



**Steel Makers Limited v Obare (Appeal E001 of 2020)
[2023] KEELRC 396 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 396 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
APPEAL E001 OF 2020
BOM MANANI, J
FEBRUARY 16, 2023**

BETWEEN

STEEL MAKERS LIMITED APPELLANT

AND

WYCLIFFE OBWOGE OBARE RESPONDENT

(Being an appeal from the decision of the Principal Magistrate's Court at Mavoko in CMEL Cause No 49 of 2019 delivered on August 19, 2020.)

JUDGMENT

Introduction

1. This is an appeal from the decision of the Principal Magistrate's Court at Mavoko in CMEL Cause No 49 of 2019 delivered on August 19, 2020. In the decision, the trial court held that the Appellant unfairly terminated the Respondent's contract of employment. Consequently, the court awarded the Respondent inter alia, damages for unlawful termination.
2. Aggrieved by the decision, the Appellant has filed this appeal. Through the appeal, the Appellant seeks that the trial court's decision be set aside.

Facts of the Case

3. The parties agree that the Appellant hired the services of the Respondent as a driver. Although the Appellant disputes the Respondent's contention that the contract was entered into in November 2007, it does not provide contra evidence on when exactly the parties entered into the contract.
4. It is common ground that the parties worked together until around 11th March 2019 when the contract of employment between them was terminated. However, the circumstances leading to termination of the contract are contested.



5. According to the Respondent, the Appellant had not paid employees' salaries for several months running from November 2018 to February 2019. This prompted the Respondent and other employees to visit the Appellant's office on 4th March 2019 to ask that they be paid their outstanding salaries.
6. It was the Respondent's case that in reaction to the visit by employees, the Appellant's manager, one Toor, reported the incident to the local police. The Respondent stated that as a result of the aforesaid report, he and other employees were arrested on March 7, 2019 and briefly detained at a local police post. That upon their release, the Respondent went back to work on March 11, 2019 but was not allowed into the Appellant's premises. He was advised by the Appellant's security team that the plant manager had indicated that the Respondent's employment had been terminated and that he should not be permitted entry into the plant. This is how the Respondent's contract of employment came to an end.
7. It was the Respondent's case that he was not afforded a chance to be heard before his services were terminated. In his view, the termination was inextricably linked to the workers' demands that the Appellant settles their overdue salaries.
8. The respondent stated that during his employment, his cumulative monthly salary was Kshs 26,494/-. It was the respondent's case that for the duration of his contract with the Appellant, he did not take his leave days. That besides, the Respondent was required to work overtime without pay. Further, the Respondent contended that he was not paid house allowance despite not being housed by the Appellant.
9. On its part, the Appellant stated that the Respondent was lawfully terminated for misconduct. That prior to his termination in March 2019, the Respondent had been involved in acts of misconduct in October 2018. He is specifically accused of having absconded duty around this time.
10. This infraction allegedly saw the Appellant subject the Respondent to a disciplinary process following which the Respondent was issued with a warning and placed on probation for one year. That during the probation period, the Respondent was warned that if he got involved in any other infraction, he would be summarily dismissed from employment.
11. It was the Appellant's case that between 7th and March 10, 2019, the Respondent again absented himself from duty without leave. That this was after the Respondent had disrupted the Appellant's business on March 4, 2019 by participating in an unauthorized industrial action that saw the Respondent and other workers disappear with vehicle keys for the Appellant's fleet. That it is these acts of absence without leave and disruption of the Appellant's business that prompted the Appellant to summarily dismiss the Respondent.

Trial Court's Finding

12. After hearing the parties, the trial magistrate arrived at the conclusion that the Appellant terminated the Respondent's contract of employment unfairly. It was the trial magistrate's finding that the Appellant did not satisfactorily prove the reason for terminating the Respondent. And neither did the Appellant demonstrate that it processed the Respondent's release in accordance with due process as required under sections 41, 43 and 45 of the *Employment Act* (EA). The court observed that the Appellant had failed to demonstrate that it accorded the Respondent a hearing at a disciplinary session before terminating his contract of employment.
13. The court proceeded to award the Respondent the following:-
 - a. Salary in lieu of notice Kshs 26,494/-.



