

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 17 OF 2015

MARGERIE MUTHONI NDWIGA.....CLAIMANT

VERSUS

DAIMA SAVINGS CO-OPERATIVE SOCIETY LTD.....RESPONDENT

JUDGMENT

1. The Claimant herein was a successful Appellant in Civil Appeal No. 7 of 2017 where the Learned Judges of Appeal reversed the Employment and Labour Court and found her dismissal to be unfair within the meaning of Section 45. The file was remitted to the Employment & Labour Relations Court at Nyeri to determine the compensation for unfair dismissal.

2. The Claimant herein having proved her dismissal was unfair would be entitled to compensation but not for the damages sought under paragraph 4 of her prayers. She had risen to the position of general clerk earning Kshs. 25,374/-. Her dismissal was after a hearing where the Respondent asserts she was not able to exonerate herself. Under Section 49(1) of the Employment Act, the employee who is unfairly dismissed is entitled to compensation in terms of Section 49(4) as read with Section 50. The considerations a Court has to take into account while determining compensation or reinstatement of an employee are any or all of the following:- (a) the wishes of the employee; (b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and (c) the practicability of recommending reinstatement or re-engagement; (d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances; (e) the employee's length of service with the employer; (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination; (g) the opportunities available to the employee for securing comparable or suitable employment with another employer; (h) the value of any severance payable by law; (i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee; (j) any expenses reasonably incurred by the employee as a consequence of the termination; (k) any conduct of the employee which to any extent caused or contributed to the termination; (l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and (m) any compensation, including *ex gratia* payment, in respect of termination of employment paid by the employer and received by the employee.

3. As noted in the preceding part, part of which is underlined for emphasis, the dismissal of the Claimant and the circumstances surrounding the same do not warrant the maximum compensation which is set at 12 months by law. In the court's determination, the Claimant is therefore entitled to 6 months compensation on that basis. In the final premises the court enters judgment for the Claimant for compensation fixed at 6 months gross salary which is Kshs. 152,244/- plus costs of the suit.

It is so ordered.

Dated and delivered at Nyeri this 24th day of September 2019

Nzioki wa Makau

JUDGE

I certify that this is a true copy of the Original

Deputy Registrar