



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM KARANJA, MUSINGA & GATEMBU, J.J.A.)

CIVIL APPEAL NO. 199 OF 2013

BETWEEN

CMC AVIATION LIMITED APPELLANT

VERSUS

CAPTAIN MOHAMMED NOOR RESPONDENT

(Appeal from the Award of the Industrial Court of Kenya at Nairobi (Madzoyo, J.) dated 10th November, 2011

in

Industrial Cause No. 919 of 2010)

JUDGMENT OF THE COURT

1. This appeal arises from the judgment of the Industrial Court of Kenya at Nairobi in Cause No. 919 of 2010 where Captain Mohamed Noor, hereinafter referred to as **“the respondent”**, was the claimant against CMC Aviation Limited, hereinafter referred to as **“the appellant”**.

2. In his statement of claim before the trial court, the respondent stated that via a contract of employment executed on 21st January, 2008 between him and the appellant, he was employed on a two year contract as a Chief Pilot on a monthly salary of **US\$9000**. The contract of employment was terminable by either party giving one month’s notice or one month’s salary in lieu thereof. The respondent could also be summarily dismissed from his employment on any of the grounds contained in **clause 7** of the said contract.

3. In October 2008 the respondent was demoted from the position of Chief Pilot to Line Captain and his salary was reduced to a sum of **US\$5075** per month or the equivalent of **Kshs.406,000/=** at an exchange rate of Kshs.80 to the dollar. The respondent continued to work in that position until 15th January, 2010 when his services were suspended to pave way for investigations following an airplane accident that took place on 15th January, 2010 in Congo.

4. The respondent further stated that following the aforesaid accident he was required by the Aviation Authorities in Congo to surrender his original log book and licence. He alleged that the appellant’s

General Manager severally gave him verbal and written assurances that the appellant would follow up with the Civil Aviation Authority of Congo the release of the said documents but after sometime only the respondent's licence was released on 1st March, 2010, the log book was still retained by the Civil Aviation Authority of Congo.

5. The respondent further averred that on 10th March, 2010 he was required by the appellant to resume duties but he could not report back to work mainly because he did not have his log book with him. On 18th March, 2010 the respondent went to the office of the appellant's Human Resources Manager and explained why he could not report back to work.

6. On 30th March, 2010 the respondent received a letter of summary dismissal on the ground that he had used abusive and insulting language against the appellant's Human Resources Manager, an allegation which he denied.

7. The respondent proceeded to the Industrial Court and filed a suit. In his statement of claim, the respondent sought the following orders against the appellant:

- a. ***Reinstatement to his employment as a Chief Pilot,***
- b. ***Damages in the sum of US\$108,000 for unfair and unlawful termination of employment and unlawful demotion equivalent to twelve months gross salary,***
- c. ***House allowance at the statutory rate of 12% of the gross salary for the period of his employment,***
- d. ***Under paid salary for the period between October 2008 and 15th March 2010 amounting to US\$33000,***
- e. ***Unpaid leave days for the years 2008 and 2009,***
- f. ***Payments due from the Staff Retired Benefits Scheme,***
- g. ***Costs of the suit.***

8. The appellant filed a memorandum of reply to the respondent's claim. It admitted that the respondent had been employed as a Chief Pilot on a two year renewable contract commencing 21st January 2008 but stated that in accordance with the terms of employment, the respondent's services were subject to periodical evaluation by his employer. In September, 2008 a performance evaluation of the claimant's performance as Chief Pilot was conducted, following which the respondent was found unsuitable to handle the responsibilities of Chief Pilot and hence was recommended for re-assignment to Line Training Captain.

9. The respondent accepted the new position in writing on 6th October, 2008 and worked in that position and was remunerated thereunder until 13th January, 2010 when he was placed on temporary suspension following the accident in the Democratic Republic of Congo.

10. Following the said accident the respondent was suspended from flying duties in accordance with international standards and procedures. The respondent was obliged to surrender his log book and licence to the accident investigators appointed by the Civil Aviation Authority of Congo. The appellant denied that it was its obligation to pursue on behalf of the respondent release of the aforesaid documents but it accorded all necessary assistance to the respondent to procure release of the same.