- b. Unpaid salary Kshs 113,109/.
- c. Unpaid leave Kshs 166,912/.
- d. Service pay Kshs 143,068/.
- e. Compensation for unfair termination Kshs 317,928/.
- f. Interest.
- g. Costs of the suit.
- h. Certificate of Service.

Grounds of Appeal

14. Dissatisfied with the trial court's judgment, the Appellant lodged the current appeal. In the Memorandum of Appeal, the Appellant raises nine (9) grounds of appeal. However, an analysis of the grounds yields the following seven (7) issues for consideration:-
- a. Whether the trial magistrate erred in law and fact by failing to consider the evidence and submissions by the Appellant. Concomitant with this is the question whether the trial court gave undue weight to the Respondent's case.
 - b. Whether the trial magistrate erred in law and fact in holding that the Appellant unlawfully dismissed the Respondent from employment.
 - c. Whether the trial magistrate erred in law and fact in awarding the Respondent unpaid salary.
 - d. Whether the trial magistrate erred in law and fact in awarding the Respondent unpaid leave.
 - e. Whether the trial magistrate erred in law and fact in awarding the Respondent compensation for unfair termination equivalent to the Respondent's gross salary for twelve (12) months.
 - f. Whether the trial magistrate erred in law and fact in awarding the Respondent service pay.
 - g. Whether the trial magistrate erred in law and fact in not awarding the Appellant costs of the lower court case.

Analysis

15. During directions on the mode of disposal of the appeal, the parties agreed to prosecute the appeal through written submissions. The submissions have been filed. The appeal will therefore be determined on the basis of the documents constituting the Record of Appeal, the authorities cited and the submissions by the parties.



16. The principles that guide the court in handling a first appeal have been restated in a series of decisions. In rehashing them, Nyakundi J in *Nanji Premji Khetani v Raphael Charo Jefwa* [2021] eKLR, quoted other decisions on the subject as follows:-

"The law on the duty of the first appellate Court is well settled. In the case of Abok James Odera T/a A. J Odera & Associates v John Patrick Machira T/a & Co. Advocates [2013] eKLR the Court stated that:

"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority v Kuston (Kenya) Limited [2009] 2 EA 212 wherein the Court of Appeal held inter alia that:-

"On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

17. In *China Zhongxing Construction Company Ltd v Ann Akuru Sophia* [2020] eKLR, Mwongo J, again quoting with approval other decisions adopted the following observation:-

It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."

18. Although these views were originally expressed by the Court of Appeal, they have since been embraced by the High Court and courts of equal status as expressing the general legal position regarding the court's duty when handling a first appeal. I adopt them as a guide in adjudicating on the current appeal.
19. Issue number one is whether the trial magistrate erred in law and fact by failing to consider the evidence and submissions by the Appellant. Concomitant with this is the question whether the trial court gave undue weight to the Respondent's case. On the other hand issue number two is whether the trial magistrate erred in law and fact in holding that the Appellant unlawfully dismissed the Respondent from employment. These two sets of issues address the question of liability. Therefore, they will be addressed jointly.
20. From the record before the trial court, both the Respondent and Appellant's witness testified. Both adopted their witness statements and introduced their respective documents as exhibits.
21. According to the evidence, the decision to terminate the Respondent appears to have been triggered by the events of March 4, 2019 when the Respondent and other employees visited the Appellant's office to ask for settlement of their salary arrears. The Respondent states that the Appellant had not paid employees salaries from November 2018. As at March 4, 2019 when the employees took the decision



