



**Kishen Holdings Limited v Nyang’au (Cause E012 of 2021)
[2023] KEELRC 566 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 566 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E012 OF 2021
L NDOLO, J
MARCH 2, 2023**

BETWEEN

KISHEN HOLDINGS LIMITED APPELLANT

AND

CHARLES NYARIARO NYANG’AU RESPONDENT

*(Appeal from the judgment of Hon. G.A Mmasi, SPM
delivered on 28th January 2021 in CMEL Case No 959 of 2019)*

JUDGMENT

1. By a statement of claim dated May 22, 2019, the respondent (claimant in the trial court) filed a claim against the appellant (respondent in the trial court) seeking relief for unfair termination of employment.
2. In a judgment delivered on January 28, 2021, Hon G.A Mmasi, SPM entered judgment in favour of the respondent in the following terms:
 - a. 12 months’ salary in compensation.....Kshs 266,772
 - b. Service pay for 6.6 years.....110,578
 - c. Unpaid leave for 5 years.....111,155
 - d. 1 month’s salary in lieu of notice.....22,231
 - e. Costs
3. Being aggrieved by the judgment, the appellant filed the present appeal. In its memorandum of appeal dated February 9, 2021, the appellant raises the following grounds of appeal:



- a. That the learned magistrate erred in law and in fact in awarding Kshs 510,736 and finding for the respondent that, he was unlawfully terminated from his employment, despite evidence on record showing that he wilfully neglected his duties;
 - b. That the learned magistrate erred in law and in fact in awarding service pay at Kshs 110,578 despite the evidence on record showing that he was a member of the National Social Security Fund (NSSF) and was therefore not entitled to service pay;
 - c. That the learned magistrate erred in law and in fact in awarding one month's pay *in lieu* of notice at Kshs 22,231 despite the evidence on record showing that he had collected his one month pay *in lieu* of notice;
 - d. That the learned magistrate erred in law and in fact in awarding 5 years' unpaid leave at Kshs 111,115 despite the evidence on record showing that all the leave days were paid at the end of every year;
 - e. That the learned magistrate erred in law and in fact in finding, without giving concise reasons, that the respondent was unfairly terminated from his employment and awarding him Kshs 266,772 while evidence shows he wilfully neglected his duties warranting the termination;
 - f. That the learned magistrate failed to appreciate the submissions by the appellant, a decision that was unfair and manifestly unjust to the appellant and untenable.
4. In its submissions in support of the appeal, the appellant condenses the grounds of appeal into three as follows:
- a. That the award for compensation by the learned magistrate was excessive and unjustified;
 - b. That the award for service pay and unpaid leave by the learned magistrate was unjustified and unfair;
 - c. That the learned magistrate failed to appreciate the submissions of the appellant and arrived at an unfair decision, manifestly unjust and untenable.
5. This being a first appeal, I am required to reconsider and re-evaluate the evidence and draw my own conclusions, taking into account that I did not have the opportunity to see and hear the witnesses first hand.
6. The duty of a first appellate court was set by the Court of Appeal in *Selle v Associated Motor Boat Company Ltd* [1968] E.A 123 where it was held:
- “An appeal to this court from a trial by the High Court is by way of 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.....or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”
7. Gauging from the appellant's submissions, liability for unlawful and unfair termination of employment is not a matter in contest. The appellant's first issue with the judgment of the learned trial magistrate is that the compensatory award of twelve (12) months' salary is excessive and unjustified.



8. In its decision in *Kenfreight (E.A) Limited v Benson K Nguti* [2019] eKLR the Supreme Court of Kenya held that a compensatory award under section 49 of the *Employment Act* falls within the province of judicial discretion.
9. This court is fully aware of the age old legal principle that an appellate court should not idly interfere with a discretionary award handed by a trial court. The principles upon which such an award may be disturbed by an appellate court are well established.
10. In *United India Insurance Co Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A Madan JA (as he then was) rendered himself on this issue as follows:

“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”
11. The appellant referred the court to the decision in *Kemfro Africa Ltd v Lubia & another (No 2)* 1987 KLR 30 where Kneller JA stated the following:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage.”
12. Parliament, in its wisdom decided to cap the maximum compensatory award for unlawful and unfair termination of employment at the equivalent of twelve months’ salary. It follows therefore that a court may make any award ranging from one month’s salary to twelve months’ salary.
13. The legislature went further to list the factors to be taken into account in making such an award. These are contained in section 49(4) of the *Employment Act* and they range from the wishes of the employee, his contribution to the termination, length of service to alternative employment opportunities.
14. This position was confirmed by the Supreme Court in *Kenfreight (E.A) Limited v Benson K Nguti* (supra) in the following terms:

“On an award of damages, the Act limits the award a court can make to a maximum of 12 months’ salary. In as much as the trial court therefore does have discretion in the quantum of damages to award for unfair or wrongful termination of employment, it must be guided by the principles and parameters set under sub-section 4 of the *Employment Act*.”
15. I have looked at the judgement of the learned trial magistrate and find no reason for the maximum award she granted to the respondent. The respondent had served for less than 10 years and there was no mention of any special circumstance that would qualify him for the maximum award of 12 months’ salary.



16. In the circumstances, I will interfere with the award by the trial court and taking into account the respondent's length of service, reduce the compensatory award from 12 months' salary to 8 months' salary.
17. Regarding the award for service pay, the only thing to say is that because the respondent was a contributing member of the National Social Security Fund (NSSF), then under section 35 (6) of the [Employment Act](#), he was not entitled to service pay.
18. On the award for leave pay, the appellant produced records indicating that the respondent's leave was commuted for cash on accrual basis. The award on leave pay was therefore made in error.
19. In the ultimate, the award by the learned trial magistrate is set aside and replaced with the following:
 - a. 8 months' salary in compensation.....Kshs 177,848
 - b. 1 month's salary *in lieu* of notice.....22,231Total... 200,079
20. Each party will bear their own costs.

DELIVERED VIRTUALLY AT NAIROBI THIS 2ND DAY OF MARCH 2023

LINNET NDOLO

JUDGE

Appearance:

Mr. Nyantika for the Appellant

Mr. Nyawade for the Respondent