11. The appellant further averred that after conducting its own internal investigations into the aircraft accident, the respondent's suspension was lifted and he was requested to report to the Chief Pilot for further instructions. The respondent however declined the request until his log book was first

retrieved from Congo.

12. On 18th March, 2010, the appellant invited the respondent to a meeting with its Human Resources Manager to explore options regarding the possibility of the respondent rendering ground services pending release of his log book. During the discussions, the respondent became upset and made verbal threats and used abusive language towards the Human Resources Manager, the appellant averred. As a result, the respondent was summarily dismissed from his employment on grounds of gross misconduct under **Section 44(d)** of the **Employment Act** and breach of the appellant's Code of Conduct.

13. Regarding the respondent's claims, the appellant contended that he was not entitled to any of the reliefs sought and urged the trial court to dismiss his claim.

14. When counsel for the parties appeared before the trial court for the hearing of the suit, it was agreed by consent that the matter be disposed of by way of written submissions. Both parties filed extensive submissions which were duly considered by Madzayo, J., as he then was.

15. The learned judge held that the summary dismissal of the respondent from his employment was in violation or contravention of the Industrial Relations Charter, the provisions of the International Labour Organization (ILO) Convention Nos. 98 and 135 as well as principles of natural justice. The court further held that the appellant did not observe statutory provisions of summary dismissal as provided under **Section 44** of the **Employment Act, 2007**. The summary dismissal therefore amounted to unfair labour practice, the learned judge held.

16. Regarding the respondent's demotion from Chief Pilot to Line Training Pilot, the trial court held that the appellant had no legal right to reduce the respondent's salary, pointing out that the respondent's evaluation form vide which the demotion and reduction of salary was done was undated.

17. The respondent was awarded **US\$9000** as one month's salary in lieu of notice, **US\$108,000** being twelve months' gross salary at the rate of US\$9000 a month, 5.25 unpaid leave days for the year 2010 as well as costs of the suit. The respondent's claims for house allowance and payment of dues under the Staff Retirement Benefits Scheme were rejected.

18. Being dissatisfied with the said judgment, the appellant preferred an appeal to this Court. The memorandum of appeal consists of nine grounds which are as follows:

"1. The learned judge erred in law in holding that the respondent's summary dismissal was unfair and illegal and therefore null and void when in fact;

- a. ***the appellant was entitled to dismiss the respondent under section 44 (4) (d) of the Employment Act, 2007,***
- b. ***the respondent himself admitted to the use of derogatory and abusive language to the Human resource Manager, which led to his dismissal.***
- c. ***The appellant notified the respondent of the grounds of his dismissal, which grounds were not challenged.***
2. ***The learned judge erred in declaring the dismissal as null and void, when only a procedural step was omitted in the dismissal process. Such omission would only result in a wrongful but not unfair or illegal dismissal, and would entitle the respondent to only a pay in lieu of notice.***
3. ***The learned judge erred in law by failing to consider that the appellant has a right to dismiss an employee without notice, and that such dismissal could not and cannot be illegal, null and void.***
4. ***The learned judge erred in holding and finding that the appellant's appointment to Line Training Pilot was illegal when;***

- a. *It was demonstrative that a performance evaluation as provided under the staff policies and procedures, and which the respondent submitted to was carried out.*
- b. *The staff policies and procedures allowed the appellant to make such changes as were necessary to achieve the expected performance levels, including changes in processes.*
- c. *the respondent having been assigned the new position in October, 2008, carried on with his employment without objection, appeal and accepted the variation of contract by letter dated 24th September, 2008, which he accepted on 6th October, 2008.*
5. *The learned judge failed to appreciate that the change in the scope of the respondent's employment had an attendant effect on his salary which the respondent accepted on 6th October, 2008 and erred in holding that the appellant was prohibited from changing or reducing an employee's salary in such circumstances.*
6. *The learned judge erred in law in awarding the respondent damages in the sum of US\$108,000, when;*
 - a. *it is trite law that general damages are not awardable in a contract claim.*
 - b. *the only damage suffered as a result of the omission in procedure was the pay in lieu of notice that the respondent ought to have received.*
7. *The learned judge erred in law in any event by computing damages based on a salary of US\$9,000 when the respondent's salary was US\$5,075 per month.*
8. *As a consequence of all the foregoing, the learned judge erred in holding that the respondent's dismissal was unfair and illegal and in assessing the award therein.*
9. *The award was manifestly excessive and unfair given the circumstances of the case. In all the circumstances of the case, the learned judge failed to uphold the law and render justice to the appellant."*

19. The appellant urged this Court to set aside the decision of the trial court and substitute it with an order that the respondent's summary dismissal be reduced to a normal termination and consequently the respondent be paid one month's salary in lieu of notice and accrued leave of 5.25 days, both reliefs based on a monthly salary of US\$5075.

