



Njeru & another t/a Macharia -Mwangi & Njeru Advocates v Kimani (Appeal E043 of 2023) [2024] KEELRC 2828 (KLR) (14 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 2828 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E043 OF 2023
NJ ABUODHA, J
NOVEMBER 14, 2024**

BETWEEN

**MACHARIA NJERU & ELIJAH NJERU T/A MACHARIA -MWANGI & NJERU
ADVOCATES APPELLANT**

AND

JOHN WM KIMANI RESPONDENT

(Being an appeal arising from the Judgment of Honourable H.M Ng'ang'a(PM) in Milimani CMEELRC No. 1397 of 2020b between John W.M. Kimani vs Macharia Njeru & Elijah M. Njeru T/A Macharia Mwangi& Njeru Advocates delivered on 9th March, 2023)

JUDGMENT

1. Through the Memorandum of Appeal dated 3rd April, 2023, the Appellant appeals against the whole of the Judgment of Honourable H.M Ng'ang'a delivered on 9th March, 2023.
2. The Appeal was based on the grounds that:
 - i. The Learned Magistrate misunderstood the nature of the case before the Honourable court.
 - ii. The Learned trial Magistrate erred in law and fact in finding that there was constructive dismissal of the Respondent herein by the Appellants.
 - iii. The Learned Magistrate erred in law and fact in finding that the Respondent was unfairly, wrongly and unlawfully dismissed when the Respondent voluntarily resigned from employment on the 29th October,2020.
 - iv. The Learned trial Magistrate erred in law and fact by applying wrong principles and parameters in finding and holding that the Respondent's dismissal was unfair.



- v. The learned trial Magistrate erred in law and fact in awarding the Respondent three month's salary in lieu of notice without any factual and contractual documents to support such award.
 - vi. The Learned trial Magistrate erred in law and fact in disregarding the Appellant's counterclaim which was admitted by the Respondent.
 - vii. The Learned trial Magistrate erred in law and fact in finding that the Respondent was unfairly dismissed, that the Appellants violated fair labour practices as espoused by the Constitution and in awarding the Respondent the maximum compensation of twelve months.
 - viii. The Learned trial Magistrate erred in law and fact in failing to consider the Appellant's evidence and misapprehended the law in arriving at the decision that the Respondent was constructively dismissed.
 - ix. The Learned trial Magistrate erred in law and fact in awarding the Respondent an award of compensation for unlawful dismissal in the remainder of the fixed term contract, an award not anchored on any statutory law or contractual documents.
 - x. The Learned trial Magistrate erred in law and fact in failing to consider that the Claimant's own communication of 29th October,2020 amounted to resignation from employment.
 - xi. The Learned trial Magistrate erred in law and fact in disregarding the overwhelming evidence presented by the Appellants herein.
3. The Appellants therefore prayed that the appeal be allowed and the judgment delivered on 9th March, 2023 by the trial Court be set aside together with all consequential orders therefrom be substituted with an order dismissing the claim with costs and costs of this appeal.
 4. The Respondent on the other hand being dissatisfied with the portion of the above judgment filed Memorandum of Appeal in ELRCA Appeal No. E045 of 2023 which by directions of this court on 13th April,2024 was consolidated with this appeal being the main appeal while Appeal E045 of 2023 being the Memorandum of Cross Appeal dated 31st March,2023 on the grounds that:
 - i. The Learned Magistrate erred both in law and in fact in making a finding that the Respondents had proven remissions of the National Social Security Fund (NSSF) on behalf of the Appellant despite there being overwhelming evidence that the Respondents had started remittance in the year 2005 and further despite the Appellant demonstrating that no remissions were effected for 9 years between 1996-2004 and that the Respondents had no alternative gratuity arrangement to cover for that period and therefore arrived at a wrong conclusion.
 - ii. The learned Magistrate erred both in law and in fact in making a finding that the Appellant's Claim for compensation for unpaid leave days was statute barred under section 90 of the Employment Act whereas the cause of action arose from a continuing default on the part of the Respondents as of 209.10.2020 when the Appellant was unlawfully terminated by the Respondents and therefore the learned magistrate clearly misapprehended the obtaining facts in the matter and the provisions of section 90 and arrived at a wrong conclusion.
 - iii. The Learned Magistrate erred in law by ignoring and failing to fully appreciate the facts obtaining in the Appellant's case and the totality of the evidence tendered by the Appellant in support of his claim for service pay for 9 years and the Respondents' own admission which actually corroborated and proved the Appellant's claim for compensation for unpaid leave days and in the results arrived at a wrong conclusion.



