged is entitled to what, in legal parlance is referred to as the right to "notice and hearing." That means he must be given written notice which must contain substantial information with sufficient details to enable him ascertain the nature of the allegations against him. The notice must also allow sufficient time to interrogate the allegations and seek legal counsel where necessary." Emphasis added.

31. The respondent complained that she was not given a fair hearing; she denied having been invited or participated in an alleged disciplinary meeting which the appellant conducted on 6th August, 2013. According to the appellant, the respondent was informed of the allegations against her and given an opportunity to respond. The minutes of the said meeting do not expressly indicate that the same was disciplinary hearing; but it centered on allegations of integrity and issuance of verbal instructions in job cancellations. Without setting out the entire minutes, the relevant portion reads-

"**Title of Meeting- K Meeting……**1

Key Discussion Items:

The MD and COO requested for a meeting with K and HR to discuss integrity and management issues that have come to their attention. During the meeting the following issues were raised:

1)Integrity: SEEA management has learnt that K has issued instructions to her team to cancel jobs in the system; thus showing that the service team has a low LTP (Long Term Pending) which is not the true reflection of the team's performance.

K denied that she issued instructions to her team to cancel any jobs in the system.

…….

5. Show Cause Letter: The show cause letter was drafted after the meeting and given to K to respond to the integrity issues raised ….K declined to sign the 'show cause letter."

32. Although we in no way wish to prescribe the format in which the minutes for disciplinary hearing should take, these minutes did not clearly spell out the respondent was facing a disciplinary hearing; nonetheless, issues of integrity regarding work protocols were put before the respondent which she denied. There was no indication given to the respondent she was appearing before a disciplinary

committee and even after the allegations were put to her, she was not asked to respond to them in writing. At the end of it all, the disciplinary committee considered the evidence and decided on the disciplinary action to be taken against the respondent. In our view, this is not a disciplinary hearing but appears as a regular meeting wherein the management informed and questioned the respondent on her perceived shortcomings in her department.

33. In light of the foregoing, although it was obvious from the above, the respondent was aware there were issues with the appellant regarding her work, the so called disciplinary meeting did not strictly comply with a fair procedure as required under **Section 41** of the **Employment Act**. The right of an employee to be heard before being terminated even if gross misconduct is alleged is imperative. The section is in the following terms:

> **"41. Notification and hearing before termination on grounds of misconduct.**
>
> > **1. Subject to section 42 (1) an employer shall before terminating the employment of an employee, on 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 sub-section (1), make."**

34. The essence of a right to a hearing as aforesaid, gives an employee an opportunity to dispute the employer's allegations, even where the employer believes that the employee is entitled to summary dismissal. It is not the employer who alone should determine what constitutes gross misconduct; an employee must be given an opportunity to respond to the allegations. In this case, the appellant alleged the respondent's employment was terminated due to disregard of work ethics or integrity on the part of the respondent. The respondent was nonetheless not given a specific warning notice, instead management meetings were convened where staff issues were discussed and finally issues of integrity before the appellant was served with a notice to show cause.

35. The allegations against the respondent were that she issued verbal instructions to her team to manipulate the GPN system. The appellant's witnesses described GPN as internet based service network system operated by the appellant. It is the platform upon which service partners engaged by the appellant record receipt of electronic gadgets for repair from the appellant's customers. It is used to track the progress of such repairs. According to the appellant's witnesses, only the service partners have authorized passwords to the system. It follows therefore, only the service partners could cancel or delete any entry therein.

36. Did the appellant establish that the respondent had authorized a service partner to cancel any job on the system? In our view, the evidence on record did not substantiate allegations against the respondent. The appellant's own witness, Mr. Kamonde, testified as recorded by the learned Judge thus,

> **"There would be a record of the cancellation in the system. They would reflect as cancelled and show the person who did. It would be available and you would be able to track my transactions in the system. The only thing not possible is that I'd (sic) not be able to show who direct me to cancel. The only way it would be available if the person who was asked to cancel would testify.** (sic) **These people on page 42 are people who could say. I was never given instructions to cancel any orders. I cannot be able to tell if these people were called and told to cancel."**

None of the respondent's team members who allegedly received instructions to cancel jobs were called as witnesses. As it stood, the evidence did not satisfactorily prove the allegations against the respondent. As a result, the appellant failed to prove that the reason for the respondent's dismissal was valid as required under **Section 45(2)** of the **Employment Act**. The totality of the foregoing is that the respondent's services were unfairly terminated.

37. Where we part company with the impugned judgment is in regard to the allegations of racial and gender discrimination and the assessment of damages.