20. The respondent filed a notice of cross appeal and grounds for affirming the trial court's decision, stating as follows:

“(a) The judgment/award with respect to the finding that the respondent was unlawfully, unfairly and unprocedurally terminated and the subsequent award of damages ought to be affirmed for the reasons that:

- i. *the obligation and burden to justify the grounds for termination rests with the employer under section 47(5) of the Employment Act, 2007 and the appellant failed to discharge this burden;*
- ii. *the reason for the termination of the respondent's employment was not a valid or fair reason nor was fair procedure followed in accordance with section 45 (2) of the Employment Act, 2007;*
- iii. *the occurrence of the incident giving rise to the respondent's termination was denied by the respondent and consequently, the appellant failed to discharge its burden under section 47(5) of the Employment Act, 2007;*

iv. *the appellant failed to consider whether the surrounding special circumstances constituted justifiable or lawful grounds for dismissal and having considered the surrounding circumstances, the trial judge returned a correct finding that they did not;*

v. *the respondent was never given an opportunity to be heard contrary to the provisions of section 41(2) of Employment Act, 2007, International Labour Convention numbers 98 and 135 and rules of natural justice;*

vi. *the appellant failed to comply with the mandatory provisions of section 41(1) of the Employment Act, 2007 ;*

vii. *the process of demotion of the respondent from Chief Pilot to Line Pilot was done unprocedurally (no cause shown and without notice) and without following the laid down procedures in law and in the appellant's own staff policies and procedures manual;*

viii. *the compensation/damages awarded to the respondent should be affirmed as they were awarded under the provisions of section 49(1) of the Employment Act, 2007 as read with section 15 of the Labour Institutions Act. No grounds have been urged or demonstrated by the appellant as to why this court ought to interfere with the quantum of damages awarded by the Industrial Court;*

ix. *the grounds of appeal now raised by the appellant were never presented before the trial court and cannot therefore be raised on appeal.*

b. *That part of the judgment/award dismissing the remainder of the respondent's claim ought to be set aside to the following extent and on the following grounds:*

i. *having returned a finding that the demotion of the respondent from Chief Pilot to Line Pilot was illegal, null and void, the learned judge erred in law and in fact in not awarding the respondent the underpaid salary from the date of demotion upto the date of termination (October 2008-15th March, 2010).*

ii. *the learned judge erred in failing to award the respondent unpaid leave days for the period 2008-2009 for 21.25 days when there was ample evidence that these were the total unpaid leave days and not 5.25 days as awarded by the learned judge."*

21. Arguing the appeal, Ms. Kirimi, learned counsel for the appellant, made reference to the terms and conditions of the respondent's employment that were communicated to him vide his appointment letter dated 21st January, 2008. The Service Agreement stated, *inter alia*:

i. *That the respondent's appointment as Chief Pilot or any other capacity as the appellant may determine from time to time was for a period of two years (renewable)*

ii. *the services could be terminated by either party giving one month's written notice or payment of one month's salary in lieu of notice.*

iii. *the grounds for summary dismissal included any of the matters specified under section 17 of the Employment Act.*

22. The appellant's counsel justified the respondent's demotion and reduction of his salary, stating that the same was done subsequent to an appropriate performance evaluation, and in any event, the respondent accepted the same in writing vide a letter dated 6th October, 2008. If at all the results of the performance evaluation were not acceptable to the respondent he ought to have declined to take the new position but he did not do so, instead he accepted the new appointment together with the reduced salary and continued to work until his suspension following the air crash in Congo, Ms. Kirimi submitted. She however

conceded that as far as the respondent's summary dismissal was concerned he was not given any opportunity to be heard before the summary dismissal was effected. That in itself can only imply that there was no fair procedure in terminating the respondent's employment but cannot vitiate validity of the termination and justify an award of damages, she contended.

