Kiogora Mutai t/a Kiogora Mutai & Co. Advocates v Khavagali (Employment and Labour Relations Appeal E110 of 2023) [2025] KEELRC 1717 (KLR) (12 June 2025) (Judgment)

Neutral citation: [2025] KEELRC 1717 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E110 OF 2023

JW KELI, J

JUNE 12, 2025

BETWEEN

KIOGORA MUTAI T/A KIOGORA MUTAI & CO. ADVOCATES .. APPELLANT

AND

RONALD MUSEVE KHAVAGALI ..... RESPONDENT

(Being an Appeal from the Judgment and Orders of the Honourable P.K. Rotich (SPM) delivered at Nairobi on the 7th day of June, 2023 in MCELRC No. E736 of 2020)

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Orders of the Honourable P.K. Rotich (SPM) delivered at Nairobi on the 7th day of June, 2023 in MCELRC No. E736 of 2020 between the parties filed a memorandum of appeal dated 23rd June 2023 seeking the following orders:-
    a. This Appeal be allowed.
    b. The judgment delivered by the Honourable Paul K. Rotich in Milimani CM ELRC E736 of2020: Ronald Museve Khavangali vKiongora Mutai t/aKiogora Mutai & Company Advocateson the 7th day of June 2023 be set aside and substituted with an order dismissing the same with costs.
    c. The Respondent be directed to pay for the costs of this appeal and Milimani CM ELRC E736 of2020: Ronald Museve Khavangali vKiongora Mutai t/aKiogora Mutai & Company Advocates.

Grounds Of The Appeal

2. That the Honourable Trial Magistrate erred in law and in fact when he allowed the Claimant's suit.

3. That the Honourable Trial Magistrate erred in law and in fact when he entered judgment in favour of the respondent in the sum of Kshs. 160,000/- being service pay when the same is not supported by law or facts and when it was an admitted fact that the respondent had not worked for 2 years. Similarly, the award for leave was without legal or factual support for an employee whose service was below 2 years.

4. That the Honourable Trial Magistrate erred in law and in fact when he failed to consider that the respondent was responsible for the termination having mutually agreed to part with the appellant when they disagreed on various items.

5. That the Honourable Trial Magistrate erred in law and in fact when he failed to consider that the respondent's employment was pegged on him being a qualified advocate hence a practicing certificate at the time of employment was a must have and thus the award of Kshs. 1,380 was unmerited.

6. That the Honourable Trial Magistrate erred in law and in fact when he failed to consider that the respondent was the author of the reason as to why the termination happened and thus not deserving an award for unlawful termination which in any event was excessive and punitive at the maximum allowed by law of 12 months.

7. That the Honourable Trial Magistrate erred in law and in fact when he failed to consider that the Appellant had complied with payment of all statutory payments and hence the award of Kshs. 160,000/- being service pay was unfair and unjustified.

8. That the Honourable Trial Magistrate erred in law and in fact when he failed to consider the Appellant's clear evidence which indicated that the claimant had taken more than the contracted leave days.

9. That the Honourable Trial Magistrate erred in law and in fact when he failed to consider the totality of the Appellant's evidence.

10. That the Honourable Trial Magistrate erred in law and in fact in ordering the Appellant to pay the respondent even for items not sought in his prayers/pleadings.

Background To The Appeal

11. The Respondent filed a claim against the Appellant vide a Memorandum of Claim dated the 2nd of September 2020 seeking the following orders:-

    a) A Declaration that the respondent was unlawfully terminated in violation of prevailing labour laws and practice.

    b) Kshs.80,000 being One (1) month's salary in lieu of notice.

    c) Kshs.960,000 being 12 months' pay as compensation for unfair termination.

    d) Kshs.228,000 being housing allowance for the nineteen (19) months worked @15%per month.

    e) Kshs.28,000 being payment for accrued leave days in the 2nd year of employment.

    f) Kshs.9,660 being the value of seven (7) months period validity of a Law Society of Kenya Practicing Certificate for 2018 (7/12 X 16,550) which the respondents firm did not pay for but utilized (This is claimed because of the respondent's decision to deduct Kshs.1,380 from the claimant's November 2019 salary the value of One (1)month validity of a Law Society of Kenya Practicing Certificate for 2019).

g) Kshs.20,000 being payment for 2 hours worked on 2.12.2019 on Misc. Civil Application No. 25 of 2018 after termination at the rate Kshs.10,000 per hour.

h) Kshs.80,000 being service pay equivalent to 15-days' pay for each of the two (2) years worked based on the salary figure of Kshs.80,000.

i) Kshs.314,355 being unremitted P.A.Y.E. between May 2018 and November 2019 all months inclusive.

j) Exemplary damages.

k) Costs of this suit.

1) Interest on (b) - (k) at court rates from the date of filing this suit until payment in full.

(Pages 4-9 of the ROA dated 29th April 2024).

12. The claimant /respondent iled his verifying affidavit and list of witnesses dated 2nd September 2020, as well as his witness statement and bundle of documents dated 15th October 2020 (pages 10-134 of ROA).

13. The claim was opposed by the Appellant who entered appearance and filed a statement of response dated 16th October 2020 (pages 141-144 of ROA); list of witnesses (page 146 of ROA); witness statement (pages 147-148 of ROA); and list of documents (pages149-153 of ROA) all dated the same date. The Respondent also filed a Supplementary List of Documents dated 7th July 2022 (pages 173-211 of ROA).

14. The Claimant's/Respondent's case was heard on the 26th of July 2022, and further on the 29th of September 2022, where the Claimant testified in the case relying on his witness statement, produced his documents, and was cross-examined by counsel for the Appellant, Mr. Kimathi (pages 241-245 of ROA and 248-249 of ROA) .

15. The Appellant's case was heard on the 16th of November 2022. The Appellant testified relying on his filed witness statement, and produced the Appellant's documents. He was cross-examined by counsel for the Claimant/Respondent, Mr. Wesonga (pages 250-253 of ROA).

16. The parties took directions on filing of written submissions after the hearing. The parties complied.

17. The Trial Magistrate Court delivered its judgment on the 7th of June 2023 partially allowing the Claimant's claim and awarding him the sum of Kshs. 1,149,380/- made up of one month's pay in lieu of notice, compensation for unlawful termination, accrued leave days for 2019, monies deducted for payment of practising certificate, and service pay (Judgment at pages 257-267 of ROA).

Determination

18. The appeal was canvassed by way of written submissions. Both parties filed.

19. This being a first appellate court, it was held in Selle v Associated Motor Boat Co. [1968] EA 123 that:- "The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 the 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."

20. Further in on principles for appeal decisions in Mbogo v Shah [1968] EA Page 93 De Lestang V P (As He Then Was) Observed At Page 94:

> " I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

Issues for determination

21. The court discerned the issues placed before it by the parties for determination in the appeal to be:-

    a. Whether the Honourable Trial Magistrate erred in finding that the Respondent was unfairly terminated from employment.

    b. Whether the Honourable Trial Magistrate erred in the reliefs granted.

Whether the Honourable Trial Magistrate erred in finding that the Respondent was unfairly terminated from employment.

22. The threshold for determination of fairness of termination of employment is according to the provisions of section 45 (2) of the *Employment Act* to wit:- '45(2) A termination of employment by an employer is unfair if the 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 employees 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." To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the *Employment Act* (Walter Ogal Anuro v Teachers Service Commission[2013]eKLR.

Substantive fairness

Appellant's submissions

23. The appellant in this matter instituted the subject appeal herein vide his memorandum of Appeal dated 23 of June, 2023, seeking to reverse the judgment and decree of the lower Court in Milimani CM ELRC NO. 736 OF 2026. The appellant has laid out the grounds of appeal on the face of the Memorandum of Appeal. Ground 1 of the memorandum of Appeal shall be argued with ground No. 3 at page 1 of the Record of appeal. The appellant avers that there is ample evidence that the Respondent fell short of his mandate as engaged evidence by the Appellant's letter dated 29.07.2019 at page 150 of the record of appeal. Vide a letter dated 29.07.2019 (see page 150 of the record) the appellant has provided his reservations to the delivery of the Respondent's allocated duties as follows: ' You have

not met your deadlines in terms of set dates and turnaround time of files. You have not been punctual in reporting to the office and normally you do not report back to work when you have matters out of station. You have not met your monthly targets of Kshs. 300.000 collected fees. Neither have you updated your financial report on time. We noted that you need to work on your organizational skills and being keen on details with your briefs."

24. That the claim by the Respondent that he was a diligent employee is far from the truth. The Respondent failed, willfully neglected and or ignored to carry out instructions by the respondent that exposed the respondent to potential liability to clients by failing to diligently process matters within reasonable turn-around times and failing to adhere to detail. The Learned Magistrate in her Judgment delivered on the 07.06.2023 and Decree issued on the 18.04.2024 made a finding that the Respondent's termination was unfair. The appellant indeed had valid and fair reasons to consider and subsequently disengage the Respondent's services. The Disengagement was in line with section 45 of the *Employment Act*, 2007. The evidence adduced in court and documentary evidence availed before court, it was established that the Respondent was engaged in various forms of misconduct as detailed at paragraph4 hereinabove, summarized as follows:-

    a. Failing to turn up at work without any explanation or permission from the Appellant.

    b. Failing to obey lawful instructions in carrying out of his work with the respondent

    c. Failing to remedy her absence from work and improving on areas of concern highlighted by the respondent

25. The appellant has stated at page 251 of the record of appeal that the Respondent was given a chance to improve but he did not. The Appellant mutually agreed to disengage and the Respondent helped look for a replacement and even inducted the new advocate. It is not true therefore that he was terminated without being given an explanation and it is not true that he was not given Notice. It is clear that the Appellant contributed to and or caused his disengagement from the Appellant.

Respondent's submissions

26. The burden of proof- The burden of proving the fairness and lawfulness of the procedure for termination lies with the employer. Section 43 of the *Employment Act* provides:"43 (1) 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",. It is vital to note that the Appellant has steered clear of challenging the decision of the Trial Court on the lawful procedure for termination under section 45 of the *Employment Act* which the court found to have been breached. He has only dwelt on the part of reasons for termination and partly, the awards. Given that the Appellant did not follow the procedure prescribed under section 41 of the *Employment Act*, 2007 before terminating the Respondent and the trial Court having found so and which finding is not challenged in this appeal, we affirm the finding of the Trial Court on this procedural failures.

27. The evidence of the Respondent at trial and the unjustifiability of the reasons for termination-The Respondent testified that his relationship with the Appellant began turning soår in May 2019, when he sought a review of his salary in line with his employment contract. The Respondent was convinced that he met his targets and having worked for over a year after confirmation, was due for a review. It did not go down well with the Appellant. The Appellant's decision to terminate the Respondent was solely on the basis that the Respondent sought for salary review which the Appellant did not want to review the salary upwards (see page 263 of the Record of Appeal). The Respondent ignored requests for review forcing the Respondent to choose to formally put the request in writing. Despite the formal request,

the Respondent never acted. Instead, he called the Respondent for a routine managerial meeting to discuss matters arising in normal work activities. During this meeting, the Respondent resorted to blaming the Respondent and raising issues that did not exist against his performance. The Appellant was also agitated and angered by the Respondent's insistence on the agreed commission and/or bonus of 30% on quarterly collections exceeding the target set of KES 300,000.00 per month in collections. At trial the Appellant denied that there was a commission agreement, the Respondent adduced evidence of internal memos at pages 94-95 of the Record of Appeal which evidenced dissatisfaction of calculations related to legal fees collections and commission earning. That far from the Appellant's position on the reasons for termination, the real reasons emanated from the justified demands of the Respondent for pay review and payment of commission as contractually agreed.

28. On the allegation of misconduct and poor performance of the Respondent- The Appellant states in his submissions that the Respondent fell short of his mandate while in the employment of the Appellant. He has made reference to the letter at page 150 of the Record of Appeal dated 29.07.2019. He states that the Respondent exposed the Appellant to potential liability to clients by failing to diligently process matters within turn- around times and failed to adhere to detail. This was never brought out or substantiated at trial by the Appellant. He tactically but dishonestly refuses to term it as termination' and uses the term 'disengagement' which he submits was based on various forms of misconduct of the Respondent which he outlines as: failing to turn up at work with no explanation or permission; failing to obey lawful instruction; and failing to remedy absence from work and improving on areas of concern;. Firstly, in his examination stated that he terminated the Respondent due to poor performance including his failure to meet targets set of monthly collections and submission of monthly reports. When asked whether he carried out a performance appraisal to determine the Respondent's performance, the Respondent answered in the negative. He also did not have any employment policy or practice within the definition provided under section 5 (8) of the *Employment Act* to place him in a competent position to make this allegation. When taken through the fees raised and collected by the Respondent, the Appellant admitted that the monthly target for the Respondent was Kshs.300,000.00. The Respondent met this target in all the months he was referred to during cross-examination particularly for the months of May, June, July, September, October 2018 and February, March, April, May, June, July, August, September October 2019; and June, August, September, October, November, January, April, July 2019 (see at pages 19-41 of the Record of Appeal as well as the actual fee notes at page 42-101 of the Record of Appeal).

29. The submission of the Appellant that he terminated the Respondent based on performance is unsupported by evidence. He failed to prove the laid down basic tenets that are necessary in proving termination on the basis of poor performance. The Court of Appeal case of National Bank of Kenya v Samuel Nguru Mutonya[2019] eKLR. In that case, the court of appeal cited the case of Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010; [2010] LLR 255 (ICK) (September, 2013) in which the court observed as follows;-

> " a. Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act*, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.
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> b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one

has been terminated for poor performance as the effort leading to this decision must be established.

c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.

d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee." The Respondent submitted that the Appellant not only failed to adduce evidence showing that the Respondent was put on performance improvement and failed to do better but also failed to produce before this Court their appraisal performance policy or practice on the parameters to measure poor performance versus good performance. The Respondent's reason for poor performance falls short on all fronts stated by the Court of Appeal above.

30. Secondly, on the allegation that the Respondent failed to turn up for work without giving any explanation or getting permission, the respondent submitted that this is a dishonest allegation. Like many organizations, the Appellant provided an attendance book/record at the reception desk where all members of staff including the Respondent were required to sign upon check-in and check-out including on Saturdays. The Respondent dutifully complied. At trial, the Appellant did not adduce any evidence to back this up. The Appellant was the custodian of all attendance records and should have produced the records in court to prove this. He did not. Yet the burden of proof lied with him when he made this allegation. Thirdly, the Appellant had set the expectation of having the Respondent, like any other advocate at the firm, to return to the office upon attending to court matters physically in court stations. However, at the trial, the Respondent convincingly testified of the challenges he faced in returning to the office whenever he had attended court in distant stations like Nakuru, Kitui, Makueni, Maua, Mutomo and others. He had raised this challenge with the Appellant but the Appellant had been unreasonably adamant. The trial court found that it was impractical and could not be a reason to consider termination (see page 264 of the Record of Appeal). Further, the letter dated 29.07. 2019 written by the Appellant (see page 150 of the record) titled 'Contract Review' acknowledged that the Respondent had 'mastered the substance of his work for about the one year of service' with the Appellant.

31. On the allegation of mutual agreement termination-. The Appellant's testimony at trial that the termination was by mutual agreement was challenged successfully. Other than his mere oral averment, he did not produce proof of such agreement in writing or call a witness to corroborate his testimony. It was proved that this averment was a falsehood. Considering the weight of a decision to terminate, an experienced lawyer and professional that the Appellant must reasonably be expected to put such mutual agreement to terminate in writing. The trial court disagreed with him (see page 264 of the Record of Appeal). In fact, in the concluding paragraphs of his handing over report at page 134 of the Record of Appeal, the Respondent expressed dissatisfaction with the manner and procedure of his termination and replacement. This could not have been the case where the parting was on mutual agreement.

32. The allegation of the Respondent's purported role in hiring his replacement- The Appellant further falsely states, which is recorded in the proceedings at page 251 of the Record of Appeal, that the Respondent took part in the sourcing for his replacement and in the induction of his replacement and

that the termination was mutually agreed upon. This was strongly controverted with evidence at the trial. This allegation is untrue and denigrates the person of the Respondent without proof. As adduced at the trial, the Appellant secretly advertised for the position of the Respondent on 30.10.2019 via Social Media. The invitation for Applications was done anonymously and required Applicants to send applications to a disguised email address which it was not possible to tell belonged to the Appellant's firm. The Respondent testified that his colleague who worked at the firm then, Ms Evelyn Weru Njeri who uses the name Wereva Njeri on Facebook social media was instructed to share the advert on social media and strictly directed to keep it anonymous and away from the knowledge of the Respondent (See page 119 of the Record of Appeal). She would later inform the Respondent of this arrangement in confidence, not an official capacity. She, however, told the Respondent that she not certain if the intended recruitment was for the Respondent's replacement or an additional employee to the firm. The Respondent confirmed it was his replacement when the new employee reported and directed to take up the work of the Respondent.On 18.11.2019, new staff reported to work and was directed to start undertaking the duties of the Respondent. She was, however, positioned at a separate desk. It appeared like she had been brought to assist or be part of the department where the Respondent had been placed. There being no notice that the Respondent was to leave his employment, he continued to work.On the same day 18.11.2019, the Appellant allocated court matters for the following week starting 2.12.2012 6.12.2019 usually handled by the Respondent to the new advocate whose initials are "GK" (See page 117 of the Record of Appeal). The Respondent had been stripped off the matters completely. Compare that with the allocations at page 118 of the Record of Appeal where allocations had been done previously before the new employee reported and the Respondent, "RK" allocated matters between 25.11.2019-29.11.2019), the week he was terminated. On 27.11.2019, the Appellant called the Respondent in an impromptu meeting ard verbally communicated his decision to terminate the Respondent effective 30.11.2019. The Respondent was not informed of the reasons nor granted an opportunity to ask any question relating to the decision. He was directed to handover immediately, which he did via handing over report on 29.11.2019. The allegation that the Respondent took part in his replacement is therefore a falsehood, dishonest and made in bad faith.

33. On the allegation that the Respondent was served with Notice of Termination-At the trial, the Appellant stated that a meeting held in July 2019 culminating in the letter 27.11.2019 amounted to a termination notice as it gave the Respondent 3 months' notice to improve on his performance. At the same time falsely alleged that that letter was a review of the terms of the contract, he also alleged that that letter constituted performance appraisal. He unsuccessfully attempted to cover up all his breaches using this single letter. The Respondent cited the case of Mukawa Hotels Holding Ltd v Beat Koch [2011] eklron what constitutes a Notice of Termination. The court stated that a notice of termination of employment must of necessity be categorical and certain. It should not be capable of more than one interpretation. The purpose of a termination notice is to warn the party receiving the Notice of the impending change so that he or it may prepare for the change. There was no notice of termination was ever issued to the Respondent. The letter titled 'Contract Review'was not a Notice of Termination and could not be interpreted to constitute such notice but was resultant of routine administrative/ managerial meeting between the Respondent and the Respondent. It speaks for itself. In fact, the trial court agreed with the Respondent as can be seen at page 264-265 of the Record of Appeal.

Decision

34. The burden of proof in employment cases is as stated in section 47(5) of the *Employment Act* as follows:-‘47 (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 for the termination of employment or wrongful dismissal shall rest on the employer.” The prove of validity of reason for the termination

lies with the employer once the basis of complaint of wrongful termination is laid by the claimant. The claimant stated he had performed and met his targets and that there was no review of performance save for an allegation by the appellant of non-performance. The appellant during the trial alleged non-performance as the reason for the termination, and said he had given the respondent chances to improve. (page 251 of ROA). He denied the computation of fees raised above the target of Kshs. 300,000 by the respondent (page 252). The appellant did not prove alternative figures by way of performance reports on the work of the respondent/claimant.

35. The reason advanced by the appellant for terminating the respondent's employment was poor performance (page 252 of ROA) . In Jane Samba Mukala v Ol Tukai Lodge Limited [2013] eKLR the court observed as follows;-

> " a. Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act*, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.
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> b. It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.
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> c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.
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> d. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee."(Decision cited with approval by the Court of Appeal in National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR (Judges, RN Nambuye, GK Oenga, S ole Kanta JJAs). Applying the foregoing decision, the court on re-evaluation of the evidence of the evidence before the trial court , agreed with the trial court that the appellant did not prove the poor performance as the reason for the termination. The court found no basis to disturb the finding of the lower court (Mbogo v Shah)."

Procedural fairness

36. The 2nd test for fair termination is procedural fairness according to the provisions of section 41 of the *Employment Act* to wit:-'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 the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.;" During cross-examination the appellant admitted that he did not take the respondent through disciplinary hearing and stated the termination was amicable. He did not pay for notice, hence the word amicable was misplaced and has no place under the *Employment Act*. Amicable can only be in accordance with the law. At minimum, parties agree to terminate and notice pay is done in accordance with the contract or statute. A discharge is then signed on settlement of terminal dues. The court finds that the provisions of section 41 of the *Employment Act* are couched in mandatory terms and the appellant was in violation. In the upshot the court upholds the lower court finding of unlawful and unfair termination.

Whether the trial court erred in the reliefs granted.

12 months' pay as compensation for unfair termination.

Appellant's submissions

37. Ground 2 and 6 of the Memorandum of appeal has tackled two facets: In Ground 5 of the memorandum of appeal, the Appellant contents the maximum compensation by the Learned Magistrate which the Appellant submits that it was an award that was excessive and not justified in the circumstances.- Section 49 (4) of the *Employment Act*, 2007 provides guidance to this Honourable court the considerations to be made when granting the remedies under the Act. The considerations include but not limited to; the circumstances under which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination and the employee's length of service with the employer. The Respondent was engaged in 01.05.2018 and was disengaged in November, 2019, having worked for one and half years. Although the claim for compensation is denied, the circumstances do not warrant the award of maximum compensation as sought by the Respondent. That position will be contra Section 49 of the *Employment Act*. The court should be mindful that there was no evidence tabled to show that the Appellant conducted himself in a way that was callous, actuated by ulterior motives, malicious or in bad faith. The appellant genuinely informed the Respondent of his shortcomings and gave him time to rectify. The Respondent was on Notice and participated in sourcing for a replacement and the disengagement was amicable. The length of service of the Respondent should also be taken into consideration as he had worked for one and half years, probation period included. While the damages awarded are discretionary, it is our submissions that that discretion was not properly applied the award of maximum compensation is erroneous. In International Planned Parenthood Federation v Pamela Ebot Arrey Effiom [2016] eKLR. But this Court has in several previous decisions decried the awarding of maximum compensatory damages for wrongful or unfair termination without a firm factual and legal foundation for such awards. It did so in CMC Aviation Limited v Mohammed Noor [2015] eKLR, stating:- "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."So too, in Ol Pejeta Ranching Limited v David Wanjau Muhoro [2017]eKLR:-"The trial judge did not at all attempt to justify or explain why the respondent was entitled to the maximum award. Yes, the trial Judge may have been exercising discretion in making the award. However, such exercise should not be capricious or whimsical. It should be exercised on some sound judicial principles. We would have expected the Judge to exercise such discretion based on

the aforesaid parameters. In the absence of any reasons justifying the maximum award, we are inclined to believe 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 our intervention". In any event, if the court was to uphold that the termination of the Respondent was unfair, the Respondent should be awarded compensation commensurate to the period of Notice, that is 1 month pay compensation as per case of Central Bank of Kenya v Julius Nkonge [2002] eKLR where this Court held that the trial Judge had erred by computing damages beyond the notice period. It was the Court's view that on the assumption that the respondent's dismissal was wrongful, he was only entitled to damages equivalent to the salary he would have earned for the period of notice, namely, three months, and that the trial Judge erred in awarding him more. Similarly, in CMC Aviation Limited v Mohammed Noor [2015] eKLR, this Court held that despite a finding of unfair termination of employment, the fact that the employment contract was terminable by one month's notice meant an award of one month's salary in lieu of notice was reasonable compensation.

Respondent's submissions

38. Section 49 of the *Employment Act* provides for the Remedies for wrongful dismissal and unfair termination. It states: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-

    (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.'' The Courts have had the discretion to award the equivalent of any month's pay up to 12 months. The principles on interfering with judicial discretion were laid down in the case of Price and Another v Hilder [1996] KLR 95 as follows:"In considering the exercise of judicial discretion, as to whether or not to set aside a Judgment the court considers whether in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the Judgment. The court will not interfere with the exercise of discretion by an inferior court unless its satisfied that its decision is clearly wrong, because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters it should have taken into consideration and in doing so arrived at a wrong decision."

39. Further in Butt v Khan[1981] KLR 349 the Court of Appeal held as follows; "An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low." The Trial Court assigned reasons for award of the maximum 12 months permissible by the law. The trial court at page 265 of the Record of Appeal made a condemnatory conclusion while making the award for 12 month's pay for damages for unfair and unlawful termination. It stated "the way in which the Claimant (read the Respondent) was terminated was casual and demoralizing". Other than the trial court's observation and the cited case law, principles and provisions of the law, we invite this court to consider the following circumstances of the Respondent and the conduct of the Appellant at termination and find that they justify this Court's decline to interfering with the award:

a) The Respondent was a young lawyer with no other means livelihood going on. He had no experience or means to move to private practice immediately. He depended entirely on his pay for sustenance;

b) The refusal to grant notice of termination of payment in lieu thereof to enable the Respondent to plan ahead knowing that he had a young family, and considering that Covid-19 quickly set in thereafter, securing an employment fast enough was not guaranteed.

c) The demeaning and humiliating manner in which the Respondent was dismissed despite both parties being members of the same profession - the legal profession - where expected standards of conformity with the law are high;

d) The dishonesty and falsehoods on the part of the Appellant in his evidence;

e) The habitual termination of employees in the same manner noting that after 1 year, the replacement of the Respondent, Gladys Kiamah, was dismissed similarly. She sued the Appellant for damages successfully in NAIROBI ELRC E530/2021.

f) The malicious deduction from his November 2019 pay;

g) Forcing the Respondent to handover within 2 days there being no notice of termination;

h) The termination without valid reasons knowing well that as a professional, the reputation of the Respondent would be tainted by the record of termination and his career progression would be affected; The Court of Appeal in Kenya Broadcasting Corporation v Geoffrey Wakio [2019] eKLR declined to interfere with the award of 12 months' salary compensation given by the Superior Court on the basis that the trial Court had assigned reasons among them blatant disregard for fair labour practices and impracticability of reinstatement. These are the circumstances obtaining herein. There was blatant disregard of fair labour practices, no valid reasons for termination, terminated on the ground that the Respondent sought for a review as provided for under his contract, no disciplinary hearing etc and that the Respondent's replacement was recruited and did report and took over from the Respondent while the Respondent was finalizing the two days he had been informed to clear and hand over. These circumstances justify an award of 12 months' salary as compensation. The Appellant has not shown that it is too high. It is actually within the statutory permutations.

Decision on the compensation award

40. The trial court awarded maximum compensation on basis that the claimant was dismissed in a casual and demoralising way. While that is true the court finds that the trial court erred by not taking into account the totality of factors to consider under section 49(4) of the *employment act* to wit:-

(4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account 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 reasonable 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."The respondent had worked from 24th April 2018 to 30th November 2019. That was 1 year and 3 months. The respondent being a young advocate was likely to secure a similar or even better job in the market. The award of maximum compensation was unjustifiable and the same is set aside and replaced with award of salary equivalent of 6 months gross pay thus 80000x6 Kshs. 480000.

Whether the Respondent was entitled to the award of service pay, accrued leave days, and monies deducted for payment of practising certificate, and whether the same should be set aside.

Appellant's submissions

a) Issue of service pay

b) Issue of leave pay.

41. As regards service pay, the Appellant contributed money to the NSSF every as detailed in the Appellant's payroll for the month of October, 2019 at page 251 of the record of appeal. The same is dated 20.10.2019. The excerpts of payroll, there were remittances to NSSF by the Appellant. The Respondent did not table any statement from NSSF to the contrary. Section 35 (4) of the *Employment Act* Provides as follows:-

" 35 (4) Nothing in this section affects the right-

(a) of an employee whose services have been terminated under subsection (1) (c) shall be entitled to service

a) pay for every year worked, the terms of which shall be fixed.

(6) This section shall not apply 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." The Respondent's claim for service pay has been ousted by section 35 (4d) and hence the Respondent is disentitled to this claim. The Learned magistrate erred in law and fact in awarding Kshs. 80,000/= as service pay.

42. That the Learned Magistrate erred in law in awarding accrued leave days of KShs.28,000/= the. Section 28(1) specifies that Annual leave is taken after working for 12 consecutive months. Leave days if any could be requested for by the Respondent as from the second year of his service. He worked for Six months before disengagement. There is no evidence that the Respondent was entitled to the said leave especially since the Appellant had denied all the claims by the Respondent and it was incumbent on the Respondent to prove the same on a balance of probability () see page 120 of the record of appeal where the Respondent's claim in the lower court is denied. The finding by the learned magistrate that the claim for leave is not contented is erroneous.

Decision on service pay and leave awards

43. Service pay- the trial court held it was not contested and the same was allowed. On review of the evidence before the trial court, the court found in defence the issue of service pay was not contested. On merit the court found there was no evidence of the Appellant being registered with NSSF let us alone having remitted the dues. There was no payslip produced. The payroll was not conclusive evidence. The issue having not been contested, the appellant cannot raise the issue afresh at appeal. The only issue the court found was in the computation of the service pay. The claimant only completed one year in service and was thus entitled to Kshs. 40000 and not 80000. The award is disturbed on that basis. Service pay of Kshs. 40000 is awarded.

44. On accrued leave days- the appellant's position that the Respondent was not entitled to leave before 12 months lapse was not correct. Section 28 of the *Employment Act* states:- (1) An employee shall be entitled—

"(a) after every twelve consecutive months of service with his employer to not less than twenty one working days of leave with full pay;

(b) where employment is terminated after the completion of two or more consecutive months of service during any twelve-month' leave-earning period, to not less than one and threequarter days of leave with full pay, in respect of each completed month of service in that period, to be taken consecutively". The court finds no basis to interfere with the award on untaken leave. The ground of the appeal is based on misconception of the law. Leave is prorated to cover period of less than a year in section 28(1)(b) of the *Employment Act* (b) to wit:- 'where employment is terminated after the completion of two or more consecutive months of service during any twelve months' leave-earning period,

to not less than one and threequarter days of leave with full pay, in respect of each completed month of service in that period, to be taken consecutively... ''

45. On the monies deducted for payment of practising certificate of Kshs. 1380- The Appellant submitted that :- As regards ground 4 of the memorandum of appeal, the award of Kshs. 1,380/- for practising certificate is erroneous as the Respondent is a professional who is expected to hold a valid practicing certificate. He paid for his own certificate which he continued using even after his disengagement hence the award for the same is in error. I found no basis to interfere with the finding of the trial court that the practising certificate was paid for in accordance with terms of employment and it was in bad faith for the appellant to deduct the equivalent of cost of the certificate for month of December. The court noted the respondent further worked for the appellant for 2 days. He could not have worked without the certificate. The could found the appellant was a unreasonable and unfair employer to the respondent.

Conclusion

46. In the upshot the appeal is partially allowed. The Judgment and Orders of the Honourable P.K. Rotich (SPM) delivered at Nairobi on the 7th day of June, 2023 in MCELRC No. E736 of 2020 is set aside and substituted as follows:-

    a. Payment in liue of Notice Kshs. 80,000

    b. Compensation for unlawful termination the equivalent of 6 months' gross pay Kshs. 480,000

    c. Accrued leave for 2019 Kshs 28,000

    d. monies deducted for payment of practising certificate of Kshs. 1,380

    e. service pay Kshs. 40000

    f. costs

    g. Interest awarded at court rates from date of judgment of the lower court.

47. Each party to bear own costs in the appeal.

48. 30 days stay is granted.

49. The filed is marked as closed.

50. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 12TH DAY OF JUNE 2025.

J.W. KELI,

JUDGE.

In The Presence Of:

Court Assistant: Otieno

Appellant – Ms. Gethi

Respondent: Mr. Wesonga