



Lidwaji v Board of Trustees Alliance Francais De Nairobi (Appeal E016 of 2023) [2024] KEELRC 2585 (KLR) (23 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2585 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E016 OF 2023
NJ ABUODHA, J
OCTOBER 23, 2024**

BETWEEN

ALEX KHALEKHA LIDWAJI APPELLANT

AND

**THE BOARD OF TRUSTEES ALLIANCE FRANCAIS DE
NAIROBI RESPONDENT**

(Being an appeal arising from the Judgment of Honourable M. W. MURAGE (SRM) delivered on 2nd December 2022 at the Chief Magistrates Court of Kenya at Nairobi in Employment and Labour Relations Case No. 250 of 2019)

JUDGMENT

1. Through the Memorandum of Appeal dated 22nd February, 2023, the Appellant appeals against the Judgment of Honourable M.w. Murage (SRM) delivered on 2nd December 2022.
2. The Appeal was based on the grounds that:
 - i. The Honourable Magistrate erred in law and in fact in failing to take in to account the principles of making an award for compensation set out under sections 49 and 50 of the [Employment Act](#) and therefore resulted in awarding damages for unlawful termination that were inordinately low, considering the Claimants length of service and circumstances surrounding the unlawful termination.
 - ii. The Honourable Magistrate erred in law and in fact in awarding compensation equivalent to four months pay without laying any legal basis for the same.
 - iii. The Honourable Magistrate erred in law and in fact in totally ignoring and failing to consider and address the Claimant’s prayer for damages for loss of employment opportunity without providing any justification.



3. The Appellant prayed that:
 - a. The Appeal be allowed and the Judgment of the subordinate Court in CMELR No. 250 of 2019 delivered on the 2nd December, 2022 be set aside with costs. That damages for unlawful termination awarded in CMELR No. 250 of 2019 be enhanced.
4. The Appeal was disposed of by written submissions.

APPELLANT'S SUBMISSIONS

5. The Appellant's advocates Andrew Mwangi Sisule and Associates LLP filed written submissions dated 21st February, 2024. On the issue of whether the Honourable Magistrate erred in law and in fact in awarding compensation equivalent to four Months pay without laying any legal basis for the same counsel submitted that the court in exercising its discretion should be guided by the rules and principles of law. Counsel relied on the case of Kenfreight(E.A) Limited v Benson K Nguti (2019) eKLR and Kridha Limited v Peter Salai Kituri(2020) eKLR and submitted that courts while exercising their discretion, should not act arbitrary and the court should explain the basis of their decision.
6. Counsel submitted that the trial magistrate in his judgment held that the appellant was terminated both substantively and procedurally unfairly and proceeded to award him four months' pay without any justification. That the court did not give reasons for its decision and went against tenets of section 49 of the *Employment Act*. That as per section 49 (1) (c) of the Act, the length of the Appellant's employment and the circumstances surrounding his unfair termination, he should be awarded a higher compensation.
7. On the issue of whether the damages awarded by the Honourable court for unlawful termination as stipulated in section 49 and 50 of the *Employment Act* were inordinately low considering the Appellant's length of service and the circumstances surrounding the unlawful termination, counsel submitted that the trial court found the Appellant to have been both substantively and procedurally terminated but awarded four months' pay equivalent to Kshs 137,612.48/=. Counsel relied on the case of Gas Kenya Limited v Odhiambo Appeal E006 of 2022 (2022) KEELRC 3930(KLR) 22 September 2022 in submitting that the Appellant was entitled to damages under section 49 and 50 of the Act after finding he was unfairly terminated. He urged that the court can reverse the trial court's award of damages if its convinced that the trial court acted upon some wrong principle of law or that the amount awarded was so extremely high or so very low as to make it in the judgment of this court an entirely erroneous estimate of the damage to which the Claimant is entitled. Counsel relied on the case of Butt vs Khan (1981) KLR 349 on this principle.
8. Counsel further submitted that the award of maximum compensation must be based on sound judicial principles while the discretion is to be exercised as per peculiar facts of each case while taking the considerations under section 49(4) of the Act. Counsel relied on cases of OI Pejeta Ranching Limited vs David Wanjau Muhoro(2017)eKLR and Kenya Broadcasting Corporation v Geoffrey Wakio(2019) eKLR.
9. Counsel submitted that the Appellant was in active and loyal service under the Respondent as his employer herein for a period of 20 years since 1998, before his unfair termination in December, 2018. That during the time, the Appellant received promotions and increments in pay. The Appellant was unfairly terminated on a vague and unclear allegation of treating a fellow employee with disrespect.
10. Counsel further submitted that the Appellant was not given a chance to defend himself on the said allegations which was against his right to fair hearing and the Respondent never produced any witness to defend the suit hence his evidence uncontroverted. Counsel relied on the case of Edward Muriga



through Stanely *Muriga v Nathaniel D. Schulter Civil Appeal No. 23 of 1997* on the uncontroverted evidence where the Respondent files a defence but does not call any witness the said defence remains mere allegation.

11. Counsel submitted that the circumstances of the Appellant's termination, the extent if any the employee contributed to the termination, his length of service, the fact that the suit was undefended, made the award of the trial court of four months' pay inordinately low. Counsel relied on the case of Alfred Muthomi & 2 Others v National Bank of Kenya Limited (2018) eKLR and the above case of Gas Kenya Limited on the court awarding the maximum compensation after considering the long length of service.
12. Counsel submitted that the trial magistrate did not give justification why he failed to consider submissions on the issue of whether the Claimant was entitled to compensation for the loss of employment opportunity as a result of the Respondent's action. He relied on the case of United India Co. Ltd v East African Underwriters (Kenya) Ltd (1985) E.A while submitting that the court of Appeal may interfere with discretionary decision of judge who failed to take account considerations of which he should have taken account of.
13. Counsel further submitted that the Respondent reached out to LDD to verify the Appellant's visit to the French school and that the Respondent's executive Director's involvement resulted in the loss of employment opportunity to LDD/The French School. This evidence remained uncontroverted. Counsel urged the court to consider a remedy of Kshs 1,000,000/= in damages for loss of employment.

RESPONDENT'S SUBMISSIONS

14. The Respondent filed submissions through the Federation of Kenya Employers dated 18th June, 2024 and on the issue of whether the Honourable Magistrate erred in law and fact in awarding compensation equivalent to four months' pay without laying any legal basis, the Respondent relied on considerations the court is to take while awarding the damages under section 49(4) of the *Employment Act*. That the court is supposed to exercise discretion as guided by the above section.
15. It was the Respondent's submission that the trial court took into account the above considerations in awarding the Appellant four months pay because the Appellant was not entitled to be paid anything because he was both substantively and procedurally terminated. Counsel urged that the court should award not more than three months compensation.
16. On the issue whether the damages awarded by the Honourable Magistrate for unlawful termination stipulated in section 49 and 50 of the *Employment Act* were inordinately low considering the Appellant's length of service and the circumstances surrounding the unlawful termination, the Respondent submitted that the principle on which the appellate courts interfere with an award was set out in the case of Butt vs Khan (1977) 1KAR. The duty of this court was to consider whether the award of the lower court was inordinately low as to warrant interference by the court.
17. The Respondent further submitted that section 49(1) (c) gives the court the discretion to award from 1 month to 12 months compensation depending on the circumstances of each case and as guided by section 49(4) of the Act. That the trial court should not be faulted for not awarding the higher limit and this court has no reason to interfere with the trial court decision as the magistrate rightfully exercised its discretion.



DETERMINATION.

18. The principles which guide this court in an appeal from a trial court are now well settled. In *Selle & Another v Associated Motor Boat Company Ltd & Others*, [1968] EA 123, Sir Clement De Lestang, Vice President of the Court of Appeal for East Africa stated those principles as follows: -

“An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

19. In this case, the Judgment of the trial court was that the termination was both procedurally and substantively unjustified and judgment was entered in favour of the Claimant against the Respondent in the sum of Kshs 137,612.48 /= equivalent to four months pay with cost and interest. The Respondent was further ordered to issue the Claimant with certificate of service.
20. The Appellant alleges that the trial magistrate erred by awarding him four months’ salary as compensation for unlawful termination despite finding that his termination was both substantively and procedurally unfair and that the trial court did not take into account the circumstances of his termination as well as the length of service and further that the trial court did not take into account the considerations under section 49 and 50 of the *Employment Act*.
21. The Respondent on the other hand alleged that the trial court took into account the considerations under section 49(4) of the Act more so the employee’s contribution to his termination. That the trial court was justified in awarding the Appellant the four months salary as compensation and that the Appellant was both procedurally and substantively terminated hence he ought not to be paid anything and if the court finds otherwise he should be awarded not more than three months salary as compensation.
22. This court asks itself if it should interfere with the trial court’s discretion on the award of damages. As an appellate court, it can only interfere with such discretion if there was an error on some matters leading to erroneous decision as was held on the case of *Kenya Revenue Authority & 2 others v Darasa Investments Limited* (2018) eKLR where the court held;

The court ought not to interfere with the exercise of discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice.

23. The court will therefore disturb the awards herein if it is reasonably shown that the trial court misdirected itself in some matter hence arriving at a wrong decision. The court notes that the award of up to twelve months salary as compensation is discretionary to the court however in exercising the discretion, the court should be guided by considerations set out under Section 49(4) of the *Employment Act*.



24. In this case the trial court awarded the Appellant four months' salary as compensation and never gave any justification. As observed earlier any Court seized with jurisdiction to hear and determine an employment dispute is guided when making any award, by the considerations set out under section 49(4) of the Act. In this particular case the Appellant had worked for the Respondent for 20 years, the trial Court found that the reasons for termination were not valid and justifiable and that the termination was not carried out through a fair procedure. The trial court did not fault the Appellant for having contributed to his termination. The court further noted that apart from filing response to the claim, the respondent did not call any witnesses in the Court below. The responses pleaded by the respondent therefore remained mere allegations was held in the case of Edward Muriga through Stanely Muriga v Nathaniel D. Schulter relied on by Counsel for the appellant.
25. This court therefore is persuaded that the trial Court erred in awarding the claimant only four month's salary as compensation in the circumstances. In the Court's view, the appellant was entitled to a higher compensation than that. For reasons adumbrated in paragraph 24 above, the appellant was entitled to maximum compensation of 12 months' salary. In this respect, the Court will rely on the dictum in the case of *Gas Kenya Limited v Odhiambo (Appeal E006 of 2022)* [2022] KEELRC 3930 (KLR) where the Court stated as follows: -
- “The Respondent was in the service of the Appellant for about 12 years (2006-2018). Other than the issues giving rise to this case, nothing shows that the Respondent had disciplinary issues in the many years he was in the service of the Appellant....Owing to the Respondent's long service, I uphold the award of 12 months' salary in compensation for unfair and unlawful dismissal”
26. On the issue of award of damages for loss of job opportunity which the Appellant alleged he did not secure with LDD. The Court notes that the trial court did not make any award on this score. The appellant had sought to be awarded Kshs. 1,000,000/= in this regard.
27. To succeed in such a claim, the appellant ought to have sufficiently demonstrated before the trial Court, how the Respondent contributed to the loss of job opportunity in another institution. The court takes the view that the Appellant did not illustrate how the Respondent contributed to the loss of a job opportunity at LDD. The court therefore agrees with the trial court in declining to make any award in this respect.
28. In the upshot the Appeal partially succeeds as follows; _
- a. 12 Months' salary as compensation for unfair termination Kshs. 412,837.44 /=
 - b. Damages for loss of employment opportunity...NIL
- Total Ksh 412,837.44/=
29. Since the appeal is partially successful, each party shall bear their own costs of the Appeal.
30. It is so ordered.

DATED AT NAIROBI THIS 23RD DAY OF OCTOBER 2024 DELIVERED VIRTUALLY THIS 23RD DAY OF OCTOBER 2024

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