23. Counsel further submitted that in this appeal the Court is limited to consideration of matters of law only and consequently the Court should guard against delving in to issues of fact that were dealt with by the trial court. As to what amounts to matters of law, Ms. Kirimi cited the Supreme Court decision of **GATIRAU PETER MUNYA v DICKSON MWENDA KITHINJI & 2 OTHERS, [2014] eKLR**. Regarding the award of US\$108,000 as 12 months' salary compensation, Ms. Kirimi submitted that it was an erroneous application of the law to the facts because given the manner in which the respondent conducted himself on 18th March, 2010 when he used abusive language against his senior and granted the fact that he had previously been warned for the same conduct, the summary dismissal was warranted. In support of the submission counsel cited, *inter alia*, **McKINLEY v BC TEL [2001] 25.C. 161 and POLKEY v A.E. DAYTON SERVICES LTD [1988] A.C. 344**. The ratio decidendi in the two cases is in line with section 44 of our Employment Act which sets out the kind of conduct that constitutes just cause for summary dismissal.

24. **Mr. Nyaribo**, learned counsel for the respondent submitted, *inter alia*, that there was no proof whatsoever that his client used abusive language to his senior thus necessitating the summary dismissal. He added that the appellant specified neither the nature of the abusive language nor the words allegedly used by the respondent. Counsel further submitted that the burden of proving that the summary dismissal was justified lay on the appellant. He cited **section 43 (1)** of the **Employment Act** which states as follows:

“In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”

Counsel added that under **section 45 (2)** an unfair termination occurs when an employer fails to prove –

- “a) that the reason for the 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***
- c. that the employment was terminated in accordance with fair procedure.”***

25. Regarding the respondent's demotion and reduction of his salary, Mr. Nyaribo submitted that the reasons for the same were not communicated in advance. Counsel also contested the appellant's assertion that the respondent did not complain about reduction of his salary. He said that vide an email dated 3rd October, 2009 the respondent had brought to his employer's attention that he had been paid US\$2000 less than his agreed salary but had not been given any explanation for that reduction.

26. Arguing the cross appeal, Mr. Nyaribo submitted that the trial court, having found that the reduction of the respondent's salary was illegal, it ought to have awarded him arrears for the underpaid salary for the period October 2008 to 15th March, 2010 amounting to US\$33,000.

27. Counsel further stated that the award of US\$108,000 was not on account of general damages. It was compensation for unfair termination of employment awarded under **section 15 (c)** (sic) of the **Labour Institutions Act** and **sections 49 (1) (c)** and **49** of the **Employment Act**.

28. From the record of appeal and the submissions made by counsel, the main issues for determination

before this Court are:

- i. *Whether the appellant's summary dismissal of the respondent was lawful or whether it amounted to unfair termination of services.*
- ii. *Whether the respondent's demotion and reduction of salary was lawful.*
- iii. *Whether the respondent was lawfully entitled to an award of damages in the sum of US\$108,000.*
- iv. *Whether the respondent was lawfully entitled to an award of US\$33,000 on account of underpaid salary for the period between October 2008 and 15th March, 2010 and unpaid leave days for the years 2008 and 2009.*

29. In determining the first issue, that is; whether the appellant was justified to summarily dismiss the respondent from his employment, the starting point is a consideration of the provisions of **section 44** of the **Employment Act**. It provides that summary dismissal takes place when an employer terminates the employment of an employee without notice or with less notice period than to which the employee is entitled by any statutory provision or contractual term. Subsection (3) thereof enables an employer to dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligation arising under the contract of service. Subsection (4) sets out various acts that may amount to gross misconduct so as to justify summary dismissal.

Section 44 (4) (d) is what the appellant herein relied upon in summarily dismissing the respondent. Such disciplinary action is justifiable if:

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

30. In its written submissions that were relied upon by the trial court in giving its award, the appellant stated that on 18th March, 2010 when the respondent was invited to a meeting by the appellant's Human Resources Manager to explore options regarding the possibility of the respondent rendering ground services pending release of his log book, the respondent and the Human Resources Manager got into some arguments. The appellant alleged that the respondent got upset, made verbal threats and used abusive language to the Human Resources Manager.

31. On 30th March, 2010 the appellant's Managing Director wrote to the respondent as follows:

“Dear Mohammed,

RE: DISMISSAL FROM EMPLOYMENT

This letter serves to inform you that you have been dismissed from the company employment with effect from 18th March, 2010. The reasons for this are listed below: Employment Act 44 (4) (d) – an employee uses abusive or insulting language or behaves in a manner insulting to his employer or to a person placed in authority over him by his employer. You are aware of the incident that took place on 18th of March.

Please return all company property in your custody to facilitate calculation of your final dues. Thank you for the past service and I wish you well in your future endeavours.”

32. The appellant did not specify the alleged abusive or insulting words that were uttered by the respondent. We think that that was a serious omission on the part of the appellant since the burden of justifying the ground for summary dismissal lies upon an employer. Had the appellant cited the abusive words the court would have had occasion to consider whether the words, in their natural meaning or in the

circumstances in which they were uttered they amounted to “**abusive or insulting language**”. No oral evidence was adduced before the trial court such that the Human Resources Manager could have testified and be cross examined on the issue. **Section 47(5)** of the **Employment Act** states as follows:

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

33. An employee has a right to dispute or allege that an act complained of as amounting to gross misconduct is not warranted in law. We are not satisfied that the appellant discharged the burden of proof that lay on him.

34. The appellant, having failed to prove that the respondent used abusive language towards the Human Resources Manager, acted unfairly in dismissing the respondent summarily. **Section 45 (2)** of the **Employment Act** stipulates what amounts to an unfair termination. We have already reproduced the subsection at paragraphs 24 above.

35. It cannot be denied that there was no fair procedure in terminating the respondent’s services. That was conceded by the appellant’s counsel.

The appellant did not comply with the procedure articulated under **section 41 (2)** of the **Employment Act** which states as follows:

“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”

36. In view of the foregoing, we find that the appellant’s act of summarily dismissing the respondent from its employment without giving him an opportunity to be heard amounted to unfair termination as defined under **section 45** of the **Employment Act**. In **KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS V MERU NORTH FARMERS SACCO LIMITED, [2013] eKLR**, the Industrial Court held that whatever reason or reasons that arise to cause an employer to terminate the services of an employee, that employee must be taken through the mandatory process as outlined under **section 41** of the **Employment Act**. That applies in a case for termination as well as in a case that warrants summary dismissal. See also **MARY CHEMWENO KIPTUI v KENYA PIPELINE COMPANY LIMITED [2014] eKLR**. We respectfully agree. 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. **Section 49** of the **Act** sets out the remedies for both wrongful dismissal and unfair termination. It states as follows:

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

- 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 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 dismissal and 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 months based on the gross monthly wage or salary of the employee at the time of dismissal.”*

37. **Section 49 (4)** of the **Employment Act** sets out several factors which a labour officer has to take into account in deciding whether to recommend the remedies specified above in paragraph 36. In determining a complaint or suit for wrongful dismissal or unfair termination of employment, **section 50** requires the Industrial Court to take into consideration the same factors. They are as follows:

- “a) the wishes of the employee;*
- b. the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and*
- c. the practicability of recommending reinstatement or re-engagement;*
- d. the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;*
- e. the employee’s length of service with the employer;*
- f. the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;*
- g. the opportunities available to the employee for securing comparable or suitable employment with another employer;*
- h. the value of any severance payable by law;*
- i. the right to press claims or any unpaid wages, expenses or other claims owing to the employee;*
- j. any expenses reasonably incurred by the employee as a consequence of the termination;*
- k. any conduct of the employee which to any extent caused or contributed to the termination;*
- any failure by the employee to reasonable mitigate the losses attributable to the unjustified termination; and*
 - any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee.”*

38. By a letter dated 9th December, 2007 the respondent had been given a warning by his employer for an incident which took place on 24th July, 2007 when the respondent insulted the appellant’s Operations Manager.

That was an important consideration that the trial court ought to have borne in mind in determining the respondent’s claim for compensation for unfair termination. It may therefore be argued that the respondent may have caused or contributed to his dismissal. That notwithstanding we have already made a finding that there was unfair termination of the respondent’s services.