- iv. The Learned Magistrate erred both in law and in fact in failing to consider and therefore ignored the Appellant's pleadings and written submissions as well as the cited authorities and therefore arrived in a wrong conclusion
5. The Respondent prayed that the cross appeal be allowed and the portion of the Judgment and decree herein declining to award service pay and compensation for unpaid leave days be set aside and substituted with an award of this court for service pay for 9 years and compensation for unpaid leave days with costs.
6. The Appeal and the Cross Appeal were disposed of by written submissions.

Appellant's Submissions

7. The Appellants' Advocates Macharia-Mwangi & Njeru Advocates filed written submissions dated 1st August, 2024. On the issue of whether the trial magistrate erred in finding that there was constructive dismissal of the Respondent by the Appellants, Counsel relied on the case of Coca cola East & Central Africa Limited v Maria Kagai Ligaga (2015) eKLR where the Court commented on the nature and what constitutes constructive dismissal and further that the burden of proof in cases of constructive dismissal rests on the shoulders of the employee. An aggrieved employee must demonstrate conduct on the part of the employer that shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.
8. Counsel submitted that the Respondent did not discharge the evidentiary burden above and that the trial court erred in finding that there was constructive dismissal of the Respondent. That it was the Respondent who voluntarily elected to end his employment with the Appellant's vide the Whatsapp message of 29/10/2020.
9. Counsel submitted that the Respondent was unable and /or unwilling to keep up with the responsibilities expected of him in the course of his employment with the Appellant and when confronted with the fact of his poor performance he opted to abscond and desert his duties without notice on 29/10/2020. That there was absence of any evidence disclosing the Appellant's intent to sever the employment contract with the Respondent.
10. Counsel submitted that from the Whatsapp message the Respondents not only vacated office but had been planning to exit his employment as he stated that the 'the situation has been forthcoming' and 'this is a surprise to many but not all'. Counsel submitted that the Appellants would be guided by the Coca-Cola case above and sections 107 and 109 of the Evidence Act in submitting that there was no evidence on record supporting the Respondent's claim for constructive dismissal.
11. Counsel observed that during the trial the Respondent when cross-examined about the alleged threats levelled against him by the Appellants, testified that he did not adduce any evidence of the said threats and added that it took place during a telephone conversation between himself and one of the Appellant and further that he had not been to the Appellant's office since sending the Whatsapp message of 29/10/2020.
12. Counsel further submitted that the Respondent relied on hearsay evidence which was inadmissible and cited the case of Kinyatti v Republic (1984) eKLR among others.
13. On the issue of whether the trial magistrate erred by finding that the Respondent was unfairly, wrongfully and unlawfully dismissed counsel submitted to the affirmative that the salient issue that arises in this matter was whether the Respondent willfully resigned from office. Counsel relied on the case of Kenneth Onialo v Majlis Resort Lamu t/a Majlis Lamu Ltd (2022) eKLR. Counsel made



further reference to the letters dated 10/11/2020, 23/11/2020 and the undated letter authored by the Respondent to Law Society of Kenya where the Respondent alleged that one of the Appellants attempted to threaten and /or intimidate him using his position. That after the Respondent vacated office and he went on a campaign to malign the name of the Appellants after choosing to leave his employment. That the Respondent did not tender any evidence demonstrating unfair termination after opting to vacate office and relied on the case of *Hobaya v Roy Hauliers Limited* (Cause E554 of 2020) (2024) KEELRC 449 (KLR) (21 February 2024). Counsel maintained that the Respondent willfully resigned from the Appellant's office without notice and the trial court erred by finding the Respondent was unfairly, wrongfully and unlawfully dismissed.

14. On the issue of whether the trial magistrate erred in awarding the Respondent three months' salary in lieu of notice counsel submitted that the Respondent voluntarily resigned from employment hence any plea of compensation for unfair termination was unmerited. Counsel relied on the case of *Asa Limited v Wekesa & Another (Cause 38 of 2016)* (2023) KEELRC 1225 (KLR)(18 May 2023)(Judgment) that it was the Respondent to pay the Appellant's in lieu of notice.
15. On the issue whether the trial magistrate erred in finding that the Respondent was unfairly dismissed, that the Appellants violated fair labour practices and in awarding the Respondent maximum compensation of twelve months, counsel submitted that the Respondent opted to vacate the Appellant's employ without notice and that the issue of violation of fair labour practices under Article 41 of *the Constitution* did not arise and the Respondent was not entitled to any declaration to that effect. Counsel relied on the case of *Chai Trading Co. Ltd v Joseph Kimathi Ikiamba* (2018) eKLR on the need to give explanation by the trial court for the maximum compensation.
16. On the issue of whether the trial magistrate erred in disregarding the Appellant's counterclaim which was admitted by the Respondent counsel submitted that the Appellants were entitled to the reliefs sought in their counterclaim dated 03/03/2021. That the counterclaim was essentially about a loan advanced to the Respondent by the Appellants which as at 29/10/2020 was outstanding at Kshs 77,000/= which amount the Respondent admitted to owing during trial. That he admitted to not having repaid the same during the hearing.
17. Counsel submitted that the employment dispute between parties herein should not bar the Appellants from claiming the amount owed to them by the Respondent. Counsel relied on the case of *Felix Ndereba Mwangi v Barclays Bank of Kenya Limited* (2021) eKLR among others on the same. That the trial court erred by disregarding the Appellants' counterclaim when the Respondent would be unjustly enriched from the Appellants' goodwill.
18. On the issue of whether the trial court erred in finding that the Respondents claim for compensation for unpaid leave was statute barred under section 90 of the *Employment Act* counsel submitted that the trial magistrate did not err on finding that the claim for unpaid leave was statute barred. That the Respondent's application for leave could be seen in the record of appeal hence his claim that he never took leave was misleading and false.
19. Counsel relied on the case of *William John Ludick v Rural Maintenance(pty) Ltd* 2013 to submit that the Claimant was entitled to leave days for the year directly preceding the year of termination. That the Respondent during hearing confirmed that he never complained of the untaken leave days. That the Respondent took all his allotted leave days during his employment with the Appellants. That the Respondent did not adduce any evidence to discount the evidence presented by the Appellants as the custodian of documents that leave was indeed granted and exhausted by the Respondent herein.
20. Counsel further submitted that the Respondent's claim was statute barred under section 90 of the *Employment Act*. That the Appellants agreed with the trial court findings on the same while relying on



among others the case of Benjamin Wachira Ndiithi v Public Service Commission & Another (2014) eKLR.

21. On the issue of whether the trial court erred in finding that the Appellants had proven remission for the NSSF counsel submitted that the Respondents claim was without merit as per section 35(6) of the *Employment Act*. That the Appellants remitted the Respondent's NSSF dues and his claim that the Appellants started remitting in the year 2005 the same was as well statute barred apart from been denied. Counsel relied on among others the case of *Ephraim Gachigua Mwangi v Teachers Service Commission & Board of Management Thogoto Teachers College* (2018) eKLR while submitting that the Respondent did not tender evidence in support of his claim under this head. That the trial magistrate did not err in finding that the Respondent was not entitled to any service pay.

Respondent's Submissions

22. The Respondent's advocates MM Law Advocates filed written submissions dated 6th September 2024. On grounds (1), (2), (3), (4), (8), (10) and (11) of the main appeal, counsel submitted that the gravamen of the complaint by the Appellant against the lower court's judgment related to the question whether; the lower court erred in making the finding that the Respondent was constructively dismissed from employment by the Appellants and, therefore, unfairly terminated as found out by the lower court in its judgment. Counsel relied on among others the case of *Nathan Ogada Atiagaga -Vs- David Engineering Limited* (2015) eKLR and Black's Law Dictionary 10th Edition and submitted that constructive dismissal, occurs when an employee resigns because their employer's behavior has become so intolerable.
23. Counsel submitted that that the learned magistrate cannot be faulted in his finding that the Respondent was constructively dismissed by the Appellants. That this court should not disturb the trial court's decision since it had the advantage of hearing and seeing the demeanour of witnesses during the trial.
24. Counsel submitted on the role of this court as a first Appeal while relying on the case of *Selle & Another vs Associated Motor Boat Co. Ltd & Another* (1968) EA 123. That this court needs to re-analyze and re-evaluate the evidence at the trial court and come at its own conclusion.
25. Counsel submitted that the Respondent's testimony during hearing was that on October 29, 2020, the 1st Appellant allegedly contacted the Respondent with unreasonable demands regarding land registration documents submitted for processing on June 7, 2019. Despite the Respondent's multiple follow-ups, the registration was delayed due to issues at the lands office, which were beyond his control. The Respondent argued that he should not be held responsible for these delays and that the 1st Appellant's demands were unjust.
26. Counsel submitted that the failure on the part of the 1st Appellant to testify in the matter despite the adverse claims made by the Respondent against him left the evidence of the Respondent regarding the telephone conversation between the 1st Appellant and the Respondent as unchallenged.
27. Counsel relied on the case *Safarilink Aviation Limited -vs- Trident Aviation Kenya Limited & Another* [2015] eKLR and submitted on uncontroverted evidence. Counsel relied on the case of *Coca Cola East & Central Africa Limited -Versus- Maria Kagai Ligaga* 12015j eKLR to submit that the Respondent was constructively dismissed.
28. Counsel submitted that the argument by the Appellants in their written submissions that the Respondent had absconded duty and voluntarily elected to end his employment cannot hold any water. That the 1st Appellant had given strict instructions to the receptionist that on 30/10/2020 he



- should not access the office. That the WhatsApp message of 31/10/2020 that the Respondent had absconded duties and he should clear to get his salary was made to bar him from future claims.
29. Counsel relied on the case of *Owudu -Versus- Digital Sanitation Services Limited* (Appeal E109 of 2023) [2024] KEELRC 917 (KLR) (18 April 2024) and submitted that absconding of duty must be demonstrated and proved. That absconding of duties is a gross misconduct as per Section 44(4) of the Act hence before termination, proper procedure under section 41 of the Act should be undertaken.
 30. Counsel submitted that it was the duty of the Appellants to end the employment relationship and that duty cannot be shifted to the Respondent. The Appellants did not tender before the trial court any iota of evidence to show that they had complied with the due process and consequently cannot fault the learned magistrate for making the decision he made in the lower court's judgment.
 31. Counsel submitted that the Appellants' argument that the Respondent was allegedly an underperformer was a red herring as the Appellant witness DW1 testified that the Respondent was hardworking. Counsel relied on the case of *Daniel Mbatia vs Express Automation Limited* (2014) eKLR to submit that even when there is poor performance an employee should be given reasonable time to improve. This did not happen in this case.
 32. Counsel further submitted that section 43 (1) of the *Employment Act*, 2007 sets out the burden of proof in a claim for unfair termination and that the Appellants dismally failed to discharge their statutory obligation under section 43.
 33. On ground (5) of the main appeal, Counsel submitted that the Appellants' complaint against the lower court's judgment at ground (5) of the main appeal was that the learned magistrate erred in law by awarding compensation to the Respondent in lieu of notice of termination. Counsel submitted that that the Respondent was/is entitled to compensation pursuant to the clear provisions of section 35 of the Act and the learned magistrate could not be faulted for awarding the same in the lower court's judgment and relied in the case of *Lu Yini -Versus- Avic Intl. Beijing (E.A) Co. Ltd & another* [2019] eKLR.
 34. On grounds (7) and (9) of the main appeal, Counsel submitted that the Appellants' major complaint against the learned magistrate's decision was the compensation awarded to the Respondent for unlawful and unfair dismissal being the maximum statutory compensation for 12 months' salary. Counsel submitted that the compensatory damages are awarded by exercise of judicial discretion by the trial court and the Appellate court ought not to interfere with that discretionary award unless it is demonstrated that the trial court misdirected itself on the law, or that it misapprehended the facts and thereby arrived at a wrong decision and relied on the case of *Mrao Ltd -vs- First American Bank of Kenya* [2003] eKLR.
 35. Counsel submitted that the learned magistrate's exercise of judicial discretion could not be faulted because the award for 12 months' salary compensation is well explained and justified.
 36. Counsel submitted that the award on maximum statutory compensation for unlawful dismissal by the trial magistrate was made squarely within the law under section 49 (1) (c) of the *Employment Act* and on sound legal guiding parameters as highlighted above and could not therefore be disturbed as the Appellants had not demonstrated any ground to merit interference.
 37. On the Respondent's cross Appeal which was mainly on the trial court's failure to award service pay for 9 years and unpaid leave counsel submitted that the Respondent took out the cross appeal being justly aggrieved by portion of the lower court's judgment declining to award service pay and award compensation for a cumulative 462 unpaid leave days as terminal dues despite the Appellants' own glaring evidence.



38. Counsel submitted that the trial magistrate's conclusion that the Respondent proved that remissions for NSSF on behalf of the Claimant were duly made was not based on any facts and/or evidence as the totality of the evidence tendered during trial by the Respondent showed that the Appellants had started remittance of the NSSF deductions in the year, 2005 despite the Respondent having worked for 9 years before and no alternative gratuity arrangements existed to cover for that period.
39. Counsel submitted that the cause of action in respect of the claim for service pay by the Respondent accrued on 29.10.2020 when the Respondent was constructively dismissed by the Appellants and was filed within a lifespan of twelve (12) months in terms of Section 90 while relying on the case of *Vipingo Ridge Limited -vs- Swalebe Ncionge Mpitta* [2022] eKLR.
40. Counsel submitted that the trial magistrate erred in declining his claim under the head for service pay for the period running between the years 1996 to 2004.
41. On Compensation for the Cumulative 462 unpaid leave days in the cross-appeal, Counsel submitted that the trial magistrate erred by failing to award compensation for unpaid leave days despite having found for a fact that the days taken by the Respondent never at any point met the statutory threshold of 21 days.
42. Counsel relied on the case of *Edward Mwangi Njihia & 4 others v Sushila Devi Gautama (As legal representative of the Estate of Satish Gautama Advocates)* (2019) eKLR to submit that court can award service pay for period no remission of NSSF deductions is proved by the employer.
43. Counsel submitted that the conclusion of the learned magistrate that the claim for unpaid leave days was time barred was plainly wrong in view of the Court of Appeal decision in the case of *G4S Security Services (K) Limited -vs- Joseph Kamau & 468 others* [2018] eKLR that the employee may claim two or more outstanding leave dues arising from distinct periods including those that are more than three (3) years old at the time of filing suit as long as such suit is filed within three (3) years of the employee's termination. That the trial magistrate erred in not awarding the Respondent his service pay for 9 years at Kshs 229,087.49/=
44. Counsel submitted that as at the time of the impugned constructive dismissal, the Respondent had accrued a total of 462 unpaid leave days and for which he claims for compensation computed to Kshs.783,990.90/-.

Determination

45. The court has reviewed and considered the grounds of appeal and the record. The Court has further considered extensive fierce submissions by both Counsel and thanks them for their industry in presenting such elucidating submissions.
46. As has been severally stated, it is now settled that the duty of the first appellate court is to re-evaluate the evidence before the lower court both on points of law and facts and come up with its own findings and conclusions as was held by the Court of Appeal for *East Africa in Peters -vs- Sunday Post Limited* [1958] EA 424. The appropriate standard of review established in cases of appeal can be stated in three complementary principles:
 - i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and



- iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.
47. The Judgment of the trial court was that the Claimant was constructively dismissed hence terminated unfairly and was awarded Kshs 135,000/= as three months' notice pay and Kshs 540,000/= as 12 months compensation for unfair termination. The trial court declined to award leave days and service pay which formed the cross Appeal by the Respondent and never addressed the Appellant's counterclaim hence this Appeal.
48. The court finds that the issues placed by the parties for determination in the appeal are with regard to both substantive and procedural fairness before the termination of employment on account of the constructive dismissal or not and the awards made or not by the trial court and frames the issues as follows:
- a. Whether the trial learned Magistrate erred in finding that the Respondent was constructively dismissed hence unfairly terminated.
 - b. Whether the trial learned Magistrate erred in awarding just some of the reliefs sought by the respondent and further whether the trial Court erred in failing to allow the appellant's counterclaim.
49. On the issue whether the trial learned Magistrate erred in finding that the Respondent was constructively dismissed hence unfairly terminated, the appellant contented that the Respondent could not perform satisfactorily duties given to him and when confronted on his poor performance, he willingly opted to resign.
- On the other hand, the Respondent alleged that he was called by the 1st Appellant who made unnecessary demands which could not be met since they all depended on the lands office hence beyond his control. That he did not have any disciplinary case, not given any warning or show cause letter relating to his employment or performance hence the Appellants made the working environment hard for him to continue working.
50. On this issue, the trial court rendered itself as follows (page 209 of the record):
- “...the two parties have given diametrically opposed versions on how the employment relationship between them ended. On one hand, the claimant alleges that his employer gave unreasonable demands which if not met meant termination of his employment. He went ahead to relieve himself of his duties in the light of these demands. On the other hand, the respondent, through RW1, alleged that after the claimant lost a title, it was prudent to seek withdrawal of the said documents hence the demands made to the claimant...Considering the obvious complexity of procuring documents from the Registry, I find that timelines given to the claimant were unreasonable, and the ultimatum to procure the documents or consider his employment terminated in less than a 24 hour period amounts to constructive dismissal...”
51. The Court of Appeal in *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR (relied on by both Counsel) cited the decision Lord Denning in the case of *Western Excavating (ECC) Ltd. -v- Sharp* [1978] ICR 222 or [1978] QB 761, where the learned Law Lord stated as follows:
- “If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to



treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct...He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively, he may give notice and say that he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once (emphasis ours). (See also Nottingham County Council -v- Meikle (2005) ICR 1).”

52. The Court of Appeal went further to state that:

“The key element in the definition of constructive dismissal is that the employee must have been entitled or have the right to leave without notice because of the employer's conduct. Entitled to leave has two interpretations which gives rise to the test to be applied. The first interpretation is that the employee could leave when the employer's behavior towards him was so unreasonable that he could not be expected to stay - this is the unreasonable test. The second interpretation is that the employer's conduct is so grave that it constituted a repudiatory breach of the contract of employment - this is the contractual test. The contractual test is narrower than the reasonable test...”

53. The court agrees with the trial court's observations that the demands upon the Respondent were unreasonable and in any case with the high probability that they could not be met within the timeliness set, the appellant advised him to consider his service terminated, this amounted to constructive dismissal and the trial Court was justified to so find. This ground of appeal is therefore found without merit and is hereby dismissed.

54. On the Appellant's claim for poor performance on the part of the Respondent, this court notes that the Appellant's witnesses during trial confirmed that the Respondent was hardworking apart from the last days. If at all this was the case why was the Respondent not issued with a warning letter and or a show cause letters on this issue. If at all it was a case of poor performance, the appellant required to have exhibited before the trial court its policy on performance and what it did to improve the respondents performance and failed in order to justify dismissal on grounds of poor performance. In the case of Jane Samba Mukala Vs. Oltukai Lodge Limited [2010] KLR 225 the court observed that–

“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.”

55. On the issue of absconding duties the Appellants alleged that after the Respondent wrote in the group WhatsApp he absconded duties which could be seen in the messages of 31.10.2020. The Appellants did not show the efforts they made to reach the Respondent and communicate their intention to initiate disciplinary action on account of absconding of duties. In any case this ground of Appeal is moot since the Court has already upheld the finding by the trial court that the respondent was constructively dismissed. The issue of absconding duty therefore does not arise.

Whether the trial learned Magistrate erred in awarding just some of the reliefs sought by the respondent and further whether the trial Court erred in failing to allow the appellant's counterclaim

56. On the claim for three months' salary in lieu of notice this court notes that the same was given under section 35(1) (c) of the *Employment Act* which limits payment in lieu of notice in absence of contract



to the contrary to, one month. The parties did not produce their contract of employment to illustrate the three months' salary in lieu of notice was payable under their contract of engagement and this court having found that the Respondent was terminated without notice will award him one month notice at Kshs 50,908/= which was his last salary gross pay. This ground of appeal therefore succeeds and the order of the trial court awarding the respondent three month's salary in lieu of notice is substituted with one month's salary in lieu of notice.

57. On the award of the maximum 12 months' salary as compensation for unfair termination, This court as an appellate court 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.

58. The court will therefore disturb the awards herein if it is shown that the trial court misdirected itself in some matter hence arriving at a wrong decision. The court notes that the award of 12 months compensation is discretionary on the court however such discretion must be exercised judiciously. In this respect the Court will be guided by considerations set out under Section 49(4) of the [Employment Act](#) in awarding the damages herein.

59. In this case the trial court rightly stated that the reason it was awarding the maximum compensation was because the Respondent had worked for long for the appellant without any evidence of prior disciplinary case except for the one for which he was forced to resign. The Court of Appeal in the case Kenya Broadcasting Corporation v Geoffrey Wakio(2019) eKLR that;

“... 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...”

60. From the foregoing, the court concurs with the trial Court on the reasons for making the maximum compensation and holds that it was justifiable in the circumstances. This ground of appeal is therefore found without merit and is hereby dismissed.

61. On the issue of the quantum of the award, the court notes that as per the last gross salary of Kshs 50,908/= the Respondent was entitled to an award of Kshs 610,896/= the Respondent was awarded Kshs 540,000/= as per his pleadings. This court notes that parties are bound by their pleadings and maintains the award by the trial court of Kshs 540,000/=.

62. On the issue of the service pay for the years between 1996 to 2005 the court notes that it was not disputed that the Appellants started deductions in 2005 and there was no alternative gratuity arrangement. The Appellants claimed that this prayer was statute barred. The court notes that the [Employment Act](#) section 35(5) introduced service pay. The NSSF Act under section 55 makes it an offence if the employer fails to make the deductions. NSSF Act dates back to 1965 while the Respondent started working with the Appellants in 1996 when the same was in force. The Respondent was terminated on October,2020 and filed his claim in December,2020 which was within one year as per the reading of section 90 of the [Employment Act](#) regarding continuing injury which requires to be



filed within 12 months after cessation thereof. The Respondent is therefore entitled to service pay at the rate of 15 days pay for each complete year of service which is the industry practice, which is Kshs 25,454 x 9 equals to Kshs 229,086/=. This ground of cross-appeal is therefore allowed.

63. On the prayer for unpaid leave, section 28 of the *Employment Act* provides as follows concerning leave:

28. Annual leave

- (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 months' leave-earning period, to not less than one and three-quarter days of leave with full pay, in respect of each completed month of service in that period, to be taken consecutively.
- (2) An employer may, with the consent of the employee divide the minimum annual leave entitlement under sub-section (1)(a) into different parts to be taken at different intervals.
- (3) Unless otherwise provided in an agreement between an employee and an employer or in a collective agreement, and on condition that the length of service of an employee during any leave earning period specified in subsection (1)(a) entitles the employee to such a period, one part of the parts agreed upon under subsection (2) shall consist of at least two uninterrupted working weeks.
- (4) The uninterrupted part of the annual leave with pay referred to in subsection (3) shall be granted and taken during the twelve consecutive months of service referred to in subsection (1) (a) and the remainder of the annual leave with pay shall be taken not later than eighteen months from the end of the leave earning period referred to in subsection (1)(a) being the period in respect of which the leave entitlement arose.
- (5) Where in a contract of service an employee is entitled to leave days in excess of the minimum specified in subsection (1)(a), the employer and the employee may agree on how to utilize the leave days. (emphasis supplied)

64. A plain reading of subsection 4 of section 28 of the Act reproduced above imports the plain meaning that an employer is obliged to grant and an employee is required to take the uninterrupted part of the annual leave referred to under subsection 3 during the twelve consecutive months of service referred to in subsection (1) (a) and the remainder of the annual leave with pay shall be taken not later than eighteen months from the end of the leave earning period referred to in subsection (1)(a) being the period in respect of which the leave entitlement arose (emphasis added). What this implies is that an employee must take his two weeks uninterrupted leave within the leave earning period as provided under section 28(1)(a) of the Act and the balance of the leave within eighteen months from the end of the leave earning period. The wording of subsection 4 is in mandatory terms and therefore the only interpretation it can yield is that the balance of leave not taken as stipulated lapses.

65. It is for the forgoing reason that it becomes logical not to regard leave as a continuing injury to be claimed beyond the three year limitation period provided for under section 90 of the *Employment Act*.

66. The Respondent was terminated in October 2020 and sued on December 2020, he therefore can only claim his uninterrupted two weeks leave for the year 2020 and the balance of any leave not taken 18



months prior to termination of his service. From the leave forms produced, no leave was approved for 2018-2020 therefore the respondent is entitled to three years untaken in accordance with the provisions of section 28 read together with section 90 of the *Employment Act*. The Respondent is therefore awarded Kshs 152,724/= as untaken leave for the three years. This ground of appeal succeeds to this extent.

67. On the Appellants Counterclaim for the loan advanced to the Respondent this court notes that the trial court ought not to have disregarded the same. The termination does not bar the Appellants from claiming what the Respondent owed them. From the October Pay slip it can be seen the outstanding loan was Kshs 77,000/= which this court allows. This ground of appeal therefore succeeds.

68. In the upshot the Appeal and the cross appeal partially succeed as follows.

- a. One month's salary in lieu of notice....Kshs 50,908/=
- b. Payment in lieu of untaken leave for three years...Kshs 152,724/=
- c. 12 months' salary as compensation for unfair termination Kshs 540,000/ =
- d. 9 years' service payKshs 229,086/=
- subtotal.....972,718
- e. Less appellants' counterclaim set off.....Kshs 77,000/=
- Total.....Kshs 895,718/=

69. Considering that the appeal and cross-appeal have partially succeeded, each party shall bear their own costs.

70. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF NOVEMBER, 2024

DELIVERED VIRTUALLY THIS 14TH DAY OF NOVEMBER, 2024

Abuodha Nelson Jorum

Presiding Judge-Appeals Division

