



**Ongori v G4S Kenya Limited (Employment and Labour Relations Appeal E284 of 2024) [2025] KEELRC 1720 (KLR) (12 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1720 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E284 OF 2024**

**JW KELI, J  
JUNE 12, 2025**

**BETWEEN**

**FRANCIS ONGORI ..... APPELLANT**

**AND**

**G4S KENYA LIMITED ..... RESPONDENT**

*(Being an Appeal from the Judgment of the Honourable Stephen K. Onjoro (PM) delivered at Nairobi on the 3rd May 2024 in Milimani MCERLC No. E1217 of 2021)*

**JUDGMENT**

1. The Appellant, dissatisfied with the Judgment of the Honourable Stephen K. Onjoro (PM) delivered at Nairobi on the 3<sup>rd</sup> May 2024 in Milimani MCERLC No. E1217 of 2021 between the parties filed a Memorandum of Appeal dated 31<sup>st</sup> May 2024 seeking the following Orders:
  - a. That this appeal be allowed.
  - b. That the judgment of the trial court dated 3<sup>rd</sup> May 2024 be varied, vacated and/or set aside.
  - c. The appellant's prayers in the amended Memorandum of Claim dated 30<sup>th</sup> August 2021 as filed in the Trial Magistrate's court be allowed.
  - d. That the costs of this appeal be borne by the Respondents.

**The Grounds of the Appeal**

2. That the learned Trial Magistrate erred in law and in fact in delivering the said judgement as he did.
3. That the learned Trial Magistrate erred in law and in fact in failing to award the Appellant general damages on a technicality.



4. That having found and held that the Appellant's employment was unfairly terminated and even awarded him costs of the suit, the learned Trial Magistrate erred in law and flouted the provisions of the Constitution in refusing to award the Appellant general damages on the technical ground that he should have termed the same as "compensation".
5. That despite the said finding and while refusing to award the Appellant general damages on a technicality, the learned Trial Magistrate erred in law and in fact in going out of his way, misdirecting himself, lending the Respondent a hand and addressing technicalities not only contrary to the Constitution but not even pleaded by the Respondent.
6. That the learned Trial Magistrate erred in law and in fact in failing to appreciate and consider the evidence and testimony tendered by the Appellant.
7. That whereas the Respondent pleaded and led evidence to the effect that the Appellant had resigned from work without notice and as such they deducted one month's salary in lieu of notice from his dues thereby admitting not paying him one month's salary; on the said ground, having found that the Appellant did not resign from employment but was unfairly terminated by the Respondent, the learned Trial Magistrate erred in law and in fact in failing to automatically award the Appellant his unpaid salary for July, 2020.
8. That the learned Trial Magistrate failed to consider the evidence on record and deduce that the Respondent paid salaries for the previous month in the current month and as such the July, 2020 pay slip tendered as evidence was in respect of June, 2020 salary not July, 2020.
9. That whereas the Respondent claimed to have paid the Claimant his terminal dues but completely failed to produce any shred of evidence to prove the same, the learned Trial Magistrate failed to consider the Claimant's evidence and award him judgment as prayed in the Memorandum of Claim.
10. That the learned Trial Magistrate's decision was unfair, prejudicial and inconsiderate of the Appellant, thereby necessitating the lodging of the appeal herein.

### **Background of Appeal**

11. The Claimant/Appellant filed a claim against the Respondent vide a Memorandum of Claim dated 4<sup>th</sup> June 2021 amended on 31<sup>st</sup> August 2021 seeking the following Orders:-
  - a. A declaration that the Respondent's action of terminating the Claimant from employment was illegal, unlawful, unfair and inhumane.
  - b. Unpaid salary for July, 2020 of Kshs 26,346.78/=
  - c. Severance Service pay (1-month salary for every year worked - 12) of Kshs 316,161.36/=
  - d. General damages for unlawful termination of Kshs 316,161.36/=
  - e. An order for the Respondent to pay the Claimant's Costs of this claim plus interest thereon.
12. The Claimant filed his Witness statement and list and bundle of documents all of even date (see pages 15-62 of ROA).
13. The claim was opposed by the Respondent who entered appearance through the law firm of Hamilton Harrison & Mathews Advocates and filed a Respondent's statement of response dated 24<sup>th</sup> August 2021 and amended on the 6<sup>th</sup> September 2021, witness statements respondent's bundle of documents



of even date together with the bundle, supplementary list of documents dated 16<sup>th</sup> September 2021 (Pages 63-81 of ROA ).

14. The claimant filed reply to the respondent's statement of response dated 1<sup>st</sup> December 2021 (pages 82-83 of ROA).
15. The claimant's case was heard on the 4<sup>th</sup> December 2023, where the claimant testified in the case, adopted his witness statement dated 10<sup>th</sup> March 2022 as his evidence in chief, produced his documents under list dated 4<sup>th</sup> June 2021 and was cross-examined by Counsel for the Respondent, Ms Songok and re-examined. The respondent's case was heard on even date where Victor Oanda was RW1. He adopted his witness statement as his evidence in chief and produced the filed documents as exhibits 1-4 with the supplementary document as Exhibit 5. RW1 was cross-examined by counsel for the claimant Angwenyi Advocate and re-examined by Ms. Songok. (see pages 113-117 of ROA were the proceedings)
16. The parties took directions on filing of written submissions after the hearing. The parties complied.
17. The Trial Magistrate Court delivered Judgment on the 3<sup>rd</sup> May 2024 and held the termination was unfair and awarded the claimant costs of the suit only (Judgment at pages 107-110 of ROA).

### **Determination**

18. The appeal was canvassed by way of written submissions. Both parties complied.
19. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co. Ltd* [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. The court is further guided by the principles on appeal decisions in *Mbogo v Shah* [1968] EA De Lestang V.P (as he then was) observation 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. Both parties submitted on the merit of the appeal on claim for salary of July 2020, Notice pay and compensation for unlawful termination. The court discerned the issues for determination to be :
  - a. Whether the appeal was merited.



## **On Prayer for General damages for unfair termination /compensation for unlawful and unfair termination**

22. One of the grounds of the appeal is that the Honourable Trial Magistrate erred by failing to award the Appellant compensation for unfair termination. The Appellant only prayed for general damages for unfair termination in his claim. The trial court held that the termination was unlawful and unfair. The court then relying on decision in Kenya Broadcasting Corporation v Geoffrey Wakio [2019] eKLR held that general damages were not available and failed to award compensation for the unlawful and unfair termination.
23. The court took into account the submissions the parties.
24. The court revisited the decision of the Court of Appeal in Kenya Broadcasting Corporation v Geoffrey Wakio [2019] eKLR relied on by the trial court. The issue before the court was appeal on judgment that ‘ 8] The appellant was ordered to pay the respondent a total sum of Ksh 6,525,863 being salary arrears of Ksh.3,525,863 and general damages Ksh 3,000,000 together with interest at court rates, from the date of the judgment until payment in full. The appellant was also ordered to pay the costs of the suit and to provide the respondent with a certificate of service within 30 days of the judgment....”The Court of Appeal in the decision held as follows:-
  - ‘(20) On the conclusion that the respondent was unfairly terminated from his employment, section 49 grants various remedies which may be awarded in singular or multiple terms, and which are discretionary rather than mandatory, to be granted on the basis of the peculiar facts of each case. This is made clear by section 49 (4) which sets out some 13 considerations which the trial court must take into account before determining what remedy is appropriate in each case. Those considerations include, inter alia, the circumstances of the termination and the extent to which the employee caused or contributed to it and the practicability of reinstatement or re-engagement.
  - (21) In the instant matter, the trial Judge was of the opinion that reinstatement was impractical and instead awarded the equivalent of 12 months’ salary as compensation under section 49 (1) (c) which provides for ‘the equivalent to a number of months wages or salary not exceeding 12 months based on gross monthly wage or salary of the employee at the time of dismissal or termination’..
  - (22) This Court has established the rule that an award of the maximum 12 months’ pay must be based on sound judicial principles. In Ol Pejeta Ranching Limited vs. David Wanjau Muhoro [2017] eKLR this Court categorically stated that the trial Judge must justify or explain why a claimant is entitled to the maximum award; that the exercise of discretion must not be capricious or whimsical.
  - (23) The learned Judge explained that the award of 12 months gross salary was in consideration of the immense loss suffered by the respondent during the long criminal trial, the blatant disregard for fair labour practices by the appellant and the impracticality of reinstatement. In his judgment, the learned Judge concluded that reinstatement was impractical due to the long period that had passed since the dismissal.
  - (24) We agree with this reasoning as practicability is one of the factors to be considered when determining whether or not to order reinstatement. (See Kenya Airways Ltd vs. Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR). From the record, the respondent’s efforts to be reinstated were frustrated for a long time. It was not until judgment was entered



in his favor that the appellant decided to reinstate the respondent. By then, the relationship was beyond repair and the respondent had already suffered much mental and financial damage. Therefore, we find that the discretion to award maximum compensation of 12 months' pay was judicially exercised and will not interfere with the same.

- (25) We now come to the award of Ksh.3,000,000 being general damages in lieu of reinstatement. It is trite law that general damages are not awardable for wrongful termination. Previous decisions of this Court have asserted that the damages payable to the employee for unfair dismissal or termination is that which is equivalent to salary in lieu of notice.(See Alfred Githinji vs. Mumias Sugar Company Ltd Civil Appeal No 194 of 1991).
- (26) In the case of Central Bank of Kenya vs. Julius Nkonge [2002] eKLR 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.
- (27) Similarly, in CMC Aviation Limited vs. 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.
- (28) In this instance, the learned Judge concluded that the award of 12 months' salary was inadequate to mitigate the loss and damage suffered by the respondent. There is no doubt that the accusations of fraud caused irrevocable damage to the respondent's career and reputation. However, in light of the fact that the respondent was awarded the maximum compensation possible under section 49(1) (c), we find no legal justification to award a further sum in form of damages.”
25. It emerges from the decision (Kenya Broadcasting Corporation v Geoffrey Wakio [2019] eKLR ) that the Court of Appeal was clear that on finding unfair termination then the court proceeds to consider the remedies under section 49 of the *Employment Act* as the trial court did in that case and awarded the maximum compensation of 12 months. The trial court further awarded general damages on basis that the 12-month salary compensation was inadequate and that was what the Court of Appeal found to be the issue. The court held the damages available would only be the notice period. The final decision of the court of appeal was :-
- {(37) As was rightly held by the trial Judge, the respondent was dismissed on 21st June, 2006 thereafter what he would be entitled to is remedies prescribed under section 49 for unlawful and unfair termination, if it is proved.
- (38) Now that we have taken that position, the upshot of our consideration of the record of appeal, the submissions by learned counsel and the relevant law is that this appeal is meritorious and partly succeeds. In the result, we set aside the award of general damages of Ksh.3 million and order that the appellant shall pay the respondent 12 months' salary as compensation for the unfair termination taking into account the respondent's length of service, the failure to reinstate the respondent.”
26. The court then finds that the general damages referred in the Court of Appeal case was award over and above the damages awarded as compensation for unfair termination. The court finds that the facts before the trial court for determination over which the parties submitted related to unfair termination. The trial court concluded there was unfair termination. The court on concluding there was unfair



termination is obliged to exercise the power of the court to award compensation to a successful litigant in a case for unfair termination derived from Sections 49 (1) (c) and 50 of the [Employment Act 2007](#) which provide that:-

“49 (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 months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

50. In determining a complaint or suit under this Act involving wrongful dismissal or unfair termination of the employment of an employee, the Employment and Labour Relations Court shall be guided by the provisions of section 49.”

27. The forgoing position was affirmed in *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR (supra) :-

“(20) On the conclusion that the respondent was unfairly terminated from his employment, section 49 grants various remedies which may be awarded in singular or multiple terms, and which are discretionary rather than mandatory, to be granted on the basis of the peculiar facts of each case.” Further by the Honourable Supreme Court in *Kenfreight (E.A) Limited v Benson K. Nguti* SC Pet. No. 37 of 2018 [2019] eKLR while explaining the applicability of the provisions of Section 49 as hereunder:-

“....What then should be the correct award on damages be based on? Having keenly perused the provisions of Section 49 of the [Employment Act](#), we have no doubt that once a trial court finds that a termination of employment as wrongful or unfair, it is only left with one question to determine, namely, what is the appropriate remedy? The Act does provide for a number of remedies for unlawful or wrongful termination under Section 49 and it is up to the judge to exercise his discretion to determine whether to allow any or all of the remedies provided thereunder. To us, it does not matter how the termination was done, provided the same was challenged in a Court of law, and where a Court found the same to be unfair or wrongful, Section 49 applies....”(emphasis given)

28. The court finds that the prayer for compensation for unlawful and unfair termination was not specifically pleaded. What was pleaded was general damages for unfair termination of which in *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR the court held were limited to notice period and were not the same as compensation under section 49 of the [Employment Act](#). In the Supreme Court - Petition No. 15(E022) OF 2021,- *Evans v police commissioner*, the Respondent raised an objection before the Court that the 5<sup>th</sup> Appellant, who was not an employee, had been wrongly enjoined as a party in a suit from the ELRC Court through to the Supreme court. There was no objection raised either before the ELRC Court or at the Court of Appeal on the participation of the 5<sup>th</sup> Appeal as a party in the suit. The Supreme court observed that while parties are bound by their pleadings, the court can make a determination on an unpleaded issue, provided that the parties canvassed on the issue and left it to the court to determine. If the parties did not canvass the issue then the court cannot consider. The court held that:



(48) The short answer to the first question regarding the jurisdiction of the ELRC to entertain the dispute is that, apart from the fact that the respondents have not cross-appealed this issue, we note that this question is being introduced for the first time before us. It was neither raised in the ELRC nor determined by the Court of Appeal. The general rule is that parties are bound by their pleadings. However, a court may make a determination on an unpleaded issue where in the course of the hearing, parties have canvassed the issue and left it to the court to determine. See *Odd Jobs v. Mubia* [1970] EA 476. This was not the case here. We cannot, in those circumstances, consider or determine the question in vacuo without the benefit of the opinions of the learned Judges of the two superior courts below. Both objections must therefore fail.”

29. The Respondent submitted that *Odd Jobs v Mubia* was not applicable as the compensation was not pleaded, hence not left open for the trial court to determine. The court found the respondent was aware of the case of unfair termination and the trial court having concluded there was unfair termination ought to have considered remedies under section 49 which include compensation for unfair termination. The above is supported by the broad powers donated to the court to make any necessary orders under Section 12 (3) of the *Employment and Labour Relations Court Act* Cap 8E of the Laws of Kenya which provides as follows:-

- (3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders
- (i) interim preservation orders including injunctions in cases of urgency;
  - (ii) a prohibitory order;
  - (iii) an order for specific performance;
  - (iv) a declaratory order;
  - (v) an award of compensation in any circumstances contemplated under this Act or any written law;
  - (vi) an award of damages in any circumstances contemplated under this Act or any written law;
  - (vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or
  - (viii) any other appropriate relief as the Court may deem fit to grant.

30. Further, Section 20 (1) of the same Act provides that

“In any proceedings to which this Act applies, the Court shall act without undue regard to technicalities.”

31. Consequently, court holds that the trial court erred in fact and law in failing to consider the compensation on finding there was a case of unfair termination. The appellant was employed in May 2008 and his service terminated in august 2020. The termination was found to be without lawful reason and procedurally flawed. The court taking into account the long period of service and the lack of contribution to the termination and the remote chances of getting a similar job the court found the maximum compensation was merited and the same is awarded for Kshs. 316,161.36.



Notice pay of 1 month salary is awarded under section 35 of The *Employment Act* for Kshs. 26,346.78. The trial court held that the July pay slip was produced as evidence of payment. The court found no basis to interfere with the decision (Mbogo v Shah)

### **Conclusion**

32. In the upshot the appeal is allowed. The Judgment of the Honourable Stephen K. Onjoro (PM) delivered at Nairobi on the 3<sup>rd</sup> May 2024 in Milimani MCERLC No. E1217 of 2021 is set aside and subsisted as follows:-

Judgment is entered for the claimant against the respondent as follows:-

- a. The termination was unlawful and unfair
- b. Notice pay of Kshs, 26,346.78.
- c. Compensation for unfair termination Kshs. 316,161.36.
- d. Total sum awarded of Kshs 342,508.14(b and above) with interest at court rate from date of judgment of the lower court.
- e. Costs of the suit.

33. The costs at appeal are awarded to the appellant.

34. Stay of 30 days granted.

35. It so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 12<sup>TH</sup> DAY OF JUNE, 2025.**

**J.W. KELI**

**JUDGE.**

In the presence of:

Court Assistant: Otieno

Appellant : -Angwenyi

Respondent: Njiri h/b Makori