39. The next issue that we must determine is whether the respondent’s demotion from the position of Chief Pilot to Line Training Captain was justified. We agree with the appellant that under the appellant’s Staff Policies and Procedures Manual and Performance Evaluation Policy the respondent’s performance had to be evaluated on a yearly basis. The respondent was well aware of that requirement. The appellant’s exhibit CMC 3 shows the performance evaluation that was conducted in respect of the respondent

sometimes in September 2008. On 24th September, 2008 the appellant's Managing Director wrote to the respondent and informed him that following the performance evaluation his title had been changed from that of Chief Pilot to Line Training Pilot and that his salary would be reviewed and changes communicated in due course. The respondent signed that letter in acceptance of the new position on 6th October, 2008. Following the re-assignment, the respondent's salary was also reduced from US\$9,000 to **US\$5075** (Kshs.406,000/=). There are several payment vouchers in the record of appeal which clearly show that between October 2008 and March 2010 the respondent was earning Kshs.406,000/=. We think it was unreasonable for the respondent to expect a salary of a Chief Pilot when he had been re-deployed to work as a Line Training Pilot. The learned trial judge erred in law when he held that the appellant had no legal right to reduce the respondent's salary based on an undated Performance Evaluation form.

40. We now turn to the award of **US\$108,000** being twelve months gross salary as compensation for unlawful loss of employment. In arriving at that sum, the trial court computed the respondent's monthly salary at US\$9,000, although we have already established that the respondent's last salary was US\$5,075. We have already set out the remedies for wrongful dismissal and unfair termination as stipulated under **section 49** of the **Act**. The trial court did not state why it opted to give the remedy provided under **section 49 (1) (c)** that is, twelve months gross salary, and not the other remedies under **section 49 (1) (a) or (b)**. The court should have been guided by the provisions of **section 49 (4)** but the trial judge said nothing about the reasons that led him to exercise his discretion in the manner he did. Although the respondent had prayed for an award of "**damages**" in the sum of US\$108,000 for unfair and wrongful termination of employment, it appears to us that in giving that award the trial court was not awarding damages as sought. The court stated that it was twelve months gross salary which is what **section 49 (1) (c)** provides as one of the remedies for wrongful dismissal.

41. The respondent was serving a two year contract of employment which was terminable by one month's notice or one month's salary in lieu of notice. Had the appellant complied with the requirements of **sections 41** and **45** of the **Employment Act**, the summary dismissal would have been a fair one. But to the extent that the appellant did not follow the statutory procedure the dismissal was found to be unfair, which we agree. Taking all this into consideration, we think that the respondent was not entitled to twelve months gross pay as compensation for wrongful dismissal. In our view, since the contract of employment was terminable by one month's notice, we believe that an award of one month's salary in lieu of notice would have been reasonable compensation. The trial court awarded that, albeit at a higher rate of US\$9000 instead of US\$5,075 plus twelve months salary amounting to US\$108,000. We hereby set aside the award of US\$9000 as one month's pay in lieu of notice and substitute therefor US\$5075. The award of US\$108,000 is set aside in its entirety.

42. As regards the respondent's cross appeal, we have already held that his demotion from the position of Chief Pilot to Line Pilot was lawful. Consequently, the claim for US\$33,000 on account of under payment of his salary does not lie. Regarding the claim for unpaid leave days, we agree with the trial judge that the respondent had utilized his annual leave for the year 2009. Having been dismissed on 30th of March, 2010 the respondent was entitled to proportionate leave days for the year 2010 amounting to 5.25 days which the trial court granted. The cross appeal is therefore without any merit and is dismissed accordingly.

43. In conclusion, the appellant's appeal is allowed with the consequence that the decision of the Industrial Court is partially set aside and substituted with an order that the respondent's dismissal be and is hereby reduced to a normal termination, the respondent is awarded one month's salary in lieu of notice in the sum of US\$5,075 and commensurate payment of 5.25 days' salary for accrued leave for the year 2010. Considering the outcome of this appeal, we order that each party bears its own costs of the appeal, the cross appeal and of the proceedings in the Industrial Court.

Dated and Delivered at Nairobi this 24th day of April, 2015.

W. KARANJA

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR