IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, MUSINGA & GATEMBU, JJ.A)

CIVIL APPEAL NO. 72 OF 2014

BETWEEN

HEMA HOSPITAL ……. APPELLANT

AND

DR. WILSON MAKONGO MARWA .....…. RESPONDENT

(Appeal from a Judgment of the Industrial Court at Kisumu (H. S. Wasilwa, J.) dated 18th day of September, 2014

in

CAUSE NO. 256 OF 2013)

****

JUDGMENT OF THE COURT

1. This is an appeal by Hema Hospital, the appellant, against the judgment of the Industrial Court of Kenya at Kisumu (H. S. Wasilwa, J.) delivered on 18th September 2014 awarding Dr. Wilson Makongo Marwa the respondent Kshs. 3,136,167.00 for unlawful and unfair termination of employment.

Background

2. By a letter of appointment dated 6th January 2006, the appellant, Hema Hospital, (the hospital) employed the respondent, Dr. Wilson Makongo Marwa, a doctor of Medicine and Surgery (the doctor) to serve the hospital as a resident medical doctor at a monthly salary of Kenya Shillings 110,000.00 with a provision for annual salary increment of between 6% and 10%.

3. The relationship between the hospital and the doctor appears to have progressed well until the year 2013. According to the doctor, he fell ill in February 2013 and was, with the knowledge of the hospital, hospitalized at Karen Hospital, Nairobi between 5th February 2013 and 9th February 2013. After his discharge from Karen hospital, the doctor applied for, and was granted his annual leave from the hospital. His leave commenced on 11th February 2013 and ended on 10th March 2013. He reported back to work at the hospital on 11th March 2013 and worked until 2nd May 2013 when he had to return to Karen Hospital, Nairobi for medical follow up. He thereafter

returned to the hospital on 4th May 2013 and continued working until 6th May 2013.

4. There is controversy as to what transpired on 6th May 2013. According to the doctor, at about 3.00 p. m on that day, the administrator of the hospital, one Mr. Simiyu Winster, called him and informed him that the Managing Director of the hospital, one Dr. Hezron Manduku, wished to see him. The doctor went to Dr. Manduku's office situated within the hospital premises, where after exchanging pleasantries, Dr. Manduku informed him that the hospital had employed another doctor "*and hence directed that* [the doctor should] *cease to work with the…hospital*." He accordingly stopped working for the hospital effective 7th May 2013.

5. The hospital administrator, Mr. Simiyu Winster, (Simiyu) who testified before the trial court on behalf of the hospital, denied having played any part in the events of 6th May 2013 at the hospital as narrated by the doctor. Simiyu stated in his evidence that "*on 6. 5. 2013, I was not on duty. I had taken off and was in Nakuru and came back on 9. 5. 2013*." He denied having asked the doctor to go and see Dr. Manduku maintaining that "*on 6. 5. 2013, I never called him to go and see Dr. Manduku*." Simiyu went on to say that upon his return to work from Nakuru on 9th May 2013, he realized that the doctor was not on duty and on enquiring, Dr. Manduku informed him that the doctor had gone for further treatment; that on 20th May 2013, Dr. Manduku called him and informed him that the doctor was admitted at Aga Khan Hospital Kisumu and was requesting for an advance salary; that he talked to the hospital accountant and Kshs. 191,000.00 was deposited into the doctor's bank account. A credit advice for that amount dated 20th May 2013 was produced as an exhibit.

6. Although the doctor acknowledged that an amount of Kshs. 191,000.00 was deposited into his bank account, according to him that payment related to salary arrears for the months of January and February 2013 when the hospital paid him Kshs. 80,000.00 for each of those months instead of his monthly entitlement of Kshs. 155,000.00; that there was therefore an under payment of Kshs. 150,000.00 for the two months in addition to which he was paid for the period of 7 days he worked in the month of May 2013.

7. After reviewing the evidence, the trial Judge found as a fact that the doctor's employment was verbally terminated by the hospital on 6th May 2013. In her judgment, the learned Judge said:

"It *is the finding of this Court that the respondent verbally dismissed the claimant. The manner of dismissal being verbal was unlawful and unfair and this breaches the provisions of law and fair labour practices."*

8. Based on that finding, the Judge awarded the doctor, as relief, a total of Kshs. 3,136,167.00 made up of Kshs. 155,000.00 being one month's salary ***"given that the claimant was not given any notice before dismissal";*** Kshs.1,085,000.00 being ***"payment of service equivalent to 1 month salary for each year worked = 7 x155, 000.00 = Kshs.1,085,000.00";*** Kshs.1,860,000.00 being ***"12 months' salary as compensation for unlawful termination=12x155, 000.00/="*** and Kshs. 36,167/= being ***"salary for days worked in May 2013"***

9. Aggrieved, the hospital has in this appeal challenged the holding that the doctor was unlawfully and unfairly dismissed from employment and the award of Kshs. 3,136,167.00.

<u>The appeal and submissions by counsel</u>

10. The appeal is based on the grounds that the decision is against the weight of the evidence; that the award for service pay is not contemplated under Section 49(1) of the Employment Act; that in making the awards the Judge did not have regard to Section 49(4) of the Employment Act and that the award of damages for unlawful termination was made in error.

11. Learned counsel for the hospital, Mr. N. L. Ombachi, referred us to the memorandum of appeal

and submitted that the finding by the Judge that the doctor was verbally dismissed is not supported by evidence; that the Judge wrongly relied on a remark *"dismissed at 2.30pm"* endorsed on the duty roster for the month of May 2013 to support that finding when there was no evidence that the endorsement was done by the hospital; that the Judge wrongly awarded salary for days worked in May 2013 when the doctor had acknowledged payment in that regard; that the award of Kshs.1,085,000.00 for service pay was made without any basis and that the same is not available under Section 49 of the Employment Act, Act No. 11 of 2007 (the Act); that in granting the awards, the Judge should have had regard to Section 49(4)(m) of the Act; that the award of Kshs. 1,860,000.00 being 12 months' salary as compensation for unlawful termination is punitive and not justified; and that in making the award the Judge ought to have considered that the doctor was not at work on account of illness from February to May 2013. For those reasons, Mr. Ombachi urged us allow the appeal and set aside the judgment of the lower court.

12. Mr. J. M. Oguttu, learned counsel for the doctor, opened his address by conceding that the award for Kshs. 36,167.00 for days worked in May 2013 was indeed made in error. Beyond that, Mr. Oguttu submitted that the appeal has no merit, urging that the finding by the Judge that the doctor was verbally dismissed was well founded; that Simiyu, the witness for the hospital, was not in a position to controvert the doctor's testimony that Dr. Manduku verbally dismissed him on 6th May 2013 as Simiyu was not present when the conversation between the doctor and Dr. Manduku took place; that it is not clear why Dr. Manduku who was privy to that conversation and who would have been better placed to testify on the controversial events of 6th May 2013 was not called as a witness; that an adverse inference should be drawn that had Dr. Manduku been called to testify his evidence would have been adverse to the hospital. Furthermore, counsel went on to say, the duty roster to which the Judge made reference is a document that is prepared by the hospital and the doctor could not have made the endorsement.

13. As regards the contention by the hospital that the doctor was away on sick leave and was not dismissed, Mr. Oguttu submitted that no application for leave by the doctor was produced to support that claim; that the amount of Kshs. 191,000.00 that the hospital claims was an advance salary made to the doctor was in fact payment of arrears of salary for months of January and February 2013 when the doctor's salary was underpaid.

14. As regards the reliefs granted by the Judge, Mr. Oguttu submitted that the same were correctly awarded; that an award under Section 35(2) of the Act is separate from and independent of relief under Section 49 of the same Act; that severance pay is an entitlement upon leaving employment and is not dependent on either termination or dismissal; that the Judge correctly applied her mind and there was no error made in granting the awards. In support of his arguments, Mr. Oguttu invited us to consider the decisions of the Industrial Court of Kenya in **Cause No. 562 of 2012 between Shankar Saklani vs. DHL Global Forwarding (K) Limited** and **Harrison Meshack Lusimbo & Anor vs. Mareba Enterprises Limited [2013] eKLR**.

Determination

15. We have considered the appeal and the submissions by learned counsel. There are two issues that require consideration. The first is whether the finding by the learned Judge that the doctor was verbally dismissed by the hospital and that the dismissal was illegal and unfair is well founded and supported by evidence. The second issue is whether the reliefs of one month's salary in lieu of notice; service pay equivalent to one month's salary for each year worked; and compensation of 12 months' salary for unlawful termination were properly awarded.

16. In addressing those issues, we are under duty to review the evidence and draw our own conclusions, bearing in mind that we did not have the opportunity to hear and see the witnesses as they testified. [See **Selle vs. Associated Motor Boat Co Ltd [1968] EA 123.**] With those considerations in mind, we will first address the question whether the finding that the doctor was verbally dismissed by the hospital and that dismissal was illegal and unfair is well founded and supported by evidence.

17. We begin by observing that in his written witness statement dated 12th September 2013 that was filed before the lower court, the doctor averred in elaborate terms that having been employed in January 2006 he worked until May 2013; that he was hospitalized in February 2013; that he thereafter went on leave until 10th March 2013; that he worked from 11th March 2013 up to 2nd May 2013; that he went for medical checkup at Karen Hospital and returned to work on 4th May 2013. In his words:

"7. I then returned to my place of work on the 4th day of May, 2013 and worked until the 6th day of May, 2013, at about 3.00 p.m., when Dr. Hezron Manduku, who is the Managing Director of the Respondent Hospital sent the Hospital Administrator, namely, a Mr. Simiyu, to come and call me.

8. Upon being called by the said Hospital Administrator, (details in terms of paragraph 7 hereof), I went to the offices of the Managing Director, located within the Respondent's Hospital, whereat I met Dr. Hezron Manduku, who after exchange of pleasantries, informed me that he has since employed another Doctor and hence directed that I cease to work with the Respondent Hospital.

9. As a result of the foregoing, the said Dr. Hezron Manduku instructed me to cease working w.e.f 7th day of May, 2013. Consequently, I stopped working with the Respondent Hospital on the 7th day of May, 2013.

10. I wish to point out that at the time when Dr. Hezron Manduku, instructed me to cease working with the Respondent Hospital, same did not issue and/or serve upon me, a letter of dismissal from and/or serve upon me, a letter of dismissal from and/or termination of employment.

11. Be that as it may, I heeded the instructions and stopped working with the Respondent Hospital, as advised."

18. Subsequent to that rather elaborate statement, Simiyu filed his witness statement dated 26th September 2013 on behalf of the hospital. It is surprising that in his statement, Simiyu did not make any reference to the controversial events of 6th May 2013 on which the doctor had expounded in his statement as reproduced above. However, in his oral testimony before the court, Simiyu denied that he called the doctor on 6th May, 2013 on instructions of Dr. Manduku and asserted that he was away in Nakuru on that date and that he subsequently realized that the doctor was not at work and that on enquiring from Dr. Manduku he learnt that the doctor was away *"for further treatment."* Why Mr. Simiyu did not consider it necessary when making his written witness statement to allude to those matters is not clear to us.

19. It is also not clear to us why Dr. Manduku, who would have had firsthand knowledge of the critical and controversial events of 6th May 2013, was not called to testify. The hospital chose to rely instead on the second hand version of events as narrated by Simiyu. That is even more puzzling, considering that when this appeal was called out for hearing before us, counsel for the appellant applied to have the hearing of the appeal adjourned in order for Dr. Manduku to be present. One would have expected Dr. Manduku to have been as enthusiastic, if not more to attend the trial before the lower court where his testimony would have been of great benefit to the court. In the result, it is not surprising that as between the testimony of the doctor and that of Simiyu, the Judge preferred the evidence of the doctor as the more probable account of the events of the 6th May 2013. Furthermore, if as the hospital maintained, the employment of the doctor was not terminated on 6th May 2013 or at any time thereafter, it is perplexing that if indeed the hospital considered that the doctor was still an employee of the hospital after 7th May, 2013, he was not paid any salary beyond the 7 days worked in May 2013.

20. As Radido, J. observed in **Mary Mutanu Mwendwa vs. Ayuda (2013) eKLR**:

> "*The Employment Act, in a radical departure from the position which obtains under the common law and in Kenya prior to 2 June 2008 has made it mandatory by virtue of section 41 for an employer to notify and hear any representations an employee may wish to make whenever his/her termination is under contemplation by the employer if the ground for the termination relates to the employees misconduct, poor performance or physical incapacity. The employee is by law even entitled to have a representative present."*

21. This Court in **CMC Aviation Limited vs. Mohammed Noor [2015] eKLR** also reaffirmed that the dismissal of an employee in that case without according him an opportunity to be heard amounted to unfair termination.

22. The respondent's employment with the appellant was terminated without notice. His dismissal did not accord with the procedural process and was therefore procedurally unfair.

23. For those reasons, the finding by the Judge that the doctor was verbally and effectively summarily dismissed from employment cannot be faulted and we have no basis for interfering with that finding.

24. We turn now to the reliefs awarded by the Industrial court. As indicated above, the learned Judge awarded the doctor Kshs. 155,000.00 being one month's salary in lieu of notice on the basis that "*the claimant was not given any notice before dismissal*"; Kshs. 1,085,000.00 on the basis that, "*the claimant is also entitled to payment of service pay equivalent to 1 month salary for each year worked*"; and Kshs. 1,860,000.00 on the basis that "*claimant is entitled to 12 months' salary compensation for unlawfully (sic) termination*". Those reliefs accorded with the doctor's prayers as set out in his statement of claim save that the Judge awarded ***'service pay'*** instead of ***'severance pay'*** that the doctor had sought in his statement of claim.

25. We have already expressed our concurrence with the characterization by Radido, J. of the Employment Act in **Mary Mutanu Mwendwa vs. Ayuda** (supra) as a *"radical departure."* The provisions in Article 41 of the Constitution of Kenya, 2010 guaranteeing the right to fair labour practices, amongst other provisions, recognizing the inherent dignity and the right to have that dignity respected and protected and the provisions of Section 49 of the Employment Act, Act No. 11 of 2007, reflect a change in the philosophical and theoretical framework underpinning remedies for wrongful dismissal and unfair termination in Kenya. Before that, courts, when rendering awards, tended to look at the relationship between an employer and an employee in purely commercial and contractual terms.

26. In a paper titled "*Emerging jurisprudence from the Labour and Employment Court Kenya on the question of reinstatement and principle of awards of damages in Employment"* presented at the Judges Annual conference in August, 2015, Harrison Okeche, Advocate put it this way:

> ***"Prior to 2010 Constitution breach of the individual employment contract constituting individual dispute were mainly handled by the conventional courts, the magistrate's court and the High Court. The cases mostly of wrongful dismissal were decided based on common law principles. The employer needed not to show any motive or give any reason for the termination of employment. The employer was only required to give notice of the termination or payment in lieu of such notice. The remedy for wrongful dismissal was pay equivalent to notice period under the contract of employment. The repealed Employment Act Cap. 226 under section 16 embodied the common law principle. The Court of Appeal and the High Court applied the principle in various cases such as, Kenya Revenue Authority V Menginya Salim Murgani [2010] eKLR, East African Airways V Knight (1979) EA 165, Muuthuri V National Industrial Credit Bank Ltd (2003) KLR 145; Joseph Okumu Simiyu V Standard Bank (K) Ltd (unreported)."***

27. Writing on the subject of fair compensation for unfair dismissal in the context of the South

African Labour law experience, Professor S. Vettori argues in her article; *"The role of Human dignity in the assessment of fair compensation for unfair dismissal"* that:

"In weighing up the interests of the respective parties it is of paramount importance to ensure that a delicate balance is achieved so as to give credence not only to commercial reality but also to a respect for human dignity. Consequently, when a court has to assess the amount of compensation to award for the unfair conduct of the employer, which usually takes the form of an unfair labour practice or an unfair dismissal, it must achieve a balance between the sometimes competing policy considerations of human dignity and equality on the one hand and commercial reality on the other hand. These rights are often the competing rights of the employer on the one hand and the employee on the other."

28. The Labour Appeal Court of South Africa in **Le Monde Luggage cc t/a Pakwells Petze vs. Commissioner G. Dun and others, Appeal Case No. JA 65/205** when applying provisions of the Labour Relations Act of South Africa held that:

"The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This Court has been careful to ensure that the purpose of the compensation is to make good the employee's loss and not to punish the employer."

Under S. 193 of the Labour Relations Act, the Labour Court of South Africa is empowered to order payment of compensation to an employee, limited, under S. 194 to *"no more than the equivalent of 12 months remuneration."*

29. A similar approach was correctly adopted by Rika J, in **D. K. Njagi Marete vs. Teachers Service Commission (2013) eKLR** where he stated that:

"….employment remedies must be proportionate to the economic injuries suffered by the employees. These remedies are not aimed at facilitating the unjust enrichment of aggrieved employees; they are meant to redress economic injuries in a proportionate way."

And later that:

"……in examining what remedies are suitable in unfair employment termination, the Court had a duty to observe the principle of a fair go all round."

30. In **Abraham Gumba vs. Kenya Medical supplies Authority [2014] eKLR**, Rika, J. stated;

"The employment relationship is not a commercial relationship, but a special relationship, which must be insulated from the greed associated with the profit-making motives, inherent in commercial contracts. This has been the historical justification of capping compensatory damages since the era of the Trade Disputes Act Cap 234 the Laws of Kenya, to a maximum of 12 months' salary."

31. That said, the statutory remedies for wrongful dismissal or unfair termination are dealt with under Section 49 of the Act. Section 50 of the Act requires the court to have regard to the provisions of Section 49 of the Act. The effect of Sections 49 and 50 is that where a labour officer or the court considers summary dismissal or termination of a contract of employment unjustified the employer may be required to pay the employee:

"(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 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 month's wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal."

32. There is also provision, with which we are not for present purposes concerned, under Section 49(3) of the Act permitting reinstatement or re-engagement of an employee.

33. The power to award the remedies provided for under Section 49 of the Act is discretionary. Judicial discretion must however be exercised judiciously. This court will interfere with the exercise of such discretion when, in the words of this Court in **Mbogo and Another vs. Shah [1968] E A 93,** it is satisfied that the decision of the lower court is clearly wrong:

> ***"….. because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."***

34. In exercising its discretion under Section 49 of the Act, the court should have regard to factors set out under Section 49 (4) of the Act which include any or all of the following:

"(a) the wishes of the employee;

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

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

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

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

(f) The reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;

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

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

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

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

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

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

(m) any compensation, including ex gratia payment, in respect of termination of employment

paid by the employer and received by the employee."

35. The list of categories of factors for consideration when exercising the judicial discretion to award remedies is however not limited to the factors set out under Section 49(4) of the Employment Act. It is therefore imperative, in our view, for a court awarding reliefs under Section 49 to give reasons or the factors it has taken into consideration for the awards it makes. In other words, we think that in granting the remedies under this section the court should expressly state the factors that it has taken into account.

36. In the present case, the learned Judge did not, with respect, rationalize or give reasons for granting the awards in the manner that she did. No reasons for awarding service pay, for example, were given in the judgment. Neither were reasons given for awarding service pay at the rate of one month's salary. The Judge did not also give reasons why she pegged the award for compensation for unlawful termination at 12 months' salary. Absent an explanation by the learned Judge regarding the basis on which she awarded those reliefs, it seems to us that the Judge accepted and adopted wholesale the submissions made by counsel for the doctor without question.

37. We first deal with the award of Kshs. 1,085,000.00. As we have already noted, the Judge labeled this award *"service pay"* when in fact the doctor had sought *'severance pay"* in his statement of claim as well as in his submissions. The prayer for the award for severance pay of Kshs. 1,085,000.00 was justified in the respondent's submissions. It is necessary to reproduce at length the submission made on behalf of the respondent in the lower court.

"(28) The Claimant herein has also sought for severance pay. It is worthy to note that the claimant had worked for the Respondent Hospital for a period of 7 years. During the said period, the Claimant was the sole Resident Doctor and same worked both during the day and the night. Indeed, the evidence to this effect, was tendered by the Claimant and same neither disputed nor controverted by the Respondent.

(29) In any event, a claim for Severance pay is statutorily provided for under the provisions of Section 35(5) of the Employment Act, 2007. Though the said Provision does not provide for the rate to be applied in the computation of Severance pay/Gratuity, Courts have occasionally invented a scheme whereby the rate provided for redundancy, has been applied. For clarity, the rate provided for in this regard, has been 15 days salary for every year worked.

(30) However, it is imperative to note that the Claimant herein is a Medical Doctor by Profession. Besides, the Claimant herein used to work both in the day and night. Consequently, the kind of work the Claimant used to perform was indeed demanding the hence (sic) the Claimant proposes that Severance pay be computed and worked on the basis of one (1) month's salary for every year worked.

(31) Owing to the foregoing, it is the Claimant's prayer that an award of Kshs.1,085,000/= only, be granted under the heading the Severance pay.

38. The submission by counsel for the doctor before the Judge was that *"a claim for severance pay is statutorily provided for under the provisions of Section 35(5) of the Employment Act."*
39. Section 35 of the Act deals generally with termination notice. Section 35(1) is a *'deeming'* provision. It stipulates the length of notice required to terminate different types of contracts of service. Where the contract is to pay wages daily, the contract is terminable by either party at the close of any day without notice. Where the contract is to pay wages at intervals of less than one month, the contract is terminable by either party at the end of the period next following the giving of notice in writing. Where the contract is to pay wages or salary periodically at interval of or exceeding one month, the contract is terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.
40. Provision in any contract of service whose terms provide for giving of a period of notice greater than the notice period specified in section 35(1) of the Act would however be given effect.

41. Under section 35(5) of the Act, an employee under the category of the contract of service to pay wages or salary periodically at interval of or exceeding one month that is terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing whose contract is terminated in accordance therewith is entitled to **service pay** for every year worked, "*the terms of which shall be fixed*."
42. **Severance pay**, on the other hand is based on section 40 of the Act and is payable in the event of redundancy. There is, therefore, a distinction between "service pay" referred to in section 35(5) of the Act and "severance pay" under section 40(g) of the Act under which an employer is required to pay to an employee declared redundant severance pay "***at the rate of not less than fifteen days' pay for each completed year of service***.*"*
43. Based on the record, it was not the doctor's case before the lower court that he was declared redundant so as to entitle him to claim severance pay. There was therefore no basis for the claim for severance pay. Even if an award for severance pay would have been tenable, it was not shown why it was claimed at the rate of one month's salary for each completed year of service and not, for example, at the rate of 15 days pay for each completed year of service referred to under section 40(g) of the Act.
44. Even if we were to assume that the doctor intended to claim service pay, which is what the Judge ultimately awarded, under section 35 of the Act, no evidence was led on the issue of service pay, particularly having regard to section 35(6) of the Act, which provides that service pay is *not payable where an employee is a member of ;*

"(a) a registered pension or provident fund scheme under the Retirement Benefits Act;

(b) a gratuity or service pay scheme established under a collective agreement;

(c)any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and

(d) The National Social Security Fund*."*

45. Although the pay slips presented before the trial court do not show any deductions made from the doctor's salary towards any of the schemes referred to under section 35(6) of the Act, we cannot assume no evidence would have been led on the matter had the issue of payment of '*service pay'* been raised before the court. There is, as we have said, a difference between a claim for severance pay and a claim for service pay. Based on the material before the lower court, we are not satisfied that an award for either heads of claim was justified.
46. For those reasons the award for service pay of Kshs.1.085, 000.00 cannot be sustained and is hereby set aside.
47. We turn next to the awards of one month's salary of Kshs.155,000.00 and of Kshs. 1,860,000.00 being "*12 months' salary compensation for unlawfully (sic) termination*". We will address the two together.
48. The justification by the doctor for the claim for salary in lieu of notice, which he claimed for three months, was set out in the respondent's submissions in the lower court in terms that he is entitled to three months' salary in lieu of notice in so far as his "*employment was summarily terminated, without due regard to the provisions of section 41 and 43(3) of the Employment Act*"

49. Section 41 of the Act that deals with notification and hearing before termination of employment on grounds of misconduct requires that 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. The employee is entitled to have another employee or a shop floor union representative of his choice present during such explanation.
50. Under section 41(2) "*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*."

51. In effect, the basis on which the respondent sought an award for three months' salary in lieu of notice was on account of the contention that his dismissal did not accord with the procedural process outlined in section 41 of the Act. In other words, the basis on which that relief was sought was that his dismissal was procedurally unfair.
52. The award for twelve months salary that the respondent successfully claimed for *"compensation for loss of employment"* was justified in the respondent's submissions before the trial court thus:

"(26) On the other hand, the Claimant's employment was brought to an abrupt and painful end without any prior Notice and/or warning. Indeed, the Respondent concedes, that at the time of the summary termination, the Claimant herein was indisposed and had variously sought for specialized treatments. Consequently, the summary dismissal, no doubt generated extreme anxiety and mental anguish.

(27) Taking into account the circumstances under which the Claimant's employment was determined coupled with the Claimant's ill health at the material time, it is the Claimant's submissions that same is entitled to compensation for loss of employment. In this regard, the Claimant proposes an award of 12 months' salary at the rate of Kshs.155,000/= only, making a total of Kshs.1,860,000/= only.

53. There is no doubt that the doctor, whose employment was terminated summarily and verbally without notice, is entitled to relief under Section 49 of the Act. As we have stated above, the court has the power to order, amongst other things, payment of wages the employee would have earned had he been given the period of notice to which he was entitled and the payment of the equivalent of a number of months wages of salary capped at twelve months. Each case is different. The peculiar circumstances of each case should have a bearing on the nature and quantum of relief that should be awarded. As already indicated, Section 49 (4) requires the court to have regard to such factors as the length of service, the opportunity available for procuring comparable or suitable employment, the duty to mitigate, among other factors.

54. The doctor is undoubtedly a qualified, duly registered and licensed medical doctor. When he testified before the lower court on 23rd July, 2014, he stated that he was practicing medicine. He did not suggest that he was either unemployed or out of work. The description ascribed to the plaintiff in **Menginya Salim Murgani vs. Kenya Revenue Authority [2008] eKLR** by Ojwang, J, as he then was, is true of the doctor in this case. Ojwang, J, described the plaintiff in that case as;

"…… an able-bodied, and intellectually and professionally, a well-endowed man. From his curriculum vitae…. I recognize, on the basis of judicial notice, that the plaintiff is a well-educated and trained professional who is most likely to find occupational engagement, outside the defendant's employ. These facts are to be applied to the governing principle of law, that an aggrieved party in a civil dispute, has the obligation to mitigate his or her own losses."

55. The doctor had a duty to mitigate his loss. In **CMC Aviation Limited vs. Mohammed Noor** (supra) this Court set aside an award of 12 months' gross salary as compensation for wrongful dismissal, having regard to the circumstances of that case, including the consideration that the respondent was serving a two year contract of employment that had provision for termination by one month's notice or one month's salary in lieu of notice. This Court stated:

*"**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 an award of one month's salary in lieu of notice would have been reasonable compensation**."*

56. Compensation under Section 49 of the Act is not confined to the wages which an employee would have earned had the employee been given the period of notice to which he was entitled. It may include that and more, having regard, as we have said, to the peculiar circumstances of each case.

57. In the circumstances of the present case, where the claimant is a medical doctor who had worked for the hospital for just over six years; who did not indicate, at the time of the trial in July, 2014 that he was out of work and all indications were indeed that he was practicing his profession; where there is no evidence of mistreatment of the doctor by the hospital, where in light of the constitutionally protected right to dignity, it cannot be said that the hospital robbed the doctor of his dignity, we think an award of three months' salary as compensation for wrongful dismissal is reasonable compensation.

58. The doctor conceded that the award of Kshs. 36,167.00 was made in error.

59. We accordingly set aside the award of Kshs.3,136,167.00 in its entirety and substitute therefore an award of Kshs.465,000.00 being the equivalent of three months' gross salary.

60. Having found, as we have, that the learned Judge of the lower court correctly held that the doctor was unfairly dismissed, the doctor shall have costs of the lower court case and of this appeal.

Dated and delivered at Kisumu this 25th day of November, 2015.

D. K. MARAGA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

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

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DEPUTY REGISTRAR