



REPUBLIC OF KENYA



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**Maina v Benisa Limited (Appeal E163 of 2021)
[2024] KEELRC 2398 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2398 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E163 OF 2021
JK GAKERI, J
SEPTEMBER 30, 2024**

BETWEEN

JOHN NGOTHO MAINA APPELLANT

AND

BENISA LIMITED RESPONDENT

JUDGMENT

1. The brief facts of this case are that the Benisa Limited employed the Appellant from April 2016 to November 2018, a duration of about 2 ½ years.
2. It was the Appellant’s case that he initially joined the Respondent as a Machine Operator and was later promoted to the position of Sales and Marketing Manager at Kshs.30,000/= per month and 2% commission on every project he secured for the Respondent.
3. That the salary would rise to Kshs.50,000/= after two (2) projects and he served diligently.
4. According to the Claimant, he secured 10 projects from 3rd April, 2017 to 15th March, 2018 worth millions of shillings but was not paid any commission.
5. It was the Appellant’s case that the Respondent did not pay National Health Insurance Fund and National Social Security Fund contributions for the entire period of engagement.
6. It was the Appellant’s case that the Respondent terminated his employment unilaterally in November 2018.
7. The Claimant filed copies of various records including his proposal to the Respondent to serve as its Sales and Marketing Manager, dated 7 March, 2017 but which the Respondent did not sign, tender award letters from various bodies, contract between Lake Victoria North Water Services Board and the Respondent dated 19th July, 2017, executed by the Appellant, agreement between Chuka Housing Co-operative Society and the Respondent executed the same, site visit certificate in December 2017, copies



of Authorization letters by the Respondent for the Appellant to represent, attend site visits, collect bid bond for tenders and execute documents on behalf of the company.

8. The Respondent's case was that the Appellant was a causal labourer engaged to assist in machine operation as it was Construction Company with no sales and marketing department, a task the Appellant had no skill in.
9. That the Appellant was an errands person typically sent to deliver tender documents and his employment was never terminated as he stopped reporting for duty allegedly after the Respondent learnt of his dishonesty.
10. In his evidence, the Claimant relied on the unsigned proposal as the basis of his employment, salary and commission.
11. He admitted that he was a friend to the Director of the Respondent and was trained in Machine operation.
12. That one Mr. Mwiti was to provide the contract but did not.
13. That he was sent to Makueni to one Caroline for purposes of marketing.
14. That the Human Resource Manager informed him that his employment had been terminated.
15. Mr. Stephen Kinyua, an Architect testified that he met the Claimant in Chuka during the Chuka Project in 2018 as he forwarded the tender documents and was introduced as the Sales Manager of the Respondent.

Respondent's evidence

16. Mr. Benjamin Macharia testified that he was the Director of the Respondent and testified that he met the Claimant at Kenya Polytechnic and worked at MP Shah Hospital.
17. That he did not commit to pay any commission to the Appellant and obtained Tenders from Newspapers and the Kenya Gazette.
18. That he had a technical team which prepared tender documents.
19. That the Appellant was an errands man and did not deliver on the Makueni case.
20. That the witness transacted the day to day affairs of the Respondent company.
21. That the Claimant did not make any proposal or changes made.
22. It was his testimony that some of the documents relied upon by the Appellant were fraudulent and a criminal complaint had been made.
23. Documents filed by the Respondent reveal that the Appellant was charged with the offence of making documents without lawful authority contrary to Section 357(a) of the Penal Code, had been arrested on 6th July, 2022 on 29 counts.
24. On 7th July, 2022, counsel for the Claimant sought a defer of the charge but the Court declined and the Claimant pleaded not guilty on all counts and was released on a cash bail of Kshs.800,000/= or bond at Kshs.2.5 with a similar surety.
25. However, on 26th September, 2022, the complainant applied to withdraw the case on humanitarian grounds as the Appellant was sick as disclosed by his counsel and the Court acquiesced that the complaint be withdrawn under Section 87 of the Criminal Procedure Code.