- to demand for the arrears, their salaries had been outstanding for a period of approximately four (4) months.
22. According to the Respondent, when the employees visited the Appellant's office to demand for settlement of the salary arrears, they were threatened with dire consequences. Shortly thereafter, some of them, including the Respondent, were arrested on March 7, 2019.
 23. It is noteworthy that although in its defense, the Appellant tried to deny that the employees had visited its offices on March 4, 2019 regarding overdue salaries, the denial was quite ambivalent. The Appellant did not expressly deny the fact of owing staff the alleged salaries. Rather, it merely stated that it had elaborate internal dispute resolution procedures which rendered visits by employees to its offices to address matters such as salary arrears unnecessary. Implicitly, what the Appellant is understood to have been conveying by this statement is that the Respondent's statement regarding the purpose of the visit to the Appellant's office on March 4, 2019 was perhaps untrue.
 24. Despite the ambivalence in the statement of defense, the Appellant's witness confirmed during cross examination that there was indeed an issue pertaining to unpaid employee salaries for a period of four months which triggered the events of March 4, 2019. It is therefore apparent that the reason why the Appellant took action against the Respondent and other employees was because they caused commotion at its premises whilst demanding payment of their salary arrears for four months spanning between November 2018 and February 2019.
 25. It is difficult to see how a demand for salary arrears by an employee can transcend into an act of gross misconduct for which he should suffer summary dismissal. Taking into account that the employees had worked for four months without salary, their reaction on March 4, 2019 was understandable.
 26. On the other hand, the Appellant's action to withhold employee salaries for this long could not be justified. It was patently wrong for the Appellant to try to christen the employees' attempts to procure payment of their salaries as gross misconduct.
 27. The Appellant stated that the Respondent absconded with vehicle keys thereby disrupting its operations. It was asserted that after he left work on March 7, 2019, the Respondent did not report back until March 11, 2019 when he was summarily dismissed. Yet, no evidence of the Appellant having sought to address the alleged abandonment of duty by the Respondent was tendered before the trial court.
 28. The court notes that it is not disputed that the Respondent was arrested and briefly detained on March 7, 2019, a Thursday. The following two days, a Friday and Saturday, it appears that the Respondent did not report on duty perhaps as a result of the events of March 7, 2019. But this failure to show up at work did not provide a license to the Appellant to terminate the Respondent without the benefit of a hearing.
 29. It is now settled that absence from duty by an employee does not automatically result in the separation of an employer and an employee. The employer has a duty to confirm that the employee has absented himself without valid reason. This is by the employer making effort to ascertain the whereabouts and reasons for the absence of the employee from work. The employer must be certain that the employee has deliberately left duty with no intention of coming back before he makes the decision to close the employment contract.
 30. This process is best handled through the disciplinary procedure set out under section 41 of the EA. The employer is expected to issue a notice to the absentee employee requiring him to justify why his employment should not be terminated for failure to report to work. That this is the legal position has now been confirmed through a number of decisions by this court (see [Stephen Ouma Ludende v Radar](#)



Limited [2019] eKLR, *Augustine Otieno Afullo v University of Kabianga* [2021] eKLR, *Ayub Kombe Ziro v Umoja Rubber Products Limited* [2022] eKLR, *Milano Electronics Limited v Dickson Nyasi Muhaso* [2021] eKLR). There is no evidence that the Appellant handled the Respondent's alleged absenteeism in the manner suggested above.

31. The Appellant tried to make hay out of the fact that the Respondent had been placed under probation following another infraction in October 2018. That he was on notice that any other infraction within one year of the probation period would earn him summary dismissal. This submission is invalid for three reasons.
32. First, the law does not countenance an employer placing an employee on probation as a disciplinary measure. The Appellant's attempt in this regard was irregular and therefore of no legal consequence.
33. Second, the period of probation in Kenya is cast in stone. By dint of section 42 (2) of the *EA* it is clear that this period 'shall not be for more than six months in the first instance but it may be extended for a further period of not more than six months with the agreement of the employee'. Therefore, the attempt by the Appellant to re-introduce a probationary term in a contract that was more than one year old and without the concurrence of the Respondent was plainly irregular and unlawful.
34. Third, even if the Respondent was on probation (assuming it was valid), that did not provide a basis for the Appellant to punish him without first giving him a hearing. The decision in *Monica Munira Kibuchi & 6 others v Mount Kenya University; Attorney General (Interested Party)* [2021] eKLR has now confirmed that even where an employee is on probation, he is entitled to the legal protection granted under section 41 of the *EA*. Consequently, the decision by the Appellant to terminate the Respondent without the benefit of a hearing allegedly because the Respondent was on probation was illegitimate.
35. The trial court held that the disciplinary action taken against the Respondent was unfair. It was the trial court's view that the Appellant failed to demonstrate the validity of the process and reason for termination of the Respondent contrary to the requirements of sections 41, 43 and 45 of the *EA*. Having regard to my observations in the preceding sections of this judgment, I agree with the trial court's view that the Appellant did not demonstrate that it had valid reason to terminate the Respondent.
36. The trial court also faulted the Appellant's decision to terminate the Respondent on account of the procedure followed by the Appellant in arriving at its decision. The court observed that there was no proof that the Respondent was served with the warnings alluded to by the Appellant. But I do not think that this was even material. What was critical for this matter is whether the Appellant gave the Respondent the opportunity to rebut the accusations against him arising from the events of March 4, 2019 and the alleged absence from duty between March 7, 2019 and March 11, 2019.
37. All that the record shows is that the Appellant summarily terminated the Respondent around March 11, 2019. After his arrest on March 7, 2019, it appears that the Respondent was not allowed to resume duty when he attempted to do so on March 11, 2019. His attempts to gain access to the Appellant's premises were thwarted when he was blocked at the gate.
38. Prior to this physical stoppage from getting to his workplace, there is no evidence that the Appellant called on the Respondent to justify why disciplinary action should not be taken against him for the events spanning between March 4, 2019 and March 11, 2019. There is no evidence that the Respondent was informed of the transgression leveled against him. There is no evidence that he was invited for a disciplinary session.