Section 5 (7) of the **Employment Act** places the burden of proof on the appellant to prove that the discrimination as alleged by the respondent did not take place. Contrary to the learned Judge's finding, the appellant, through its witnesses proved that it did not discriminate against respondent or any other employee for that matter either on racial or gender basis. To demonstrate this, the appellant produced Mr. Choi's curriculum vitae detailing his qualifications. In this regard, it was not within the province of the learned Judge to appraise Mr. Choi's credentials. It is the employer who is better suited to know the kind of expertise it desires for a particular position. Besides, the curriculum vitae reflected that he had worked in a similar position for about four years within the appellant's organization before being designated to the respondent's department. Secondly, the appellant's witnesses testified that the appellant was an equal opportunity employer.

38. This now leads us to the issue of damages awarded to the respondent for unfair termination of employment. The decision on how many months' worth of compensation a litigant ought to get under **section 49(1) (c)** above is left to the courts' discretion. Also important is that this Court can only sparingly interfere with discretionary decisions. As stated in **Mary Njoki v John Kinyanjui Mutheru** [1985] eKLR:-

> **"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight of bearing of circumstances admitted or proved, or has plainly gone wrong the appellate court will not hesitate to decide. Watt v Thomas, [1947] AC 484."**

39. Clearly as demonstrated above, there was no justification for the award of damages based on gender discrimination and the award on racial discrimination and bonus earned in the first quarter of 2013 being equivalent to her monthly salary of Kshs. 596,000/=. There was no evidence led in regard to entitlement of bonus. Equally, the learned Judge did not properly exercise his discretion under **Section 49** of the **Employment Act** in granting 12 months' salary equivalent to Kshs. 7,152,000/= as compensation for sexual and racial discrimination as well as unlawful termination. This is because as discussed herein above, the allegation of racial and sexual discrimination was not proved. Inasmuch as the respondent's termination was unfair and wrongful, the learned Judge ought to have given reasons as to why he opted to give the maximum compensation; failing to give reasons renders the award injudicious. See **United States International University vs. Eric Rading Outa** (supra). The learned Judge ought not to have left his reasons to guesswork or implication as matters stand, we are unable to decipher how the 12 months compensation was arrived at in view of the fact that there was no tangible evidence of racial and gender discrimination.

40. Counsel for the appellant also faulted the award of payment for 22 days worked in the month of August, 2013 that was Kshs 437,066.60. We think the learned Judge took into consideration the uncontroverted evidence as pleaded that the respondent's employment was terminated on 20th August 2013. By all means, she was entitled to be paid for those days. The respondent was awarded one months' salary in lieu of notice which was within the terms of the contract of employment. Therefore, since the contract was terminable by one month's notice, one month's salary in lieu of notice and salary for the days worked in the month of August 2013 were properly awarded. However, as there was no justification for the awards in respect of bonus payment and gender and racial discrimination, we hereby interfere with the assessment of those damages. See **Peter M. Kariuki vs. Attorney General** [2014] eKLR. However having found the respondent's termination was wrongful, we are of the view that she was entitled to an

award of damages for the pain and inconvenience of bearing the brunt of unlawful termination. As the respondent is awarded the contractual one month notice, we are of the view an award of two (2) months' salary for having been dragged through a charade of a trumped up process should be adequate compensation.

41. As regards the award of interest awarded from the date of filing the suit, we wish to refer to the dicta in the case of **Salim & Another vs. Kikava** [1989] KLR 534 in which this Court revisited and confirmed the provisions of **Section 26** of the **Civil Procedure Act**, that interest on damages assessed at large starts running from the date of assessment as the date when liability arises. We find no justifiable reason for the learned Judge to depart from a path well beaten as regards awarding of interest on damages at large.

42. In conclusion, this appeal ought to succeed in part to the extent that racial and gender discrimination was not proved against the appellant. The award of damages for unfair termination is hereby set aside and substituted with an award of Kshs. 596,000/= being one month's salary in lieu of notice, two months' salary as general damages for wrongful termination, that is, Kshs. 1,192,000 and 22 days worked in the month of August, 2013, that is, Kshs 437,066.60, total Kshs. 2,225,066.60 all the sums are subject to statutory deductions. Interest shall accrue from the date of the trial court's judgment. In view of the orders granted, and this being an employment relationship, we do not wish to set these parties against each other any further we order each party to shall bear their own costs in this appeal but the appellant shall bear the costs as ordered for the High Court proceedings.

Dated and delivered at Nairobi this 29th Day of September, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR