



REPUBLIC OF KENYA



**H Young & Co. (E.A) Ltd v Kobong (Appeal E10 of 2024)
[2025] KEELRC 514 (KLR) (24 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 514 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E10 OF 2024
NJ ABUODHA, J
FEBRUARY 24, 2025**

BETWEEN

H YOUNG & CO. (E.A) LTD APPELLANT

AND

STEPHEN BUSUTU KOBONG RESPONDENT

*(Being an appeal from the Judgment and Orders of Hon. Principal Magistrate
C.K Cheptoo In Milimani CMELRC No. E1887 Of 2021 Stephen Busutu
Kobong Vs H. Young & Co. (E.A) LTD, delivered on 15th December 2023)*

JUDGMENT

1. Through the Memorandum of Appeal dated 15th January 2024, the Appellant appeals against part of the Judgement, decree and Orders of Honourable Principal Magistrate C.K Cheptoo delivered on 15th December, 2023.
2. The Appeal was based on the grounds that:
 - i. The Learned Magistrate erred in law and fact and misdirected herself in awarding the Respondent 10 months' salary as compensation for unfair termination.
 - ii. The award of 10 months' salary compensation for unfair termination was exorbitantly high.
3. The Appellant prayed that the Judgment of the Honourable Principal Magistrate C.K Cheptoo delivered on 15th December 2023 as regards 10 months' salary compensation for unfair termination be set aside and this court to find that the Respondent was not entitled to 10 months' salary compensation with costs of the trial court and this Appeal.
4. The Appeal was disposed of by written submissions.



Appellant's Submissions

5. The Appellant's Advocates Okwach & Co. Advocates filed written submissions dated 26th November 2024 and on the issue of whether the 10 months' compensation was exorbitantly high and or justified, counsel submitted that the same was exorbitantly high on the ground that the Respondent had worked for only 2 years and 9 months from 27th November 2018 – 3rd September 2021.
6. Counsel relied on among others the case of *Kwale International Sugar Company Ltd v Mbaya* (Civil Appeal E059 of 2022) [2024] KECA 795 (KLR) (12 July 2024) (Judgment) and submitted that the trial Judge in considering the award took into account irrelevant considerations and or failed to take into account relevant considerations, which act then invites this Court's intervention.
7. Counsel also relied on the findings in *Alfred Ogenche Nchore v Kenya Kazi Services Ltd* (2022) eKLR, *Kenya Commercial Bank Limited v Thomas Nyangi Mwita* (2019) eKLR and *Justus Orina Mariita v Accurate Steel Mills Limited* (2022) eKLR and submitted that a maximum of 3 months' compensation would be applicable in this case and pray that the court award the Respondent as such.
8. Counsel relied on the case of *Riley Falcon Security Services v Adhiambo (Appeal E002 of 2022)* [2023] KEELRC 3087 (KLR) (30 November 2023) (Judgment) and submitted that, the Trial Court did not justify or give reasons as to why it awarded the Respondent a whole 10 months' compensation.

Respondent's Submissions

9. The Respondent's Advocates Samuel, Mburia & Company Advocates filed its submissions dated 9th December 2024 and on the issue of whether the Learned Magistrate erred in law and fact by awarding the Respondent 10 months' salary as compensation for unfair termination, submitted that section 49 (1) (c) of the *Employment Act* 2007 provided that the Court had power to award compensation up to a maximum of 12 months' gross salary. When giving an award under section 49 of the *Employment Act*, a court of law is expected to exercise judicial discretion on what is fair in the circumstances. Counsel relied on the case of *Mbogo & another versus Shah* (1968) EA 93 and submitted that a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion misdirected himself in some matter and as a result has arrived at a wrong decision or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of that discretion and that as a result there had been injustice.
10. Counsel submitted that the Appellant has not demonstrated how this exercise of discretion by the trial court was inconsistent with the *Employment Act, the Constitution* of Kenya and relevant statutory provisions and that the application of Section 49 of the *Employment Act* should be based on a case to case basis
11. Counsel relied on the case of *D K Njagi Marete v Teachers Service Commission* [2020] eKLR and submitted that the peculiar circumstances of each case should have a bearing on the nature and quantum of relief that should be awarded.
12. Counsel submitted that the Appellant has not challenged the determination of the trial court that the Respondent's termination was unfair therefore, the award by the trial court was reasonable and should be upheld.

Determination

13. The court has considered the pleadings and submissions filed by the parties herein and observes that the principles which guide this court in an appeal from a trial court are now well settled. In *Selle And*



Another v Associated Motor Boat Company Ltd & Others, [1968] EA 123, Sir Clement De Lestang, Vice President of the Court of Appeal for East Africa stated those principles as follows: -

“An appeal to this Court from a trial by the High Court is by way of a 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 conclusions 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 in the case generally.”

14. The Judgment of the trial court was entered as against the Appellant by finding that the termination of the Claimant failed both procedural and the substantive justification test hence unfair and unlawful. The court awarded the Respondent one-month salary in lieu of notice, damages for unlawful termination at ten months’ salary and certificate of service with costs and interests. The Appellant was aggrieved on the award of 10 months’ salary as compensation for unfair termination which it terms as excessive in the circumstances.
15. The appeal is therefore on this single issue of whether the trial court erred by awarding the respondent 10 months’ salary as compensation for unfair termination of service and whether the same was excessive.
16. It was the Appellant’s case that the award of 10 months’ salary as compensation for unfair termination of the Respondent was exorbitantly high considering that the Respondent only worked for 2 years 9 months. On the other hand, it was the respondent’s case that the appellant having not challenged the determination of the trial court on the issue of termination and fairness thereof, the award was reasonable in the circumstances and should be upheld.
17. This court notes that when making an award under Section 49 of the *Employment Act*, it is exercising judicial discretion on what is fair in the circumstances. Black’s Law Dictionary 9th edition at page 534 defines judicial discretion as follows:

“the exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court’s power to act or not to act when a litigant is not entitled to demand the act as a matter of right”

18. It is now an established principle that for an appellate court to interfere with the award of damages made by the trial court, there has to be sufficient grounds. Newbold P in *Mbogo v Shah* [1968] EA 93 while determining the principles that guide the court on interference with the exercise of judicial discretion held that:

“... a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”



19. The court is of the opinion that the awards must be reasonable and must be assessed with moderation taking into account the provisions of Section 49(4) of the Employment Act and in this case particularly those of Section 49(4)(b) and (e) that is :
- (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
 - (e) the employee's length of service with the employer.
20. As was stated by the Court of Appeal in the case of Cecilia W. Mwangi and Another v. Ruth W. Mwangi CA No. 251 of 1996 (unreported), awards of damages must be within limits set by decided cases and also within limits that Kenyans can afford. The Court notes that the Respondent was in employment of the Appellant for a period of 2 years 9 months. A look at the authorities relied on by the Appellant in its submissions including that of Alfred Ogenche Nchore v Kenya Kazi Services Limited [2022] eKLR, the court while making an award of three months' salary as compensation took consideration of the following:
- i. The Claimant worked for the Respondent for three years and six months and wished to continue.
 - ii. The Claimant contributed to the summary dismissal...
 - iii. The Claimant testified that he had suffered immensely since he lost his job.
21. The trial court became of the view that the the Appellant failed in its mandate under Section 43 and 45 of the Employment Act and that in any legal proceedings where the employee alleges unfair termination like the present suit, the employer had a burden to prove that it had a valid and fair reason for dismissing the employee.
22. From the foregoing, the court finds that while 10 months' compensation as awarded by the trial court could be high in comparison with awards of cases of the same caliber. The appellant did not demonstrate that Respondent contributed to the termination. In any event, the maximum award of 12 month's salary as compensation for unfair termination of service is not a function of the length of service only, though relevant. Such an award is determined based on the reason and the circumstances of the termination. An employee who recently joined an organization may have taken a career gamble by leaving his or her previous employment with the hope that the new employment will better their career and offer better compensation. A dismissal in a manner so egregious that no reasonable employer would have dared, would attract as much fury from the court, as an employee who has served almost a lifetime and is dismissed under similar circumstances.
23. In the upshot and in view of the observations made hereinabove, the Court finds the appeal without merit and the same is hereby dismissed with costs.
24. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2025

DELIVERED VIRTUALLY THIS 24TH DAY OF FEBRUARY, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