39. Evidently, the totality of this evidence points to a failure by the Appellant to observe due process contrary to the dictates of sections 41, 43 and 45 of the *EA*. The learned trial magistrate was therefore right to hold that the disciplinary process against the Respondent was flawed. She was right to observe that the evidence tendered by the Appellant failed to shade light on the disciplinary process claimed to have been followed by the Appellant.
40. Having regard to the foregoing, it is my finding that the trial magistrate impartially considered the evidence on liability as tendered by both parties. It is clear to me that the Appellant did not place before the court evidence that would have swayed the magistrate to return a decision on liability in the Appellant's favour. As a result, Grounds 1, 6, 7 and 9 of the Appeal are without merit and are dismissed.
41. The third issue is whether the trial magistrate erred in law and fact in awarding the Respondent unpaid salary. Paragraph 5 of the Respondent's Memorandum of Claim states that the reason he and other employees visited the Respondent's office on March 4, 2019 was to ask the management of the Respondent to pay their salary arrears for the months of November 2018 to February 2019. During his testimony in court, the Respondent adopted his witness statement on oath. The said statement alludes to the fact that the reason for the altercation between employees and the Respondent's management on March 4, 2019 was their unpaid salaries for the months of November 2018 to February 2019. The Respondent stated that he was not paid salary for this period.
42. On the other hand and contrary to the submissions by counsel for the Appellant, the defense witness, James Murigi, confirmed that as at March 4, 2019, employees of the Respondent had not received salaries for four months. However, it was this witness's evidence that these arrears were later paid in April 2019.
43. The witness stated that he was not able to confirm if the Respondent was paid. He however confirmed that the Appellant owed the Respondent some cash.
44. The court takes note of the fact that at the time the Appellant is said to have paid employees their salary arrears in April 2019, the Respondent had already been terminated and was no longer within the Appellant's premises. The Appellant does not provide any evidence to demonstrate how it transmitted payments of the Respondent's salary arrears to him. There are no bank deposit slips or Mpesa statements or cash payment vouchers produced to show release of the Respondent's salary arrears to him in April 2019 as alleged.
45. The assertion that the Respondent was paid his arrears was made by the Appellant. In terms of section 109 of the *Evidence Act*, this was a fact that the Appellant had raised and upon which it wanted the trial court to return a verdict in its favour. The evidential burden of proof to establish this fact lay with the Appellant. There is no evidence that the burden was discharged.
46. I am further fortified in the position I take above but on different grounds by the Court of Appeal decision in Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune [2021] eKLR. The court said the following of the employer's obligation to keep employment records and produce them whenever there was need to confirm compliance with particular terms of the contract:-

“On the specific terminal dues, once again there were no records by the appellant with regard to the amount of salary that was paid to the respondent; and whether the respondent took or was paid in lieu of rest days, leave days or public holidays. Similarly, by dint of Section 10(7) of the *Employment Act* the burden of proof lay with the appellant to demonstrate that the respondent was not entitled to the terminal dues she was claiming. More so, considering that being the employer, he is the recognized custodian of such records under Section 74 of the *Employment Act*.



Beginning with salary arrears, it is common ground that the respondent's employment came to an end on November 10, 2013. As per the respondent, she had not been paid for the months of July, August, September and October, 2013 prior to the determination of her employment. In contrast, the appellant denied the existence of such arrears. On our part, taking into account that the appellant did not produce any evidence of payment of the respondent's salary during this period we are inclined to give the respondent the benefit of doubt. Therefore, we concur with the ELRC that the appellant owed the respondent salary arrears for the months of July, August, September, October and 10 days in November, 2013."

47. In the premises, I reach the conclusion that there was no evidence that the Respondent's salary arrears for November 2018 to February 2019 were paid by the Appellant. In the absence of this evidence, the trial court was right to enter judgment for the Respondent for salary arrears. However, this amount works to Kshs 105,976/ for the four months.
48. The trial court also awarded the Respondent salary for the days worked in March 2019 as part of his salary arrears. The Appellant does not deny that the Respondent had worked for seven days in March 2019 before he left. It is also not disputed that the Respondent's daily wage was Kshs 1019/-. Consequently, he was entitled to salary for the seven days which totals Kshs 7,133/-. The total salary arrears are therefore Kshs 7,133/- + Kshs 105,956/- = Kshs 113,109/-. This is as awarded by the trial court. It is upheld.
49. The Appellant's counsel makes a rather startling argument with regard to the Respondent's claim for salary arrears. He argues, without the benefit of supporting evidence, that the concession by Appellant's witness that the Respondent was owed salary arrears only related to the salary arrears for the seven days worked in March 2019. I have therefore disregarded this argument.
50. The fourth issue to be addressed in the appeal relates to whether the trial magistrate erred in law and fact in awarding the Respondent unpaid leave dues. The main thrust of the Appellant's argument against this award is that it was time barred under section 90 of the *Employment Act*. There is also the ancillary challenge premised on the ground that there was insufficient evidence placed before the trial magistrate to warrant the grant of the prayer.
51. Regarding limitation of actions, the Appellant argues that a claim for leave dues falls in the category of continuing injury claims. Therefore, such claim must be filed within twelve (12) months of cessation of the injury.
52. Basing his observations on the particulars of loss pleaded under paragraph 9 of the Memorandum of Claim, the Appellant submits that the Respondent's claim for leave dues relates to the period between November 2007 and November 2016. Therefore, under section 90 of the *Employment Act*, the injury occasioned to the Respondent by the nonpayment of these dues ceased in November 2016. Thus, the Respondent had up to November 2017 to file suit to recover the outstanding leave dues. As the claim was filed in April 2019, it fell outside the twelve (12) months window allowed under section 90 of the EA for filing continuing injury claims. It was therefore time barred.
53. The first issue to consider is whether nonpayment of accrued periodic leave entitlements amounts to a continuing injury as suggested by counsel for the Appellant. Contrary to the position espoused by counsel and despite some divergent decisions by this court (differently constituted), I hold the view that periodic payments under a contract of service such as: leave pay; salary; and house allowance do not, where there is default in settling them, fall under what is described as "continuing injury claims". My view is that to the extent that these entitlements arise periodically in accordance with the contract



of service, they create distinct causes of action every time there is failure by the employer to pay them (see *Vipingo Ridge Limited v Swalehe Ngonge Mpitta* [2022] eKLR).

54. The above view finds support in some decisions by the Court of Appeal. For instance, in *G4S Security Services (K) Limited v Joseph Kamau & 468 others* [2018] eKLR, the Court of Appeal suggested that claims arising at the end of every month in an employment contract do not constitute continuing injury claims within the meaning of section 90 of the EA. The court expressed itself on the matter as follows:-

“The learned Judge found that the respondents’ claims was for unpaid terminal dues which constituted a continuing injury. He defined ‘continuing’ based on the English term as ‘remain in existence, operation or a specified state’. The learned Judge on this basis held that the terminal benefits once accrued, remained due and owing to the employees continuously until paid.

In the circumstances of this case we find that such ‘unpaid terminal dues’ do not constitute a continuing injury as contemplated under the proviso to Section 90 of the *Employment Act*. The respondents assert claims arising from the termination of their employment and dues that accrued to each of them at the end of each month.”

55. This being the position and contrary to the position taken by the Appellant, the claim by the Respondent for accrued leave, being a periodic entitlement, was not a continuing injury claim. The limitation law applicable to it was not as suggested by the Appellant.

56. My view has been and remains that as periodic entitlements are covered by the three year limitation period under section 90 of the EA, an employee who alleges default by an employer to satisfy such entitlement must file suit to enforce the right within three years of default. Therefore, the Respondent, in my humble view, ought to have claimed the periodic leave entitlements as and when they accrued but not later than three years from the date of accrual of every of the various annual leave pays. As the Respondent’s suit was filed in April 2019, this would imply that his claims for leave dues for 2015 and backwards would be time barred as they were more than three years old at the time of institution of the suit.

57. Notwithstanding the view that I express above, the Court of Appeal has suggested that the cause of action in respect of all outstanding terminal dues is deemed to arise from the date of termination of the employment contract. The necessary implication of this holding is that a cause of action does not necessarily arise from the date of default to settle a periodic entitlement under a contract of service but from the date of closure of the contract of service. This position is implied in the decision of *G4S Security Services (K) Limited v Joseph Kamau & 468 others* (*supra*). In the case the court observed as follows:-

“In the circumstances of this case we find that the contracts of 464 respondents were terminated in 2008, 2009 and 2010 and the claim was filed in 2014. Pursuant to Section 90 of the *Employment Act*, the claims should have been filed within three years of the termination of employment. The claims in respect of the 464 respondents were therefore time barred.”

58. It is to be noted that from the original claim giving rise to the above appeal, some of the entitlements claimed by the litigants to include overtime pay and salary arrears were more than three years old at the time the claimants were terminated. Having regard to the position expressed by the Court of Appeal above, it follows that the Respondent’s claim for accrued leave was not time barred in so far as it was



- filed on April 8, 2019 hardly a month after the Respondent was terminated around March 11, 2019. Consequently, the plea by the Appellant that the claim was time barred must fail.
59. On the merits of the claim for leave dues, I note from the record that the Respondent stated on oath that he did not take leave or receive pay in lieu of leave for nine (9) years. In the demand letter which he produced as exhibit, he identified the years in issue as 2007 to 2016. This evidence in effect supported the Respondent's averments in his Statement of Claim on the issue of leave dues.
60. I have looked at the testimony by the defense. From the evidence, the defense witness admitted that the Respondent had unpaid leave claims. However, he did not elaborate on the subject beyond this statement. It is noteworthy that the defense witness did not deny that the unpaid leave claim covered nine (9) years as stated by the Respondent. In effect, save for the plea that it was time barred the Respondent's claim for leave pay was not denied by the Respondent (see the implications of this in the case of *Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune* [2021] eKLR).
61. Having failed to challenge the claim on account of limitation and having not challenged the merits of the claim, it is my considered view that the trial magistrate was right to have allowed the prayer for leave dues as claimed. I will therefore dismiss the ground of appeal challenging this award.
62. The fifth issue relates to whether the trial magistrate erred in law and fact in awarding the Respondent compensation for unfair termination equivalent to the Respondent's gross salary for twelve (12) months. From the record, the court awarded the Respondent Kshs 317,928/- under this head. Spread over a period of twelve months, this represents a figure of Kshs 26,494/- per month. In effect, the trial court awarded the Respondent compensation for unlawful termination that is equivalent to the Respondent's gross salary for twelve (12) months.
63. The guidelines on computation of the quantum of damages for unfair termination are stipulated under section 49 of the EA. The law permits a trial court to award a successful claimant compensation that is equivalent to a maximum of his salary for twelve months.
64. Whilst courts have this discretion, it has been indicated that they should only grant the maximum award on cogent grounds. The essence here is to prevent the use of compensation for wrongful termination as a tool to either punish the employer or enrich the employee. As a result, courts must endeavour to strike a balance between these two competing interests.
65. In the case of *Ol Pejeta Ranching Limited v David Wanjau Muboro* [2017] eKLR, the Court of Appeal underscored the point that whilst a trial court has discretion to grant the maximum compensation, it must nevertheless justify such award. In the absence of such justification, the award becomes susceptible to being upset on appeal. The court reiterated this position in the case of *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR.
66. I have looked at the record in the appeal before me. In reaching her decision to award the Respondent the maximum award of Ksh. 317,928/-, the trial magistrate did not offer any justification for her decision. In the Court of Appeal's words in the *Ol Pejeta* case (supra), she exercised her discretion whimsically.
67. I am alive to the legal position that as an appellate court, I must not interfere with the exercise of judicial discretion by a trial court unless it is demonstrated that it has been exercised improperly. In this case, I find that the failure to justify the maximum award by the trial court constituted an improper exercise of judicial discretion. This obligates me to interfere with the award.
68. I have considered the history of the relationship between the parties. I believe the Appellant's evidence that prior to the close of 2008, the Respondent had been involved in episodes of unexplained



absenteeism. This is particularly so with respect to October 2018. This behaviour appears to have soiled the relationship between the parties.

69. This Respondent's aforesaid conduct, in my view, precipitated the Appellant's desire to get rid of him at the earliest opportunity. Therefore, it is not unreasonable to conclude that the Respondent's previous conduct contributed to the Appellant's decision to terminate his employment.
70. Having regard to this reality, I am of the view that the Respondent was not entitled to compensation for wrongful termination that exceeded his gross salary for six (6) months. Accordingly, I set aside the award for compensation equivalent to the Respondent's twelve (12) months' salary under this head and replace it with an award for compensation equivalent to his salary for six (6) months which totals Kshs 158,964/-.
71. The sixth issue relates to whether the trial magistrate erred in law and fact in awarding the Respondent service pay. I should perhaps begin by stating that service pay is a statutory entitlement to any employee who leaves the service of an employer upon completion of service that has lasted for a period of one year and more. This entitlement is provided for under section 35(5) of the EA.
72. The only disqualifying factor to this entitlement is if the employee is a member of the National Social Security Fund (NSSF), a gratuity or provident scheme. The trial court's record does not show that the Respondent had been registered under the NSSF or other provident scheme. He was therefore entitled to service pay.
73. The Respondent testified that he was employed in the year 2007. However, he was not given a contract of employment. On the other hand, the Appellant denied that the Respondent was hired in 2007. However, the Appellant neither gave the date of hire of the Respondent nor provided a contract between the parties to address this issue.
74. Under section 9 of the EA, a contract of service whose duration is for three months and more must be evidenced in writing. The section places the responsibility of ensuring that the contract is reduced into writing on the employer.
75. Under section 10 of the EA, a written contract ought to address several issues including the date of commencement of the employment contract and its duration. Under section 10(7) of the EA, if there is a dispute on any aspect of a contract that is required to be in writing but which the employer has failed to reduce into writing, the obligation to prove or disprove the disputed aspect lies with the employer. Underscoring this truism, the Court of Appeal in Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune [2021] eKLR expressed itself as follows:-

“Moving onto the nature of the respondent's engagement there was no documentary evidence adduced to that effect. The appellant as well as his wife in their evidence stated that they did not keep any employment records. Their position was that the respondent was a casual employee while the respondent argued that she was not. In this regard, the learned Judge correctly appreciated that by virtue of Section 10(7) of the Employment Act the appellant was under a duty as the employer to produce written particulars of the respondent's employment. His failure to do so placed the burden of proof upon him to establish his contention as well as disprove the respondent's allegation. See Nanyuki Water & Sewage Company Limited v Benson Mwiti Ntiritu & 4 others [2018] eKLR.

In our view, the appellant did not discharge the above burden. It was not enough for him to just state that the respondent was a casual employee.”



76. In this case, if the Appellant disputes that the commencement date of the contract between them fell in November 2007 as asserted by the Respondent, the Appellant bore the responsibility of disproving the Respondent's assertion. From the record, there was no evidence tendered to disprove the Respondent's assertion that he was hired in November 2007. Consequently, the court was right to compute the Respondent's service pay entitlement from November 2007.
77. The Appellant also argues that the Respondent was engaged as a casual. Therefore, he was not entitled to service pay. This argument again fails for two reasons. First, the Appellant did not place before the trial court records to demonstrate that the parties were engaged on casual basis despite the Respondent's length of service.
78. Second, section 37 of the EA automatically converts casual contracts of service into indefinite term contracts once an employee remains in continuous service of the employer for one month or more. This position is confirmed in the decision of Jackson Muiruri Wathigo t/a Murtown Supermarket v Lilian Mutune (*supra*) when the Court of Appeal observed as follows:-
- “Besides, the appellant in his own submissions asked this Court to find that the respondent had been engaged from 14th September, 2011 to November 10, 2013. Clearly, even if we were to accept that the respondent was initially engaged on a casual basis, the duration of her employment, that is, from September 14, 2011 to November 10, 2013 meant that her terms were automatically converted by dint of Section 37 of the Employment Act to a monthly salaried employee.”
79. Counsel for the Appellant also makes an interesting argument regarding transition between the Employment Act cap 226 (now repealed) and the Employment Act, 2007. In his view, since the Respondent was hired under the repealed Act, he had to demonstrate that his contract had been transposed to the current Employment Act in order for him to benefit from section 37 of the new Act. This argument is flawed. Section 93 of the current law which deals with transition provides a complete answer to the Appellant. It states as follows:-
- “A valid contract of service, and foreign contract of service to which Part XI applies, entered into in accordance with the Employment Act (now repealed) shall continue in force to the extent that the terms and conditions thereof are not inconsistent with the provisions of this Act, and subject to the foregoing every such contract shall be read and construed as if it were a contract made in accordance with and subject to the provisions of this Act, and the parties thereto shall be subject to those provisions accordingly.”
80. Section 35 of the EA does not provide the formula for computing service pay. As a result, courts have had to borrow the formula used to compute severance pay under section 40 of the EA to ascertain the quantum of service pay due to an employee under section 35 of the EA. In Stephen Mkale Mulindi v Provide International [2019] eKLR the court stated as follows on the matter:-
- “.....the law has not yet fixed the formula for computing service pay. There are numerous authorities where the Courts have taken judicial notice for computation of service pay at the rate of 15 days' pay for each completed year of service.”
81. In the case before me the Respondent had been in the service of the Appellant since November 2007. Therefore, at the time of his termination, the Respondent had served for slightly over eleven years. He was therefore entitled to service pay at the rate of salary for 15 days for every year worked for eleven years. This works out to Kshs 13,247/- x 11 = Kshs 145,717/-. The trial court awarded the Respondent Kshs 143,068/- under this head. I uphold the award.



82. The final issue to be addressed relates to whether the trial magistrate erred in law and fact in not awarding the Appellant costs. The general position in law is that the decision whether to award costs in a suit is one that is left to the discretion of the trial court. Usually and as a rule of general application, costs follow the event. Put differently, costs usually go to the successful party in a case.
83. A trial court can only deny a successful party costs on very cogent grounds. Any decision to deny such party costs on flimsy grounds or on no grounds at all is tantamount to abuse of discretion which must be avoided (see *Farah Awad Gullet v CMC Motors Group Limited* [2018] eKLR).
84. In the case before the trial court, the Respondent was the successful party. There was no evidence of misconduct on his part to warrant the court to deny him costs. In awarding the Respondent costs, the court followed the guidelines referred to above. Therefore, I see no reason why I should interfere with the order on costs.
85. Finally, it is noted that, except for some unsupported observations in its final submissions, the Appellant did not appeal against the award of salary in lieu of notice. Accordingly, the award is affirmed.

Disposition

86. Accordingly, I dismiss the appeal save for the alterations to the award for compensation for unfair termination as specified in this judgment. For the avoidance of doubt, the appeal has only been allowed in respect of the trial court's award on compensation for wrongful termination. The award has been reduced to an award that is equivalent to the respondent's salary for six (6) months (Kshs 158,964/). All other findings by the trial court are upheld.
87. I award the Respondent costs of the appeal.

DATED, SIGNED AND DELIVERED ON THE 16TH DAY OF FEBRUARY 2023

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Applicant

..... for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

