



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, P.C.A. , AZANGALALA & SICHALE, JJ.A.)

CIVIL APPEAL NO. 265 OF 2015

BETWEEN

RIFT VALLEY RAILWAYS (K) LIMITED.....APPELLANT

AND

WILLIAM NEMBE OBORA AND 74 OTHER.....RESPONDENTS

*(An appeal from the Judgment/Award of the Industrial High Court*

*of Kenya at Nairobi (Mbaru, J.) dated 18<sup>th</sup> June, 2014*

*in*

*H.C. Industrial Cause No. 499 of 2012)*

\*\*\*\*\*

**JUDGMENT OF THE COURT**

[1] This appeal arises from the judgment/award of the Employment and Labour Relations Court of Kenya, (*E & LRC*), at Nairobi (*Mbaru, J.*) in *Cause No. 499 of 2012* where *William Nembe & 73 Others*, hereinafter referred to as "*the respondents*", were the claimants against *Rift Valley Railways (Kenya) Limited*, hereinafter referred to as "*the appellant*".

[2] In their statement of claim before the trial court, the respondents stated that on 1<sup>st</sup> November, 2006, the former Kenya Railways Corporation transferred its services through a concession agreement to the respondent herein. By standard contracts of employment all dated 25<sup>th</sup> October of the same year, the appellant employed the appellant in various capacities under different remuneration packages given in a schedule to the statement of claim.

[3] The respondents also pleaded that all employees of the appellant went on strike from 1<sup>st</sup> to 14<sup>th</sup> July, 2008, demanding a review of their salaries which prompted the appellant to promise meeting the respondents' representatives to iron out outstanding issues which they had raised. Pursuant to the consultations, on 28<sup>th</sup> August, 2008, the appellant revised the respondents' terms of employment which were reflected in documents annexed to the statement of claim.

[4] The respondents further pleaded that on 21<sup>st</sup> June, 2011, the appellant, through an internal memo,

invited those of its employees who wanted to voluntarily retire early to do so and at the same time, informed all employees that it would carry out a retrenchment exercise besides the voluntarily retirement programme.

[5] The respondents claimed that there was uncertainty concerning the parallel programmes and averred that they sought intervention of their union without success prompting them to proceed to the appellant's headquarters on 30<sup>th</sup> June, 2011, to seek clarification as the criteria to be applied to retrench some of them.

[6] The respondents further pleaded that all the employees, including the respondents, were addressed by, among others, the appellant's Chief Human Resource Officer who proceeded to address their concerns. The meeting ended at 2 p.m. and the employees, including the respondents, resumed duty which events are supported by documents annexed to the statement of claim.

[7] The respondents further pleaded that given the above averments, they did not understand why the appellant cancelled the evening commuter trains of that day while allowing cargo trains to operate.

[8] They also pleaded that on 9<sup>th</sup> July, 2012, the appellant paid them for work done from 1<sup>st</sup> to 4<sup>th</sup> July, 2011, but shocked them on the same 4<sup>th</sup> July with letters summarily dismissing them for engaging in a sit in.

[9] In the premises, the respondents claimed that the appellant breached their terms of contract and did not act in good faith when it purported to summarily dismiss them when they had faithfully served it.

[10] Further evidence of not acting in good faith, according to the respondents, was the appellant's belated consideration of their grievances on appeal even after it had summarily dismissed them which actions were contrary to the Code of Conduct governing their employment and the provisions of the **Employment Act**.

[11] The respondents also averred that evidence of acting *mala fide* was found in the appellant's purported consideration of their grievances even after serving them with letters of summary dismissal.

[12] The respondents contended that their dismissals achieved the appellant's earlier desire to retrench staff and used the meeting of 30<sup>th</sup> June, 2011 as a camouflage.

[13] It is further averred in the statement of claim that as a conciliator failed to resolve the dispute the respondents had no option but seek court intervention.

[14] The respondents further averred that they would have worked until the retirement age of 60 years but for the summary dismissal. The dismissal therefore, according to the respondents, was against their legitimate expectation. They also claimed that due to the nature of their work they were disadvantaged in the employment market.

[15] For those reasons, the respondents sought the following orders against the appellant:

***(a) A declaration that the summary dismissal of the respondents was unfair and unlawful.***

***(b) A declaration that there was breach of the express terms and conditions of the contracts of employment between them and the appellant.***

***(c) A declaration that there was breach of an implied term of trust and confidence between them and the appellant which breach denied them any prospects of future employment.***

***(d) General damages for unlawful and unfair dismissal.***

**(e) Damages for future earnings and for breach of implied terms, "full salary and other emoluments from 4<sup>th</sup> July, 2011 to when the employment contracts were to terminate upon the retirement of 60 years of age but for the unfair dismissal inclusive of 8% annual increment of aggregating to Kshs. 1,000,788,987.87.**

**(f) Costs.**

**(g) Interest.**

**(h) Any other relief the court would deem to grant.**

[16] The appellant, in answer to the respondents' claim, filed a statement of response and raised a counter-claim. It admitted that the respondents had, indeed, been employed as stated in their claim but denied that they were to remain in employment until retirement as their employment was subject to the **Employment Act** including terms thereof relating to termination. It specifically averred that neglect of duty and failure to carry out assigned duties, *inter alia*, would lead to summary termination. The appellant invoked its Human Resources Manual which it claimed was incorporated in the contracts of employment with the respondents which recognized absenteeism and failure to obey lawful orders as grounds for summary dismissal.

[17] It further denied ignoring the respondents' grievances and specifically averred that it carried out a fair job grading and harmonization exercise in which the respondents participated. It admitted the strike in July, 2008, but pleaded that the same was illegal and issues leading to the same were quickly resolved through dialogue which is the mode characteristic of the appellant.

[18] With regard to tenure of office of the respondents the appellant averred that the contracts of employment stipulated that the parties could terminate the employment even before the retirement age of 60 years.

[19] With regard to voluntary early retirement programme, the appellant admitted issuing the memo on the same on 21<sup>st</sup> June, 2011, and only details of the payment package were to be thrashed out between it and the respondents' Union on 30<sup>th</sup> June, 2011, which details were dealt with and that nothing remained to be clarified. There was therefore, according to the appellant, nothing to warrant the staging of the strike or further communication after the dismissal of the respondents. In any event, according to the appellant, the programme was voluntary and no grievance could be founded thereon.

[20] The appellant specifically averred that the respondents absented themselves from duty on 30<sup>th</sup> June, 2011, without notice and even after being urged by the appellant's management and Union officials to resume work, they refused to do so thereby necessitating cancellation of commuter trains for the evening of 30<sup>th</sup> June, 2011, as a result of which it incurred a loss of Kshs. 43,200,000.00.

[21] In those premises, according to the appellant, it was entitled to summarily dismiss the respondents as it did vide its letters of 1<sup>st</sup> July, 2011. Despite the said letters, the appellant as a gesture of good faith, paid the respondents for 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> July, 2011 considering that some respondents would not receive the letters in time.

[22] The appellant further pleaded that in dismissing the respondents, it did not breach the terms of their employment contract since the respondents had wrongfully absented themselves from their respective duties and had failed to carry out lawful duties assigned to them. Furthermore, according to the appellant, the respondents participated in an illegal strike and despite being accorded an opportunity to state their case before their services were terminated, they declined to do so.

[23] It was also the appellant's view that the respondents could secure alternative employment elsewhere after the dismissal.

[24] The appellant further averred that its employees, including the respondents, were given a further opportunity to challenge the dismissal on appeal and save for the respondents, other employees were reinstated following their appeals. According to the appellants, the appeals were conducted in a fair manner and demonstrated its good faith and belief in fair labour practices.

[25] In the premises, the appellant denied being hell bent to carry out a retrenchment exercise by dismissing the respondents and further denied allegations of *mala fides* made by the respondents. It expressly reiterated its attempts to act fairly in fidelity to the rules of natural justice and in accordance with its code of conduct and any deviation therefrom, was occasioned by the respondents' unreasonable conduct for which the respondents were to blame.

[26] On the counterclaim, the appellant averred that the respondents illegal strike forced it to cancel its passenger and cargo train services resulting in the loss of Kshs.42,300,000.00 which it claimed from the respondents.

[27] After the close of pleadings, counsel for the parties filed and exchanged extensive written submissions which were duly considered by the learned Judge of the Employment and Labour Relations Court. The learned Judge determined that the claim was competent despite being filed by the claimants themselves and not through their Union. On the issue of termination, the learned Judge held that even where gross misconduct was alleged, the employee against whom the misconduct was alleged should have been given an opportunity to be heard before terminating or summarily dismissing him. It was also her finding that just as strike action is a weapon of last resort to be taken by an employee, summary dismissal is also the last resort to be taken by the employer where there are other sanctions available to the employer.

[28] On the claims she was considering, the learned Judge found that the dismissal of the respondents occurred before they were heard which default rendered the dismissals unprocedural and unfair. Regarding the appeals allegedly made by the respondents, the learned Judge found the process thereof a sham and of no useful value. In her view, the participation of the appellant's Chief Human Resource Officer in the dismissal of the purported appeals, destroyed the legitimacy of the appeal process. It was also the further finding of the learned Judge that even the criteria for reinstating some of the employees and not the appellant's was unclear.

[29] In the end, the learned Judge awarded the respondents full gross salaries for the period from 4<sup>th</sup> July, 2011 to 26<sup>th</sup> March, 2012, amounting to Kshs. 20,871,664/= on the basis that the respondents should have remained at work for that period. The learned Judge made a further award of twelve (12) months' salary based on the respondents' gross monthly salary under **section 49 (1) (c)** of the **Employment and Labour Relations Act**. Lastly, she awarded the respondents one (1) month's salary in lieu of notice again based on the gross monthly salary as at the time of dismissal.

[30] The learned Judge declined to award the appellant's claim in the counterclaim since, in her finding, the estimated revenue was not attributable to only the respondents as opposed to the employees who were reinstated.

[31] Being dissatisfied with the said judgment, the appellant preferred the appeal before us premised on some 7 grounds of appeal which counsel for the appellant collapsed into five (5) namely:

***(a) That the learned Judge erred in fact and in law in failing to find that the strike of 30<sup>th</sup> June, 2011 was illegal.***

***(b) That the learned Judge erred in fact and in law in quashing the summary dismissal of the respondents and awarding them the equivalent of 21 months' salary as damages for unfair termination.***

***(c) That the learned Judge erred in making orders granting remedies which are not contemplated under section 49 and 50 of the Employment Act; and that the award of 21 months'***

**salary made in compensation for unfair and unlawful termination is ultra vires as it is beyond the statutory limit of twelve (12) months remuneration.**

**(d) That the learned Judge did not consider the mandatory provisions of section 49 (4) of the Employment Act before awarding the respondents damages for unfair termination.**

**(v) That the learned Judge erred in fact and in law in failing to consider the counter-claim as filed when it was not disputed that the appellant indeed suffered loss as a result of the respondents' strike.**

[32] The appellant therefore urged this Court to set aside the decision of the trial court and substitute it with an order dismissing the respondents' claim and allowing its counter-claim. The appellant further sought costs of the appeal and those of the court below together with interest.

[33] **Mr. Wilson Mwihuri**, learned counsel for the appellant, relied upon written submissions which had previously been filed with the leave of the court.

Highlighting the same, learned counsel contended that the events of 30<sup>th</sup> June, 2011, which culminated in the dismissal of the respondents constituted a strike by the respondents contrary to the finding of the learned Judge of the court below. In learned counsel's view, the respondents took matters in their own hands rather than leave the same to their Union which was contrary to lawful procedure.

[34] It was also learned counsel's further argument that the respondents' actions attracted disciplinary sanction of summary dismissal. The said dismissal, according to learned counsel, could not be quashed. It was learned counsel's alternative argument that if there was default in following relevant procedure, the respondents could only be entitled to a maximum of twelve months salary under **section 49** of the **Employment Act**. In his view, however, that maximum award was not available to the respondents as they had contributed to events leading to their dismissal which contribution was not considered by the learned Judge of the court below.

[35] Learned counsel also urged the further view that the awards made over and above the twelve months' salary compensation were improperly made as the same are not contemplated under the **Employment Act**.

[36] **Mr. Gichuru**, learned counsel for the respondents, in response while highlighting written submissions filed on behalf of the respondents, contended that the respondents dismissal was clearly unfair. To buttress that argument **Mr. Gichuru** submitted that it was only after the respondents were dismissed that the appellant belatedly attempted to address the issues they had raised in the meeting of 30<sup>th</sup> June, 2011. In his view, the respondents had genuine complaints against the appellant which complaints were caused by parallel programmes initiated by the appellant: early retirement of its employees and retrenchment. The respondents did not fully understand who would and who would not be affected by either or both of the programmes. According to counsel, the respondents therefore walked to the appellant's headquarters for clarification.

[37] To illustrate the unfairness of the dismissal of the respondents, learned counsel submitted that over 500 employees of the appellant met at the appellant's headquarters, yet only the respondents were dismissed without the appellant explaining the basis for doing so and retaining the rest of the employees. **Mr. Gichuru** maintained that after the meeting of 30<sup>th</sup> June, 2011 the respondents and other employees of the appellant resumed their duties. There was therefore, according to learned counsel, no basis for the appellant's counter-claim.

[38] According to learned counsel, even if the actions of the respondents were found wanting, dismissal was not the disciplinary action to take as the same can only be taken as a last resort. **Mr. Gichuru** also faulted the appeal process which, according to him, was flawed as the same officers who handled the dismissals handled the appeals.

[39] Regarding the award, learned counsel submitted that the same was justified under **section 49** of the

**Employment Act.** According to learned counsel, the learned Judge in making the impugned award exercised her discretion which discretion was properly exercised and no basis had been demonstrated to interfere with the same.

[40] With regard to the counter-claim, the learned counsel submitted that the same had not been strictly proved as required and that the learned trial Judge properly dismissed the same.

[41] This being a first appeal, our mandate is set out in **Article 164(1)** of our **Constitution, Section 3** of the **Appellate Jurisdiction Act (No. 9 Laws of Kenya)**, **section 78** of the **Civil Procedure Act** and **Rule 29(1)** of this Court's Rules. We are enjoined under the law to re-appraise the facts and to draw our own inferences and conclusions, of course, bearing in mind that, we did not hear the witnesses' testify and giving allowance for that. The predecessor of this Court stated in **Selle and Another - versus - Associated Motor Boat Company Limited & Others [1968] EA 123**, thus:

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

[42] We have considered the appellant's case and that of the respondents as advanced in their pleadings, submissions, authorities and the relevant law. Having done so, in our view, the broad issues arising for our determination are:

- 1. What was the nature of the respondents' activities of 30<sup>th</sup> June, 2011?**
- 2. Could these activities found a proper basis for summary dismissal of the respondents?**
- 3. What were the consequences of those activities and the subsequent actions of the appellant against the respondents?**
- 4. Was the appellant's counter-claim proved on a balance of probabilities?**
- 5. What orders should we make in this appeal?**

[43] It is common ground that the respondents were all employees of the appellant pursuant to a concession agreement dated 23<sup>rd</sup> January, 2006 between the appellant, the Kenya Railways Corporation and the Government of Kenya. The letters confirming their employment stated, in part:

***"Your employment henceforth will be on permanent terms subject to satisfactory performance of duties assigned to you, and shall automatically terminate on the date upon which you attain the age of 60 years. Other terms and conditions of service remain as spelt out in your original letter of appointment."***

[44] In the course of their employment, with the appellant, the latter, faced with financial constrains, determined to downsize its personnel. It therefore offered to its employees, including the respondents, an early retirement opportunity. Simultaneously, the appellant embarked on retrenchment of some of its employees. The twin programmes caused apprehension among the appellant's employees which concerns, according to the respondents, their Union did not satisfactorily address.

[45] According to the respondents, the entire Nairobi work force of the appellant decided to individually seek clarification of the twin programmes on 30<sup>th</sup> June, 2011. They therefore went to the appellant's

Headquarters in Nairobi where they were addressed by officers of the appellant including, **Mr. Mwendar, (PW4)**, the appellant's Chief Human Resource Officer, and the respondents' Union officials. The respondents contended that the meeting proceeded cordially and they were advised to resume their duties which they did. In their view, their action could not attract disciplinary action by the appellant.

[46] On its part, the appellant contended that the respondents had no reason to go to its Headquarters as all their concerns could be addressed by their Union which was actively engaged in resolving the same issues. In its view, the respondents wrongfully took matters in their own hands and their actions constituted a strike which was unlawful. In the premises, according to the appellant, it was entitled to summarily dismiss the respondents.

[47] The learned Judge of the E&LRC, held as follows, on the activities of 30<sup>th</sup> June, 2011:

***"98. In this case, whatever industrial action the claimant's employed against their employer, the respondent, the sanction taken against them was too harsh in the circumstances of the case where the respondent admits that indeed they were valid grievances that were being raised by all employees and to single out the claimants for dismissal without following due process and undertaking the procedures as outlined in the respondent's Human Resource manual, was unfair labor practice against the claimants.***

.....

.....

***Any other disciplinary action that may be followed by an employer must adhere to the set policy guidelines developed by an employer to address disciplinary matters and in compliance with sections 12,10 and 5 of the Employment Act. Even in a case where the employer has taken these measures reference must be given to the provisions of section 42 on the hearing process which must meet fair hearing rules that are mandatory".***

[48] It is plain that the learned Judge of the trial court did not determine one way or another whether the activities of the respondents on 30<sup>th</sup> June, 2011, amounted to an unlawful or unprotected strike. Her decision was therefore not founded on whether the respondents staged an unlawful strike on 30<sup>th</sup> June, 2011.