26. By a judgment dated 22nd November, 2021, the learned trial Magistrate awarded the Appellant;
 - i. 12 months compensation Kshs.360,000.00
 - ii. One month's salary Kshs.30,000.00
 - iii. Leave days Kshs.60,000.00
 - iv. House allowance Kshs.144,000.00
 - v. Service pay Kshs.30,000.00
27. This is the decision the subject matter of the instant appeal.
28. The Appellant faults the judgment of the trial Magistrate in various respects:
 - i. Failing to compute salary in lieu of notice, annual leave, service pay and compensation at Kshs.50,000/= per month.
 - ii. Failing to find that the Appellant's salary was Kshs.50,000/= per month.
 - iii. Finding that other Engineers assisted the Appellant in the work thereby disentitling the Appellant commission.
 - iv. Failing to find that the Respondent challenged the evidence tendered by the Appellant that he secured contracts worth Kshs.512,266,198.33 for entitlement to a commission.
 - v. Failing to grant the Appellant commission at 2%.
 - vi. Failing to make an award of general, punitive and exemplary damages.
 - vii. Filling in the gaps left out by the Respondent.
29. These grounds may be summarized as commission, reliefs and evidence.

Appellant's submissions

30. On commission, counsel submits that since the trial Court found the proposed job offer, a contract of employment, thus enforceable and the CEO made amendments, the document was binding on the Respondent on matters salary.
31. That because the Appellant was the Sales and Marketing Manager and represented the Respondent as evidenced by the letters on record, and the Respondent secured contracts, he was entitled to a commission at 2%.
32. That the reliefs were not challenged.
33. Reliance was made on Mica Sibbo Bulali V Miriam Josephine Charles (1988) eKLR on filling of gaps.
34. It was also urged that Courts determine the issues placed before them as held in I.E.B.C & another V Stephen Mutinda Mole & 3 others (2014) eKLR on pleadings.
35. As to whether Engineers assisted the Appellant, counsel urges that the same was irrelevant as he was the Sales and Marketing Manager and brought work to the Respondent as a broker.
36. As to whether the Respondent challenged the Appellant's evidence at trial, counsel submits that it did not as there was no evidence of tenders and it paid for fuel for the vehicle used by the Appellant.



37. As regards general, punitive and exemplary damages, counsel submits that the Respondent did not challenge the same and the Appellant's efforts to follow up his dues were not noticed by the Court.
38. Counsel submits that the Appellant is still entitled to punitive and exemplary damages citing *Rookes V Barnard (1964) AC 1129*, *Itakura V Odera (2022) KEHC 3120* among others.
39. Puzzlingly, counsel argues that since termination was unfair, as held by the trial Court, general, punitive and exemplary damages ought to have been awarded.
40. On failure by the Court to rely on Kshs.50,000/= in the computation of dues, counsel relies on the decision in *Five Forty Aviation Ltd V Erwan Lanoe (2019) eKLR*, *Pius Kimaiyo Langat V Co-operative Bank of Kenya Ltd (2017) eKLR* and *Housing Finance Company of Kenya Ltd V Gilbert Kibe Njuguna*, among others to urge that contracts belong to the parties who are bound by their terms.
41. In his Supplementary Submissions, the Appellant submits that the evidence of RWI deponed on 23rd January, 2023 should be treated with caution as no evidence was adduced to show that the Appellant sent his relatives to plead for withdrawal of the criminal case or the Appellant expressed any remorse and no medical records were availed.
42. Counsel for the Respondent urges that parties are bound by their pleadings and the Appellant's medical records were not produced in Court and Courts determine issues raised by the parties as held in *Philmark Systems Co. V Andermore Enterprises (2018) eKLR*.
43. Counsel submits that having withdrawn the criminal case, the Respondent ought not to rely on the proceedings as evidence in the instant case and the allegation that the appeal hinges on forged documents was misleading as the Appellant was not found guilty and the case was withdrawn by the Respondent on its own volition.