[49] Notwithstanding a specific finding that the respondents went on strike on 30<sup>th</sup> June, 2011 the learned Judge nevertheless concluded that the respondents had genuine concerns regarding the appellant's twin programmes of early retirement and retrenchment. We cannot fault the learned Judge on that finding. Like the learned Judge, we find that it cannot be in contention that the respondents had legitimate concerns. The appellant maintained before the trial court and before us that the respondents had no reason to go to its Headquarters to seek clarification on issues arising from the aforesaid twin programmes as it was its view that the respondents could and were effectively represented by their Union. Yet the appellant could not state who of its employees were members of the Union and who were not. If some of the employees were not represented by the Union, how could their concerns be urged without individually presenting their grievances?

[50] The need to clarify how the voluntary early retirement/retrenchment programme would be conducted was appreciated by the appellant. We say so, because on 6<sup>th</sup> July, 2011, it issued an internal memo in which it sought to clarify the programmes. The appellant did not exhibit any other document issued prior to 30<sup>th</sup> June, 2011, by which the twin programmes were explained to its employees.

[51] On the issue of summary dismissal, the learned Judge held the view that that relief was not available to the appellant. Her reasons for so finding were multi-prolonged. Firstly, the learned Judge found that the entire Nairobi workforce of the appellant raised valid grievances against the appellant and participated in the meeting of 30<sup>th</sup> June, 2011. Yet the rest of the employees, who could have been in excess of 500,

were reinstated in circumstances which the appellant failed to satisfactorily explain. The action against the respondents could therefore not meet the scrutiny of impartiality and fairness. Secondly, the learned Judge found that in summarily dismissing the respondents, the appellant did not follow due process. It had indeed violated its own procedures set out in its own Human Resource manual. Thirdly, that the dismissal letters were served before hearing the respondents. Fourthly, that the appellant's attempt to consider appeals of employees it had already summarily dismissed was a sham.

[52] We think the learned Judge had basis for those findings. The appellant has incorporated its Human Resource Policies and Procedures Manual in this record which, at paragraph 11.8, provides:-

**"11.8 Dismissal**

***RVR reserves the right to summarily dismiss an employee for gross misconduct as defined in the Employment Act."***

[53] The respondents were purportedly summarily dismissed on 1<sup>st</sup> July, 2011. The relevant **Employment Act** then applicable is that of 2007 whose commencement date was 2008. Although the respondents were employed earlier, the provisions of the **Act** applied by dint of the provisions of **section 93** thereof which is in the following terms:-

**"93. Transitional provisions**

***A valid contract of service, and foreign contract of service to which part XI applies, entered into in accordance with the Employment Act shall continue in force to the extent that the terms and conditions thereof are not inconsistent with the provisions of this Act and subject to the foregoing every such contract shall be read and construed as if it were a contract made in accordance with and subject to the provisions of this Act, and the parties shall be subject to those provisions accordingly."***

(Underlining ours).

[54] The employment contracts between the respondents and the appellant were therefore subject to the provisions of **section 41** of the said **Act** which provides as follows:-

**"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".***

[55] The appellant in this case complained about the respondents' activities of 30<sup>th</sup> June, 2011. The following day, 1<sup>st</sup> July, 2011, the appellant wrote to the respondents summarily dismissing them. The appellant plainly fell foul of the provisions of section 42 (1) aforesaid in that it did not explain to the respondents in any language the reason for which termination was contemplated. It also did not accord the respondents an opportunity to be heard either alone or in the company of a Union representative. It cannot be gainsaid that the termination of the respondents' employment amounted to unfair termination as defined in **section 45 (1) (2) (b) and (c)** of the **Employment Act** which read:

**"45 Unfair termination**

- 1) *No employer shall terminate the employment of an employee unfairly.*
- 2) *A termination of employment by an employer is unfair if the employer fails to prove:*
  - a. *that the reason for termination is valid;*
  - b. *that the reason for the termination is a fair reason ;*
    - i. *related to the employee's conduct capacity or compatibility; or*
    - ii. *based on the operational requirements of the employer; and*
    - iii. *that the employment was terminated in accordance with fair procedure."*

*And sub-section (4)(b) of the same section is in the following terms:-*

- "(4) A termination of employment shall be unfair for the purposes of this Part where:*
- a. ....
  - b. *It is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee".*

[56] In the case before us, the appellant not only failed to accord the respondents opportunity to be heard, it also acted in a discriminatory manner - which compounded the unfairness and was patently inequitable. As we have already observed, the appellant's entire workforce in Nairobi was in excess of 500. The record shows that almost the entire workforce in Nairobi participated in the activities of 30<sup>th</sup> June, 2011. They were all served with letters of summary dismissal of the same date 1<sup>st</sup> July, 2011. Yet, only the respondents, a quarter of the said workforce, were not reinstated whereas the rest were reinstated in circumstances we have found unclear.

[57] The appellant was purported to have reinstated the other employees following an appeal process preferred by some of its employees. Like the learned Judge of the trial court, we have found that process a sham. Firstly, the appellant put the cart before the horse. It dismissed the respondents before purporting to hear their appeals. It did not explain the appeal process to the respondents before staging the process. The appeals were initiated by the respondents after the dismissals. The process was flawed for another reason. The architect of the process was **Mwendar (PW 4)**, who testified for the appellant. He was the appellant's Chief Human Resource Officer. He signed the contentious twin programmes of early retirement and retrenchment. He participated in the proceedings of 30<sup>th</sup> June, 2011, and signed the letters of summary dismissal. With regard to the appeal process, he stated, in cross examination, in part:

*"Maybe there was not (sic) notice issued to claimant did appeal. The claimant to appeal at their own imitative. Page (sic) 46 - 89 appeal proceedings. I was at the meeting plus HR plus officers....."*

And in re-examination, Mwendar stated:

*"I did undertake the appeal process with invitation to each..... I was present and Odhiambo and supervisors".*

[58] Given the role **Mwendar** played leading to the summary dismissal of the respondents, he should not have had any role in the appeal process. In participating in the appeal process, **Mwendar** offended the rule of natural justice that one should not be a judge in his own cause. Another way of putting it is that there was an overlap of members of the appellant who considered the respondents' complaints and those who subsequently heard their appeals. The risk of bias of those overlapping members such as **Mwendar** was

real. It is for those reasons that we agree with the learned Judge of the trial court that the appeal process was shambolic.

[59] In the premises, our conclusion is that the appellant's termination of the respondents' employment did not follow the procedure set out under the **Employment Act** which provisions it incorporated in the contracts of employment with the respondents. The learned trial Judge was therefore justified in determining that the appellant's action attracted the sanctions set out under the same **Employment Act**.

[60] The learned Judge, besides quashing the summary dismissal, held as follows:-

***".... in the contest (sic) that the claimants have been out of employment from 4<sup>th</sup> July, 2011 to date and should have remained at work, and in the interests of justice and in due consideration of section 12(3) of Industrial Court Act on making an appropriate relief, there shall be compensation for that time. The claimants will be paid their full gross salary from 4<sup>th</sup> July, 2011 to 26<sup>th</sup> March, 2012 when the court became seized of this matter which comprises eight (8) months that amounts to Kshs.20,871,664.00 for all the 75 claimants.***

.....

***On the basis of section 49(1)(c) and for the unfair dismissal the claimants will be paid the equivalent of twelve (12) months' salary based on their gross monthly salary at the time of dismissal.***

.....

.....

***Each claimant will be awarded one month's pay in lieu of notice based on the gross monthly salary at the time of dismissal".***

[61] In total therefore, the learned trial Judge awarded each respondent the equivalent of twenty one (21) months' salary for the unfair dismissal. Before discussing whether the learned Judge was entitled to make that award, we propose first to dispose of two issues raised by the appellant. The first issue is whether the actions of the respondents of 30<sup>th</sup> June, 2011 constituted an illegal strike. Having considered the record and what we have stated herein-above, we do not think the issue as to whether the actions of the respondents on the material date constituted a strike is necessary for a determination of this appeal. This appeal, in our view, turns on whether the dismissal of the respondents was in accordance with their employment contracts. We have found that it was not. The termination of the respondents' services did not only fail to conform with the provisions of their employment contracts, but it was also in breach of the provisions of the **Employment Act**. It was, in short, an unfair termination.

[62] As we held in **CMC Aviation Limited - v - Captain Mohammed Noor [Civil Appeal No. 199 of 2013] (UR)**:

***"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 can say the same for the action the appellant took against the respondents in this case.

[63] The second issue raised by the appellant was that the learned trial Judge's award of 21 months' salary for the unfair and unlawful termination was *ultra vires* as it was beyond the statutory limit of twelve (12)

months' salary stipulated in the

**Employment Act.** The answer to this complaint is in the **Act** itself. **Section 49(1)** of the **Employment Act** provides:-

**"49 Remedies for wrongful dismissal and unfair termination**

**1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following -**

(underlining ours)

**a. the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;**

**b. where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked, and any other loss consequent upon the dismissal and arising between the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or**

**c. the equivalent of a number of months' wages or salary not exceeding twelve (12) months based on the gross monthly wage or salary of the employee at the time of dismissal".**

[64] Although **section 49** of the **Employment Act** mentions a labour officer as the one who recommends to the employer the above remedies, the Court is enjoined to be guided by the same provisions by virtue of **section 50** of the same **Act**. The section reads:-

**"50. Courts to be guided.**

**In determining a complaint or suit under this Act involving wrongful dismissal or unfair termination of the employment of an employee, the Industrial Court shall be guided by the provisions of section 49."**

[65] A plain reading of the above provisions shows that an employee wrongfully dismissed or whose services are unfairly terminated may be awarded any or all of the remedies provided in **section 49 (1) (a)**, **(b)** or **(c)** or **both 49 (1) (a)** and **49 (1) (b)** or **both 49 (1) (a)** and **49 (1) (c)**. It is not immediately clear why the remedy given in **49 (1) (b)** and **49 (1) (c)** is expressed in the alternative but then not all legislation is given to plain interpretation. What is however, clear beyond peradventure is that payment of twelve (12) months' salary is not the maximum compensation an employee may be awarded under **section 49** of the **Employment Act**. It is therefore not correct to state that the award of twenty one (21) months' salary was *ultra vires*.

[66] Turning back to the issue whether, in this case, the learned Judge was entitled to award the respondents, twenty one (21) months' salary, the answer is again found in **section 49** of the **Employment Act**. As we have already observed the learned Judge could, under the said section, only award each respondent one month's salary or twelve (12) months' salary or both of them. In our view, the award of salaries from 4<sup>th</sup> July, 2011 to 26<sup>th</sup> March, 2012, amounting to Kshs.20,871,664.00 had no basis, in view of the evidence that the respondents were not serving the appellant for that period. In making that award, the learned Judge stated that the respondents had been out of employment for that period when they should have remained at work. In the learned Judge's view, it was "*in the interests of justice and in due consideration of section 12(3) of the Industrial Court Act*" that appropriate relief be made for that period. That section is on the jurisdiction of the **Employment and Labour Relations Court. Sub-section (3)** reads:

**(3) In exercise of its jurisdiction under this Act, the court shall have power to make any of the following orders:-**

**i. interim preservation orders including injunctions in cases of urgency;**

**ii. a prohibitory order;**

**iii. an order for specific performance;**

**iv. a declaratory order;**

**v. an award of compensation in any circumstances contemplated under this Act or any written law;**

**vi. an award of damages in any circumstances contemplated under this act or any written law;**

**vii. an order for reinstatement of any employee within three years of dismissal subject to such conditions as the court thinks fit to impose under circumstances contemplated under any written law; or**

**viii. any other appropriate relief as the court may deem fit to grant".**

[67] **Section 12(3)** of the **Employment Act and Labour Relations Court Act (E & LRCA)**, appears to extend the remedies envisaged under the entire **section 12 (3)** and **section 49** of the **Employment Act**. In our view, **section 12** defines the general jurisdiction of the **Employment and Labour Relations Court**. That court under **Section 12 (3), (v)** and **(vi)** has power to award compensation and damages and **section 49** enumerates the remedies the same court may grant where there is proof of wrongful dismissal and unfair termination. Those remedies are not, however, exhaustive. In this case, however, there was no basis to grant further relief under **section 12 (3) (viii)** of the **E & LRCA**. The award of eight (8) months' salary for the period from 4<sup>th</sup> July, 2011 to 26<sup>th</sup> March, 2012, in our view should not therefore, with all due respect, have been made in the circumstances of this case and it must be set aside.

[68] In awarding the respondents twelve (12) months' salary, the learned Judge found that the appellant had been in breach of the express and implied terms and conditions of their contracts of employment. For that reason the learned Judge held the view that the respondents' employment should not have been terminated which termination she found to be unfair.

[69] The appellant contended that an award of twelve (12) months' salary should be reserved for an employee who is without blame. The respondents in this case, according to the appellant, were not blameless as they staged a strike. Reliance was placed on the decision in the case of **CMC Aviation Limited - v - Captain Mohammed Noor [Civil Appeal No. 199 of 2013] (UR)**. In that case, this Court considered the factors set out in **section 49 (4)** of the **Employment Act** in determining a complaint of wrongful dismissal or unfair termination and the remedies of compensation. The Court held that the trial Court erred in not considering the contribution the respondent could have made to the events leading to his dismissal. The appellant's argument is, *prima facie*, strong and persuasive. However, it loses its luster when all factors are taken into account. The appellant had over 500 employees in its Nairobi workforce. Yet it singled out the respondents only for summary dismissal. The appellant did not attempt to explain why only the respondents would suffer the ultimate penalty of summary dismissal. That decision smirched of discriminatory conduct on the part of the appellant. For reasons which we shall never know, the respondents were singled out and denied the benefits of the voluntary early retirement/retrenchment programme which was open to their colleagues who had also participated in the activities of 30<sup>th</sup> June, 2011 like them. In those circumstances, we think there was basis to award the respondents the twelve (12) months' salary compensation in addition to the one (1) month's salary in lieu of notice. Accordingly, we find no basis to interfere with those awards.

[70] We turn now to the appellant's counter-claim. The appellant contended that the learned trial Judge

"failed to find that the losses were indeed suffered by the appellant in the amount of Kshs.34,954,250.60". That however, in our view, was not the only reason why the counter-claim failed. It was common ground that that claim was a special damage claim which had not only to be specifically pleaded but also strictly proved. See Hahn - v - Singh [1985] KLR 716.

[71] In the appellant's Statement of Response and counter-claim, the appellant averred that it had incurred a loss estimated at Kshs.43,200,000.00 as a result of cancellation of its passenger and cargo train services when the respondents failed to return to work on 30<sup>th</sup> June, 2011. In the premises, the appellant claimed Kshs.42,300,000.00 from the respondents. The counter-claim carried no particulars of the alleged loss. From the appellant's averments, it was not possible to determine how much of the loss was incurred by reason of cancelling the passenger trains as opposed to cargo trains. It was further not possible to attribute any of the loss to any particular employee or cadre of employees. As we have already observed, it was accepted by all parties that the entire Nairobi workforce participated in the activities of 30<sup>th</sup> June, 2011. The entire workforce were therefore responsible for loss, if any, incurred by the appellant. Yet the appellant made no attempt to identify which of the alleged loss was attributable to the staff of the appellant who were reinstated, which staff greatly outnumbered the respondents. It also became apparent, during the trial, that the appellant only cancelled passenger service trains but not cargo train.

The record further showed that the passenger train services were cancelled mainly because it was not safe to operate that service. The appellant did not attempt to identify who of the respondents had the responsibility to ensure the safety of the passenger trains.

It was further demonstrated at the trial, that whereas the same personnel were responsible for preparing both the passenger and cargo trains for operation, the appellant did not satisfactorily explain why the passenger trains could not be prepared for service on the material date just like the cargo trains. In those premises, we agree with the learned trial Judge that the appellant failed to relate the figure of Kshs.42,300,000.00 pleaded in the counter-claim and that of Kshs.34,954,250.60 given by **Ali Nzoka Kitemi, (RW3)**, at the trial to the actions of the respondents.

[72] In Mbaka Nguru & Another - v - James George Rakwar [1998] eKLR, this Court following the statement of Lord Goddard, C.J., in the case of Bonham Carter - v - Park Ltd [1948] 647 T.L.R, 177; stated:

***"It will suffice to say that plaintiffs who do not plead their damages properly and who then do not prove the same do so at their own risk. They will not get those damages however, sympathetic the court may feel towards them. The rules of pleading and modes of proof must be adhered to".***

[73] Lord Goddard, C.J., had in Bonham-Carter - v - Hyde Park Hotel Ltd.

(supra) said, on damages:

***'Plaintiffs must understand that if they bring actions for damages it is for them to prove their damages, it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court saying: "This is what I have lost; I ask you to give me these damages'.***

***They have to prove it".***

See also Mohammed Ali & Another - v - Sagoo Radiators Limited [2013] eKLR - (Civil Appeal No. 231 of 2005), wherein this Court adopted the holding in Hahn - v - Singh (supra) thus:-

***"... special damages ..... must not only be claimed specifically but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularly of proof required depends on the circumstances and the nature of the acts themselves".***

[74] In the case before us we are, like the learned Judge of the court below, not persuaded that the

evidence with regard to damages claimed by the appellant, was satisfactory which inadequacy was compounded by the fact that the damages sought were not particularized in the counter-claim. Accordingly, our conclusion is that the learned Judge of the court below was entitled to dismiss the appellant's counter-claim.

[75] The upshot is that we set aside the award of gross salaries from 4<sup>th</sup> July, 2011 to 26<sup>th</sup> March, 2012 amounting to Kshs.20,871,664.00. The judgment of the ***Employment and Labour Relations Court*** is varied to that extent. The sums left intact shall attract interest at court rates from the date of filing suit until payment in full.

[76] The appellant has succeeded in part. However, given the parties' antecedent relationship of employer/employees respectively, the order which commends itself to us on the issue of costs is that each party shall bear its/their own costs in this appeal.

Judgment accordingly.

***Dated and delivered at Nairobi this 2<sup>nd</sup> day of December, 2016.***

***P. KIHARA KARIUKI - P.C.A.***

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***JUDGE OF APPEAL***

***F. AZANGALALA***

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***JUDGE OF APPEAL***

***F. SICHALE***

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***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR.**