Respondent's submissions

44. As to whether the Appellant's proposal was a contract of employment, the Respondent's counsel submits that while the Respondent does not contest the salary paid to the Appellant, it disputes the allegation that an employment relationship arose from the Appellant's proposal as it did not sign the document and the amount of Kshs.50,000/= mentioned had no basis and RWI denied having stamped the document and testified that no other director of the Respondent could have done it.
45. Counsel urges that it is not the duty of the Court to rewrite contracts.
46. Reliance was made on the sentiments of the Court in *United Millers Ltd V Nairobi Java House Ltd (2019) eKLR* on acceptance of offers.
47. That the trial Court's finding that the Respondent's CEO signed the proposal was not based on any evidence, and was thus erroneous.
48. Counsel submits that for contract to come into existence, the offer must be unequivocally accepted and in this case the appellant stamped the document as it was accessible to him.
49. That the letters dated 14/7/2017, 27/7/2018, 10/4/2018, 17/10/2018 and two others of even date had forged signatures of RWI.
50. On payment of commission, counsel submits that award of tender is not prove of having played any role in securing the tender as the document was available to any of the Respondent's employees and all the contracts were awarded by public bodies in accordance with the provisions of Public Procurement & Asset Disposal Act and the Respondent was prequalified and awarded as being the most competitive.



51. Counsel submitted that CW2 did not testify that the Appellant participated in the award of the tender by Chuka Housing Co-operative Society.
52. Counsel further urges the Court to find that there was no contract entitling the Appellant to a commission of 2% or any commission and even if there was, he did not show what he was entitled to earn a commission.
53. On punitive and aggravated damages, counsel submits that the circumstances do not warrant the award of exemplary damages and cites the Court of Appeal decision in D.K. Njagi Marete V Teachers Service Commission (2020) eKLR.
54. That the damages for unfair termination of employment were sufficient.

Analysis and determination

55. Being a first appeal, the duty of the Court is as was articulated by the Court of Appeal in *Selle & another V Associated Motor Boat Co. Ltd & others* (1968) EA 123 namely; to re-evaluate the evidence before the trial Court as well as the judgment and arrive at its own conclusions and judgment on the appeal, bearing in mind that the Court neither saw nor heard the witnesses.
56. See also *Peters V Sunday Post Ltd* (1958) EA 42.
57. Before delving into the arguments relied upon by the counsel, it is significant to evaluate the evidence adduced by the parties in support of their cases and in particular the Claimant/Appellant.
58. Strangely, none of the documents produced by the Claimant has the Respondent's signature on behalf of the board of directors.
59. RWI denied having signed any document and the letters he allegedly signed have different signatures, some whose variation is too distinct and in particular those on collection of Bids Bond.
60. The recommendation letter was signed by one Mr. Frankline Miriti who was allegedly to give an employment contract but did not and was given almost 2 years after the Claimant had left employment.
61. As regards employment, the trial Magistrate was satisfied that the issue did not commend itself for determination though the Claimant's counsel had raised it.
62. Be that as it may, the evidence before the Court showed unequivocally, that the Respondent and the Appellant had a relationship from April 2016 to November 2018 as evidenced by the Letter of recommendation as well as other documents which appear to suggest so.
63. As to whether the appellant was employed as a Sales and Marketing Manager, although CWII testified that that is how he was introduced to him by RWI at their offices at Ruiru, the Claimant adduced no evidence to suggest that he had any skill or expertise in sales or marketing having been engaged as a Machine Operator.
64. Similarly, he provided no evidence as to what his typical duties were in sales and marketing.
65. What was he selling or marketing for the Respondent and how?
66. Neither the Claimant's written statement nor the oral evidence he adduced in Court capture his job description or work on a typical day, which fortifies the Respondent's evidence that he may have been an errands man as the proposal he made to the Respondent was not responded to.



67. Copies of the agreements between the Respondent and other companies, notification of tender award, site visits and letters to represent the Respondent is not sufficient evidence to show that the Claimant was in Sales and Marketing which involves sale of products as opposed to submission of tenders and collection of Bid Bonds.
68. Equally, in at least 4 of the letters on record, the Claimant refers to himself as the Sales and Logistic Manager, all dated before November 2017 when he allegedly was serving as Sales and Marketing Manager.
69. The learned trial Magistrate was of the view that since the Respondent did not avail any evidence of the employment relationship, the appellant's proposal was the contract of employment and was thus a valid employment contract.
70. In the Courts view, the learned trial Magistrate erred in finding that the proposal by the appellant was binding on the Respondent as it neither signed nor signified its acceptance of its terms.
71. At common law, a contract is a legally binding agreement between two or more parties and one of the essential elements of a contract and its indispensable foundation is consensus ad idem or meeting of minds or agreement.
72. The fact of payment of salary, which was not proved, cannot be the basis of inferring that the proposal was accepted.
73. A party is not privy to a written contract it has not signed but may have an oral contract with the other party, as was the case here.
74. Having failed, refused or neglected to sign its part of the contract, the Respondent was not privy to the proposal though it was the Claimant's employer.
75. The learned trial Magistrate acknowledges the foregoing by awarding pay in lieu of notice of Kshs.30,000.00 as opposed to the Kshs.50,000.00 proposed by the Appellant and declined to award the commission proposed by the Appellant.
76. The trial Court expressed the view that since the Claimant was being paid Kshs.30,000/= which was not contested, it was his monthly pay as one of the employees of the Respondent.
77. As to whether the Appellant secured contracts worth Kshs.512,266,198.33, the trial Court identified the Letters of Award of Tenders filed by the Appellant and reasoned that as the Appellant had confirmed on cross-examination that there were engineers involved in the process to offer technical support;
- “ . . . It was concerted effort and the Court cannot award the Claimant the sum stated herein. Having failed to convince this Court as required by law.”
78. Clearly, apart from the Letters of Award of Tenders/Acceptance and copies of concluded contracts, the Appellant availed no credible evidence to demonstrate the role he played in having the tenders awarded bearing in mind that he was neither trained in sales, marketing nor engineering.
79. The tenders accepted were as follows;
1. Murang'a Water and Sanitation Co. Ltd – construction of 10.3 km water pipeline at Kabula.



2. Lack Victoria North Water Services Board – Borehole and Civil Works Lot III in Homa Bay & Migori and Nyamira Boreholes.
 3. Embu Water & Sanitation Co. Ltd – laying of sewer pipes.
 4. Embu Water & Sanitation Co. Ltd – construction of manholes.
 5. Embu Water & Sanitation Co. Ltd – construction of ponds.
 6. Michuki Technical Training Institute – Construction of Building Workshop.
 7. Kenya Medical Research Institute – Rehabilitation of Sewer line & Associated infrastructure Busia County.
80. The seven tenders involved civil and other engineering works requiring technical expertise in the particular areas and the Appellant had none.
81. The Respondent’s witness testified that the Respondent had a technical team which did the technical work, a fact the Appellant acknowledged in his evidence.
82. Without availing evidence of the role he played in the preparation of tender documents before the same were submitted with clear illustrations, his role remains undefined and thus his overall contribution is difficult to quantify.
83. The trial Magistrate’s finding cannot be faulted as he who alleges must bear the burden of proof as exemplified by Section 107 of the *Evidence Act* that;
1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
84. Equally, under Section 108 on the incidence of burden,
The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
85. Section 109 of the *Evidence Act* is also relevant as it address proof of particular facts as was the case in this instance.
86. Having failed to prove the particular role he played in the preparation and submission of tender documents since their existence was a matter of public notoriety as they must be publicised to all and sundry, and having further failed to adduce evidence as to how he facilitated the award of the tender to the Respondent, the trial Magistrate’s finding cannot be faulted.
87. The foregoing findings apply to the appellant’s claim for commission for individual tenders awarded, for the simple reason that the Claimant adduced no evidence of the specific role he played to qualify for a 2% commission in each of them.
88. Relatedly, the Claimant adduced no evidence of the Respondent’s acceptance or agreement to pay any commission or particulars of the commission.
89. Was the commission payable on the total award or the net profit made by the company? Was it payable after acceptance or execution of the task or on payment by the contracting party?



90. In the absence of an agreement duly executed by the Respondent to pay a commission of a defined percentage, the claim for commission lacks a solid basis for award and the Court is in agreement with the findings of the trial Court.
91. With regard to the salary payable to the Appellant, the trial Magistrate is assailed for using Kshs.30,000/= in lieu of Kshs.50,000/=.
92. The learned trial Magistrate relied on the salary admitted by the Claimant as what he was receiving an amount the Respondent did not contest.
93. For unexplained reasons the trial Magistrate relied on the sum of Kshs.30,000/= as opposed to Kshs.50,000/= yet he had found and held that Appellant's proposal was a contract of employment between the Appellant and the Respondent.
94. Having found that the Appellant's proposal was an offer which the Respondent never accepted unequivocally, it could not be the contract of employment and its terms could bind the Respondent.
95. Since the appellant admitted that his monthly salary was Kshs.30,000/= and adduced no evidence to show that the Respondent had agreed to raise it at any point, the Court lacks the evidential basis to deem Kshs.50,000/=, the appellant's salary.
96. The Court is in agreement with the findings of the trial Court on the amount of salary payable per month.
97. As regards annual leave, the finding of the trial Magistrate is faulted on the basis of the salary used in the computation.
98. Strangely, neither the appellant's written witness statement nor the oral testimony adduced in Court makes reference to the number of days the appellant was claiming.
99. While the claim is for unpaid leave days, weekends and holidays, the trial court awarded payment for leave days only on the premise that the Claimant did not take annual leave for the entire duration of employment and assumed that the number of days was equivalent to one month's salary which is not the case.
100. The trial court's findings on this claim lacked supportive evidence as the appellant served for more than 2½ years from April 2016 to November 2018, a fact admitted by both parties.
101. Secondly, the appellant never alleged that he did not proceed on annual leave or how many days he was claiming. The Court fill in gaps and award payment.
102. In the Court's view, a litigant who cannot tell the number of leave days he or she is claiming and who does not explain why leave was not taken or why he or she worked on which weekend or public holidays engages in a fishing expedition hoping to catch whatever the hook haps on.
103. In the Court's view, there ought to be a number for the Respondent to controvert. Numbers are specific and ascertainable. Weekends and public holidays are ascertained every year.
104. The appellant's claim for unpaid leave days, weekends and public holidays is amorphous lacking in particulars and thus unmerited.
105. The trial Court's finding is thus interfered with and the claim for leave days is denied.



106. On unpaid salary, the trial court found that since the appellant did not take action in relation to the alleged underpayment and was thus comfortable with his salary of Kshs.30,000.00, he was not entitled to the unpaid salary.
107. The appellant adduced no evidence of any underpayment and furnished no particulars as to when the alleged non-payment took place and how much was unpaid as neither the written witness statement nor the oral evidence adduced in Court set out the relevant particulars of underpayment.
108. The claim for unpaid salary lacks supportive evidence and is declined on account that the Court has inter alia found that the appellant's proposal to the Respondent dated 7th March, 2017 was not accepted by the Respondent as the basis of their relationship.
109. At any rate, the appellant was already an employee of the Respondent. It was not a new appointment but a promotion.
110. On service pay, the Court is in agreement with the findings of the trial Court that the Respondent tendered no evidence to prove that it was deducting and remitting NSSF contributions as by law required.
111. The appellant thus qualified for service pay under Section 35(5) of the *Employment Act*, 2007 at 15 days for each completed year of service Kshs.30,000.00 which the Court affirms.
112. On housing allowance, the trial Court found that the appellant was entitled to housing allowance as the Respondent tendered no evidence to demonstrate that the sum of Kshs.30,000.00 was inclusive of accommodation which the Respondent did not provide and awarded allowance for 32 months at 15%, a total of Kshs.144,000/=.
113. It requires no emphasis that housing is one of the statutory rights of employees under Section 31 of the *Employment Act* provided at the employer's cost and an employer is required to show that the salary paid to an employee has a housing component or it has been factored in the case of a consolidated salary or that the employee was accommodated by the employer.
114. Granted that the Respondent did not adduce evidence to prove any of the foregoing, the finding of the trial court cannot be faulted and is affirmed.
115. Finally, as regards termination of the Appellant's employment, while the appellant submitted that it was unfair, the Respondent pleaded that the appellant absconded duty as he stopped reporting to the work place and his employment was not terminated.
116. The trial Court found that based on the evidence adduced by the parties, the appellant discharged his obligation in that he talked to one Caroline and connected her to the person in Makueni who would assist her secure a tender and the Respondent tendered no evidence to show that the Appellant did not fulfil his obligation in that instance.
117. Neither the appellant nor the respondent is clear as to what transpired in November 2018 but both agree that the parties separated, albeit by termination and/or desertion.
118. The appellant is unsure of the date and his witness statement is reticent on termination of employment.
119. Equally, the respondent's evidence is reticent on when the appellant absconded duty and what it did to so ascertain.
120. The trial Court found that the termination was unfair as the Respondent failed to prove that it had a valid and fair reason or it complied with the requirements of Section 41 of the *Employment Act*, 2007.



Whether the Appellant's employment was unfairly terminated or he deserted duty

121. Black's Law Dictionary, 10th Edition defines desertion as;

“The wilful and unjustified abandonment of a person's duties or obligations.”

122. In *Seabolo V Belgravia Hotel (1997) 6 BLLR 829 (CCMA)* a South African Court stated;

“... an employee who deserts his or her post does so with the intention of not returning, or having left his or her post subsequently formulates the intention not to retain . . .”

123. According to Mbaru J. in *Owudu V Digital Sanitation Services Ltd (2024) KEELRC 917 (KLR)*;

“Absconding duty and desertion are defined in the case of *Javan Kisoi Mulwa V SAA Interstate Traders (K) Ltd (2018) eKLR* where desertion takes place when the employee has no intention of resuming work.

Absconding is when the employee fails to seek permission for work absence. For an employer to claim abscondment, this must be demonstrated and proved.”

124. The emerging jurisprudence of this Court on matters desertion or absconding is that an employer who pleads either is bound to demonstrate the reasonable steps it took to ascertain the employee's whereabouts or why he or she was not reporting to work.

125. See *Omwoyo Onchweri V BOM Nakuru YMCA Secondary School (2015) eKLR*, *Sitima V Jokali Handling Services Ltd (2023) EELRC 762 (KLR)*.

126. In *Judith Atieno Owuor V Sameer Agricultural and Livestock Ltd (2020) eKLR*, Maureen Onyango J. stated as follows:

“In the case of *Felistas Acheha Ikatwa V Charles Peter Otieno (2018) eKLR*, it was held;

“The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to deserting employee that termination of employment on the ground of desertion is being considered.”

127. See also *Evans Ochieng Oluoch V Njimia Pharmaceuticals Ltd (2016) eKLR*, *Boniface Francis Mwangi V BOM Iyego Secondary school (2019) eKLR*, *Simon Mbithi Mbane V Inter Security Services Ltd (2018) eKLR*.

128. In the instant case, the Respondent adduced no scintilla of evidence to prove the efforts expended in tracing the appellant to resume duty or notify him of the impending disciplinary action on the basis of the desertion.

129. In sum, the respondent failed to demonstrate that the appellant deserted the workplace.

130. On termination of employment, the law is explicit that there must be a valid and fair reason for the termination and fair procedure.

131. In *Walter Ogal Anuro V Teachers Service Commission (2013) eKLR*, Ndolo J. held that;

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment



of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

132. Having failed to prove that the appellant deserted his post, it was incumbent upon the respondent to prove that termination of the appellant’s employment was fair.

133. The appellant testified that he was notified of the termination by Mr. Mwititi, the Human Resource Manager as directed by RWI. Regrettably, Mr Mwititi did not testify and the appellant’s evidence was uncontroverted.

134. From the evidence adduced by the parties, it is discernible that the Respondent has failed to demonstrate that it had a reason(s) to terminate the appellant’s employment or conducted it in accordance with a fair procedure as prescribed by the provisions of Section 41 of the [Employment Act, 2007](#).

135. The trial Court found thus:

“Thus, the only inference one can draw is that the dismissal was unfair and unlawful for failing to accord the Claimant that safeguard”.

136. In determining the quantum of compensation under Section 49 of the [Employment Act](#), the trial Court considered the length of service and the fact that appellant did not contribute to the termination of employment and awarded 12 months compensation.

137. However, the Court did not consider the fact that the appellant did not express his wish to remain in the Respondent’s employment and did not appeal the termination of employment. Should the Court interfere with the award?

138. In *Ken Odondi & 2 others V James Okoth Omburah T/A Okoth Omburah & Co Advocates (2013) eKLR*, the Court of Appeal held that;

“The principles upon which this Court can interfere with the exercise of discretion of the trial judge are well established. This court must, to interfere, be satisfied that the judge has misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice – *Mbogo & another V Shah (1968) EA 93*; *Ephantus Mwangi & another V Wambugu 1983/4 2 KCA 100* and also *Sumaria & another V Ahed Industries Ltd (ur) Civil Appeal No. 203 of 2002*.”

139. Similarly, in *Kenfro Africa Ltd T/A Meru Express Services 1976 & another V Lubia and another (No. 2) (1985) eKLR* where the Court stated as follows;

“The principles to be observed by an appellate Court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the judge, in assessing the damages, took into account an irrelevant factor or left out of account a relevant one, or that short of this, the amount is so inordinately high that it must be a wholly erroneous estimate of the damage.

See *Ilanga V Manyoka (1961) EA 705, 709, 713 (CA-T)*; *Lukenya Ranching & Farming Co-operative Ltd V Kavoloto (1979) EA 414, 418, 419 (CA-K)*. This Court follows the same principles.”



140. See also *Shabani V City Council of Nairobi* (1985) KLR 516, *Butt V Khan* (1981) KLR 349.
141. In *OI Pejata Ranching Co. Ltd V David Wanjau Muhoro*, the Court of Appeal reduced the award of 12 months compensation to 6 months as it had not been justified on the basis of Section 49(1)(c) of the *Employment Act*, 2007.

The Court stated as follows:

“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 . . .”

142. In the instant appeal although the learned trial Magistrate took into account the length of service “of close to one year” and the Appellant did not contribute to the termination of employment through misconduct, the Court left out the fact that the appellant did not express his wish to remain in employment and/or appeal the Respondent’s decisions.
143. Be that as it may, the Respondent has not contested the sum of Kshs.360,000/= and it is affirmed.
144. The upshot, in conclusion therefore is that;
- a. The judgment of the trial Court is upheld to the extent that the claim for
 - i. One month’s salary in lieu of notice kshs.30,000/= is affirmed.
 - ii. The claim for service pay of Kshs.30,000/= is affirmed.
 - iii. Commission of 2% for each project fails as is the claim for unpaid salary.
 - iv. The award of Kshs.360,000/= compensation is affirmed.
 - v. House allowance Kshs.144,000/=.Total Kshs.564,000.00
 - b. The judgment of the trial Court is interfered with to the extent that the award for unpaid leave, weekends and public holidays Kshs.60,000.00 is set aside.
145. Parties shall bear their own costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30TH DAY OF SEPTEMBER 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of



Section 1B of the *Civil Procedure Act* (**Chapter 21 of the Laws of Kenya**) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

