**Kenfreight (EA) Limited v Nguti (Petition 37 of 2018) [2019] KESC 79 (KLR) (23 July 2019) (Judgment)**

*Kenfreight (E.A) Limited v Benson K. Nguti [2019] eKLR*

Neutral citation: [2019] KESC 79 (KLR)

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

**PETITION 37 OF 2018**

**PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ**

**JULY 23, 2019**

**BETWEEN**

**KENFREIGHT (EA) LIMITED ..... APPELLANT**

**AND**

**BENSON K NGUTI ..... RESPONDENT**

***(Being an appeal from the Judgment of the Court of Appeal (Makhandia, Ouko& M'Inoti, JJA), sitting at Mombasa delivered on 11th March, 2016)***

**The remedies listed under section 49 of the Employment Act are available at the discretion of the Court in all situations of unfair or wrongful termination**

Reported by Beryl Ikamari

***Labour Law*** *- employment - termination of an employment contract - termination in accordance with contractual terms as compared to statutory termination-termination via payment in lieu of notice - remedies for wrongful termination - whether the remedies listed under section 49 of the Employment Act would apply to a claimant whose employment contract was terminated by the making of payment in lieu of notice as per the terms of the contract - Employment Act (cap 226), sections 35, 36 and 49.*

**Brief facts**

The respondent's employment contract was terminated by the appellant with effect from December 1, 2010. The respondent filed a suit at the trial court in which he contended that his termination, which had the purpose of replacing him with a Belgian national, was wrongful. He stated that there were no justifiable reasons for his termination and that he was not afforded a hearing before being terminated. He added that the terminal dues he was paid were grossly below what was payable under the existing practice in the appellant company. He sought court orders, *inter alia*, to declare his termination unlawful and to reinstate him. The trial court declared the termination unlawful and awarded a total of Kshs. 8,116,344 with costs and interest as compensation.

Aggrieved, the appellant lodged an appeal at the Court of Appeal. The Court of Appeal dismissed the appeal and made the finding that the termination was unfair in spite of the payment made *in lieu* of notice. Further aggrieved, the appellant filed the instant appeal at the Supreme Court. The appellant asserted that even if the termination was unfair, under section 46 of the Employment Act the maximum damages that could be awarded were equivalent to pay for the notice period and that section 43(a) and 47(5) of the Employment Act were inapplicable for a termination effected in accordance with mutually agreed contractual terms.

**Issues**

Whether the remedies listed under section 49 of the Employment Act would apply to an employee who was terminated by the making of payment *in lieu* of notice in accordance with the terms of an employment contract.

**Relevant provisions of the Law**

**Employment Act (cap 226)**

**Section 49 - Remedies for wrongful dismissal and unfair termination**

*(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—*

*(a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;*

*(b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract;*

*(c) or (c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.*

*(2) Any payments made by the employer under this section shall be subject to statutory deductions.*

*(3) Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to—*

*(a) reinstate the employee and treat the employee in all respects as if the employee's employment had not been terminated; or*

*(b) re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage.*

*(4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account 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.*

**Held**

1. One of the ways in which an employment contract could be terminated was the issuance of notice under section 35 of the Employment Act. There was a right under section 35 as read with section 46 of the Employment Act for an employee terminated via notice to dispute the lawfulness of the termination. Further, under section 36 of the Employment Act, either party to an employment contract to which section 35(5) applied could terminate the contract without issuing notice while paying remuneration which would have been paid during the notice period.
2. Section 49 of the Employment Act provided for remedies for unfair termination of an employment contract. When giving an award, the court had discretion to determine what was fair under the circumstances. However, the court's discretion was to be based on the set parameters including the limiting of the award to a maximum of the equivalent of 12 months' salary.
3. The Court of Appeal's decision could not be said to be inconsistent with the decision of the same court in *CMC Aviation Limited v Mohammed Noor*, Civil Appeal No. 199 of 2013, [2015] eKLR. The facts in that case were different from the facts in the instant case. The respondent in that case was summarily dismissed while the respondent in the instant case was dismissed via payment *in lieu* of notice.
4. In *CMC Aviation Limited v Mohammed Noor*, Civil Appeal No. 199 of 2013 the Court of Appeal found that the respondent was only entitled to an award of one month's salary, the equivalent of the notice period as per the employment contract, as compensation. However, that finding did not mean that the remedy available for summary dismissal was limited to one month's salary. That was how the court exercised its discretion in that instance.
5. The decision as to what would constitute an appropriate remedy was at the discretion of the court. Section 49 of the Employment Act listed several remedies that could be granted for unfair termination and it was up to the court to decide on whether to grant any or all of the remedies. It did not matter how the termination was done, section 49 would apply for purposes of determining the nature of the appropriate relief.
6. The Court of Appeal's finding on whether or not the amount of Kshs. 3, 258, 245 formed *ex gratia* payment or any other payment to which section 49(4)(m) of the Employment Act was applicable, was an exercise of discretion. The appellant did not demonstrate how that exercise of discretion was wrongful. Therefore, there was no reason to interfere with the Court of Appeal's finding on that issue.

*Petition of appeal dismissed; appellant to bear the costs of the appeal.*

**Citations**

**Cases**

***Kenya***

1. *CMC Aviation Limited v Mohammed Noor* Civil Appeal 199 of 2013; [2015] KECA 775 (KLR) - (Distinguished)
2. *County Council of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others* Civil Appeal 17 & 18 of 2015; [2015] eKLR - (Explained)
3. *CPC Industrial Products v Angima* Civil Appeal No 197 of 1992 - (Distinguished)
4. *Daniel Kimani Njihia v Francis Mwangi Kimani & Thika District Land Registrar* Civil Application 3 of 2014; [2015] KESC 19 (KLR) - (Followed)
5. *International Planned Parenthood Federation v Pamela Ebot Arrey Effiom* Civil Appeal 132 of 2011; [2016] KECA 429 (KLR) - (Explained)

6. *Isindu, Pius Machafu v Lavington Security Guards Limited* Civil Appeal 301 of 2015; [2017] KECA 225 (KLR) - (Explained)
7. *Iyego Farmers Co-operative Sacco v Kenya Union of Commercial Food and Allied Workers* Civil Appeal 12 of 2015; [2015] KECA 302 (KLR) - (Explained)
8. *Kenya Ports Authority v Mary Saru Mwandawiro* Civil Appeal 57 of 2016; [2017] KECA 14 (KLR) - (Explained)
9. *Nation Media Group Limited v Onesmus Kilonzo* Civil Appeal 108 of 2015; [2017] KECA 181 (KLR) - (Explained)
10. *Oshwal Academy (Nairobi) & another v Indu Vishwanath* Civil Appeal 125 of 2011; [2015] KECA 120 (KLR) - (Explained)
11. *Sirma v Independent Electoral and Boundaries Commission & 2 others* Petition 13 of 2018; [2019] KESC 64 (KLR) - (Followed)
12. *Teachers Service Commission v Kenya National Union of Teachers & 3 others* Application 16 of 2015; [2015] KESC 29 (KLR) - (Followed)

***Regional Court***

*Selle v Associated Motor Boat Company* [1968] EA 123 - (Explained)

**Texts**

Garner, BA., (Ed) (2009), *Black's Law Dictionary* St Paul Minnesota: West Group 9th Edn

**Statutes**

***Kenya***

1. Constitution of Kenya articles 163(4)(b)(5); 271 - (Interpreted)
2. Employment Act (cap 226) sections 5, 35, 36, 41, 43(a)(1); 44; 45(2)(a)(b); 46; 47(5); 49(1)(a)(b)(c)(2) 355; 411(2); 431; 442; 475; 494(m)- (Interpreted)
3. Supreme Court Act (cap 9B) sections 20, 21- (Interpreted)

**Instruments**

1. United Nations International Labour Organization Convention (No 135) In general
2. United Nations International Labour Organization Convention (No 98) In general

**Advocates**

*Mr Khagram* for the appellant

## JUDGMENT

### A. Introduction

1. This is an appeal dated October 4, 2018 and lodged on October 5, 2018 having been admitted by this court as one involving a matter of general public importance under article 1634(b) and 163(5) of the *Constitution*. The appellant is challenging the entire judgment and orders of the Court of Appeal Makhandia, Ouko & M'Inoti, JJ A. sitting in Mombasa, delivered on March 11, 2016 which upheld the decision of the Employment and Labor Relations Court at Mombasa Makau J in Cause No 146 of 2013. The Court of Appeal dismissed the appellant's appeal.

2. While certifying this appeal as one involving a matter of general public importance, in Miscellaneous Application No 18 of 2016 this Court Maraga, CJ & P; Ojwang, Wanjala, Njoki & Lenaola, SC JJ on September 24, 2018 rendered itself thus:

> " [6] The court has considered the question at the core of the application, namely, that the Appellate Court's decision was not guided by the reasoning and

determination in that Court's earlier decision in *CMC Aviation Ltd v Mohammed Noor*, Nairobi Civil Appeal No 199 of 2013.

[7] It is clear to this court that the particulars of inconsistency between the Appellate Court's decisions in the two cases would only be fully evinced upon a hearing of the intended appeal.

[8] Considering that the prospect of inconsistent determinations in relation to the law of employment would affect the process of application of the law, and would have a bearing on the interests of members of the public, we find this matter to fall within the terms of article 163(5). of the *Constitution*."

**B. Background**

**i. Proceedings at the Employment and Labour Relations Court**

3. On November 26, 2010, the respondent received a letter from the appellant terminating his employment through its Group Managing Director, invoking the respondent's contract of employment of September 5, 1996. That letter was to the effect that the respondent's employment would be terminated with effect from December 1, 2010, having been given one-month notice. He was also informed that he would be paid his salary for the month of December 2010 in lieu of notice.

4. Aggrieved by the termination, the respondent filed Cause No 146 of 2013 against the appellant in the former Industrial Court now Employment and Labour Relations Court. alleging that the termination of his employment was illegal, wrongful, unfair and discriminatory; that there was no justifiable reasons for the termination; that he was not given a hearing before the termination; and that the termination was actuated by the appellant's intention to replace him with a Belgian national. As a result, the respondent contended that the amount of Kes 3,258,245 paid as his terminal dues was grossly low as it did not take into consideration an existing practice in the appellant company where full-time directors/ employees whose employments were terminated would be paid terminal dues inclusive of 2 month's as opposed to 15 day's. salary for each year worked with the appellant. In that regard, the appellant sought the Court to declare his dismissal unfair, unlawful and a nullity, reinstate him, and order payment of his salary for the period between November, 2010 and the date of his reinstatement. In the alternative to his reinstatement, he sought payment of his full salary plus 14 % per annum interest thereon from the date of dismissal until the date of his retirement at the age of 60 years, 12 months' salary for unfair termination, in addition to terminal dues equivalent to two months' salary for each year worked, plus interest at 14% per annum effective November 26, 2011 until payment in full , costs and interest.

5. The respondent's claim was vehemently denied by the appellant who instead claimed that the respondent's dismissal was not on disciplinary grounds but a normal termination through service of one month notice as was provided for under the employment contract. It was the appellant's case that the respondent was not entitled to any accrued employment dues on termination but still, the respondent had granted him an ex-gratia payment.

6. The Court Makau, J, having heard both sides, framed the following two questions for determination, namely, whether the termination of the respondent's employment was wrongful and unfair, and whether the claimant was entitled to the reliefs sought.

7. The learned Judge found, based on evidence on record, that in terms of sections 41, 43(a), 45(2)(a)(b), and 47(5) of the *Employment Act*, the appellant did not prove any justifiable cause for terminating the respondent's employment. He held that the appellant's suggestion that the respondent was negligent and inefficient as a result of which he caused loss to the appellant was never put to him for rebuttal and

the respondent was not accorded a disciplinary hearing, nor was he given the reason or reasons for his dismissal. In that regard, the learned Judge declared the respondent's termination unfair and unlawful, awarded him 12 months' gross salary at the rate of Kes 676,362 per month for unfair termination, the total translating to Kes 8,116,344 with costs and interest. This award was expressed to exclude the dues of Kes 3,258,245, described in the judgment as ex-gratia. already paid. The rest of the prayers were rejected.

**ii. Proceedings at the Court of Appeal**

8. Aggrieved by the decision of the Industrial and Labour Relations Court, the appellant filed an appeal to the Court of Appeal at Mombasa, Civil Appeal No 31 of 2015, Kenfreight EA Limited v Benson K Nguti. The grounds of appeal were summarized into five as follows; that the learned Judge erred in his finding that the termination of the respondent's employment was wrongful and unfair; that having found the respondent's contract of employment was for an indefinite term, only terminable by one month's notice, it was erroneous for the Judge to hold that the termination was stantially and procedurally unfair and to award Kes 8,116,344; that the appellant invoked its contractual rights to terminate the respondent's employment upon giving 30 days' notice and payment of one month salary in lieu of notice, a right distinctly independent of the statutory right under which valid reasons must be given, an employee heard in his defence and strict procedure followed before termination; that an employer can elect to terminate an employee's employment either under contractual terms or under statutory provisions; that the appellant elected the former even though there were sufficient grounds to invoke the latter and summarily dismissed the respondent; that the appellant having invoked the contract of service, did not have to assign any reason or justification for the termination; and that in any case, the respondent accepted the termination of his employment by receiving, without protest, the final dues paid to him.

9. It was the appellant's case that the learned Judge not only ignored the appellant's evidence but also misdirected himself by relying on sections 43 and 47(5) relating to summary dismissal whereas the respondent's case was based on unfair termination pursuant to a contract of employment; that the award of Kes 8,116,344 by way of damages for unfair termination amounted to unjust enrichment of the respondent, and further, that it was erroneously based on "gross" salary thereby ignoring the tax element. The learned Judge, it was contended, committed a further error by treating the entire amount of Kes 3,258,245 as *ex-gratia* yet only a small fraction 15 days' salary for every year of service. constituted *ex-gratia* payment.

10. The Court of Appeal framed one issue for determination that is, whether the appellant could elect to terminate the respondent's employment outside the provisions of the *Employment Act* and instead rely solely on the contract of employment. In other words, whether in the circumstances of this case, the respondent was only entitled to the amount specified in the contract of service as payable to him by the appellant upon termination of his employment in lieu of notice or whether he was entitled to remedies for unfair termination under section 49 of the Act.

11. In its judgment dated June 13, 2016, the Court of Appeal dismissed the appeal and found, in agreement with the trial judge, that the termination of the respondent's contract of service was unfair, the payment in lieu of notice notwithstanding.

12. On the issue whether the notice of termination was proper, the Judges found that the appellant had complied with the terms of the contract of service by paying to the respondent Kes 676,362, being the respondent's one-month salary in lieu of notice. On the issue whether the termination was unfair, the Judges found that it is considered unfair to terminate a contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair; that the reason

related to the employee's conduct, capacity, compatibility or is based on the operational requirements of the employer. That the employer must also prove that the termination was in accordance with fair procedure and that the burden on the employee is only limited to asserting that an unfair termination has occurred. In a nut shell, the Court upheld the trial court's decision that the termination was unfair. The court also found that the treatment of the respondent leading to the termination as well as the termination itself was discriminatory.

13. On remedies available to the respondent, the learned Judges found that the trial judge's award of 12 months gross salary as damages for unfair termination was judicially exercised. On the payment of Kes 4,669,677 by the appellant as ex gratia payment, the Judges found that the appellant feigned the basis of the payment describing it falsely as a terminal benefit which it wasn't obliged to pay and which was not provided for in the Act while the payment was based on an established practice of the appellant company, was therefore not an ex gratia payment and that to that end, the payment of Kes 3,258,245 was independent of the award of Kes 8, 11,344.00 under section 49. While correcting the trial judge's error, the learned Judges therefore held that the award was ject to statutory deductions in terms of section 492..

**iii. Proceedings at the Supreme Court**

14. Aggrieved further by the decision of the Court of Appeal, the appellant filed this Petition seeking to appeal the Court of Appeal's decision of March 11, 2016.

**C. The Parties' Respective Cases**

**i. The appellant**

15. The appellant's case is based on 5 grounds namely, that the learned Judges of Appeal erred in law and in fact: when they held that the respondent was unfairly terminated in breach of section 45 of the *Employment Act* in complete disregard of section 46 of the same Act; in failing to recognize the fact that even if the termination was unfair, an award of damages could only be made up to a maximum equivalent pay of the notice period and no more; deciding the relief and remedies to grant, any compensation and ex gratia relief paid by the appellant and received by the respondent ought to have been taken into account; failing to appreciate that sections 43(a) and 475 of the *Employment Act* are inapplicable where termination is validly effected pursuant to contractually agreed terms; and failing to recognize and hold that the trial court's discretion was exercised under clear misinterpretation of facts and misdirection of the law applicable.

16. Mr Khagram, counselfor the appellant made oral mission on May 8, 2019 when the appeal came up for hearing in addition to written missions filed on February 8, 2019. While citing sections 20 and 21 of the *Supreme Court Act* and the case of *Selle v Associated Motor Boat Company* [1968] E.A 123, the appellant mits that this court has jurisdiction to make any order or grant reliefs that could have been granted by the Court of Appeal.

17. The appellant further urges that the respondent's employment was terminated pursuant to its contractual right and that the said termination was fair and cites sections 45, 442, 351(c) of the *Employment Act* to support its missions. It is the appellant's other case that section 36 of the *Employment Act* is not negated in circumstances where the contractual notice period prescribed is greater than the 28-day period. It urges, in addition, that the reason for terminating the respondent's employment was valid as having been not only contractually agreed but also been statutorily permitted. It relies on the decisions in *Nation Media Group Limited v Onesmus Kilonzo* [2017] eKLR and *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR to support their mission. Counsel

for the appellant further urged that an employer, just like an employee, can terminate employment upon issuance of notice and cites article 271 of the *Constitution* to support this mission.

18. It is also the appellant's mission that where a contract of employment is terminated pursuant to a contractual notice period, and not on grounds of misconduct, poor performance or physical incapacity, an employee is not entitled to the process envisaged under section 41 of the *Employment Act*. It thus urges that it was entitled to terminate the respondent's employment upon agreed notice.

19. The appellant furthermore urges that in the circumstances of this case, the provisions of sections 43(1) and 47(5) of the *Employment Act* are not applicable. That, be is as it may, under sections 431 and 475, the burden of proving unfair termination rests on the employee while the burden of justifying the grounds of termination rests on the employer. Additionally, that a party who relies on a contractual term to terminate a contract of employment in accordance with sections 35 and 36 of the *Employment Act*, such a party cannot be said to not have a valid reason or not to have justification for termination.

20. Counsel for the appellant in addition mitted that in the event of a finding that the termination was unfair, the respondent would only be entitled to damages to the extent of the loss suffered and no more. The appellants thus note in that regard that there are conflicting decisions of the Court of Appeal on this issue and relies on the two decisions in *CMC Aviation Limited v Mohamed Noor*[2015] eKLR and *OShwal Academy Nairobi & another v Indu Vishwanath* [2015] eKLR to make that point.

21. Lastly, the appellant mits that the courts below erred in failing to recognize that section 494(m) of the *Employment Act* requires any compensation including ex gratia payment, to be taken into account in respect of damages to be paid for unfair termination. It mits that in this case, the sum of Kes 3,258,245.00 paid to and accepted by the respondent must be taken into account in arriving at any payable damages.

**ii. The respondent**

22. The respondent filed his missions in response to the Petition and appellant's missions dated February 22, 2019. He mits that from the appellant's documents and witness evidence on record, termination of the respondent's contract of service was on the grounds of allegations of neglect, misconduct, breach of duty and poor performance. That, however, the respondent was not accorded a fair hearing in contravention of the provisions of section 411 and 2 of the *Employment Act*, article 7 of the *Termination of Employment Convention* of 1982 and well settled Court principles. He relies on the decisions in *County Council of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others* [2015] eKLR to support this contention. He adds that it has been admitted by the appellant before the Superior Courts that no disciplinary hearing was conduct in relation to the respondent's case and so the allegation of non-accord of fair hearing is uncontested.

23. He mits further that the alleged termination on reliance of contractually agreed terms, was merely intended to defeat the provisions of sections 41, 43, 45, 47 and 49 of the *Employment Act* as the appellant's actions prior to the termination letter of December 8, 2010 echo different reasons for termination.

24. On discrimination, the respondent mits that the appellant's Group Managing Director admitted in evidence that it was the appellant's policy that before termination of employment, an employee is given an opportunity to be heard yet the same treatment was not accorded to the respondent in breach of the provisions of section 5 of the *Employment Act*. He thus mits that by virtue of section 5(7) of the *Act*, the burden of proving that discrimination did not take place as alleged is on the employer.

25. On the remedies available, the respondent agrees with the trial courtand the Court of Appeal and mits further that both courts were well guided in exercise of discretionary powers, and that there is no conflict in the two alleged decisions as each case was decided on its own merits. Further, that the courts took account of all the relevant circumstances of this case including ex gratia payment and statutory deductions. He further urges that under section 49(1) of the *Employment Act*, the two remedies of notice pay and 12 months' pay can be awarded concurrently. He relies on the holding in *International Planned Parenthood Federation v Pamela Ebot Arrey Effiom* [2016] eKLR in that regard. He further mits that the Court of Appeal in *CPC Industrial Products v Angima* Civil Appeal No 197 of 1992 while departing from the holding that the two remedies can be awarded concomitantly held that the principle that damages will only be limited to the period of notice agreed on by the parties could only apply if in exercising the right to terminate the contract of service, the employer was not actuated by ulterior motive. He also cited the holding in *Iyego Farmers' Cooperative Society v Kenya Unuon of Commercial Food and Allied Workers* [2015] eKLR and *Kenya Ports Authority v Mary Saru Mwandawiro* [2017] eKLR on this issue.

**D. Analysis**

**i. Issues for determination**

26. Having considered the pronouncement of this court admitting this appeal as one involving a matter of general public importance, the grounds of appeal, the mission of the parties, the authorities in support thereof and having further noted that the appellant has raised several other issues for determination, it is evident to us that there is only one issue for determination by this court, namely:

> What is the appropriate remedy for an employee upon unfair or wrongful termination of a contract of employment? Specifically, to whom would the remedy in section 49 of the *Employment Act* apply where the dismissal upon notice is found to be unfair or wrongful?

27. The appellant in that context mits that the respondent's employment was terminated by invoking the contractual clause of terminating the contact which allowed either party to terminate the contract by issuing a one-month notice or by paying one-month salary in lieu thereof. According to the appellant, such a right can be invoked under section 35 of the *Employment Act* without assigning reasons for terminating the contract of employment. It is therefore the appellant's mission that the Learned Judges of Appeal departed from previously decided cases, in upholding the decision of the trial court, thereby creating conflicting decisions on the same issue as well as the question of interpretation and applicability of the *Employment Act* 2007, by making orders which are inconsistent with the decision of the Court of Appeal, albeit differently constituted in *CMC Aviation Limited v Mohammed Noor*; Civil Appeal No 199 of 2013, [2015] eKLR the CMC Aviation case.

28. Conversely, it's the respondent's case that the circumstances leading to termination of his employment were allegations of misconduct, breach of duty, negligence and poor performance contemplated under section 41 of the *Employment Act* which entitles him to the right to be heard. Counsel for the respondent further mitted that the *CMC Aviation* case was one which the court decided uniquely and is not related to the instant case.

**ii. Analysis**

29. We have considered the above mission and note that the *Employment Act* provides for various modes of terminating an employment one of them being by issuing a termination notice under section 35. The same section gives an employee a right to dispute the lawfulness or fairness of the termination in

accordance with the provisions of sections 46; or of an employer or employee to terminate a contract of employment without notice for any cause recognized by law.

30. Further, section 36 provides that either party to the contract of service to which section 355. applies, may terminate the contract without notice upon payment to the other party of the remuneration which would have been earned by that other party, or paid by him as the case may be in respect of the period of notice required to be given under the corresponding provisions of that section.

31. In that context, the *Employment Act*, 2007 makes provisions for appropriate remedies for wrongful dismissal or unfair termination as follows:

> " [49].
>
> (1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—
>
> (a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;
>
> (b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph a. which the employee would have been entitled to by virtue of the contract;
>
> (c) or c the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.
>
> (2) Any payments made by the employer under this section shall be ject to statutory deductions.
>
> (3) Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to—
>
> (a) reinstate the employee and treat the employee in all respects as if the employee's employment had not been terminated; or
>
> (b) re-engage the employee in work comparable to that in which the employee was employed prior to his

dismissal, or other reasonably suitable work, at the same wage.

(4) A labour officer shall, in deciding whether to recommend the remedies specified in sections (1) and(3),take into account 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."

32. When giving an award under section 49 of the *Employment Act*, a court of law is expected to exercise judicial discretion on what is fair in the circumstances. The *Black's Law Dictionary* 9th edition at page 534 defines judicial discretion as follows:

> " the exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not to act when a litigant is not entitled to demand the act as a matter of right"

33. On an award on damages, the Act limits the award a court of law can make to a maximum of 12 months' salary. In as much as the trial courttherefore does have a 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 -section 4 of section 49 of the *Employment Act*. What then did the Court of Appeal do in addressing the above issue and as determined in *CMC Aviation Limited v Mohammed Noor*; Civil Appeal No 199 of 2013, [2015] eKLR the CMC Aviation case?

34. In that case, the respondent was employed on a two-year contract as a Chief Pilot. On March 30, 2010, he was summarily dismissed from his employment on grounds of gross misconduct under section 44(d) of the *Employment Act* and breach of the appellant's Code of Conduct. The trial court held that the dismissal of the respondent from his employment was in violation or contravention of the Industrial Relations Charter, the provisions of *International Labour Organization ILO. Convention Nos. 98* and *135* as well as principles of natural justice. The court also held that the appellant did not observe statutory provisions on summary dismissal as provided for under section 44 of the *Employment Act*, 2007. The summary dismissal therefore, amounted to unfair dismissal. sequently, the respondent was awarded one month's salary in lieu of notice, twelve months' salary, unpaid leave days as well as costs of the suit. The appellant appealed to the Court of Appeal challenging the whole decision of the trial court. The respondent filed a cross-appeal and grounds affirming the trial court's decision. The Court of Appeal Karanja, Musinga & Gatembu, JJ A sitting at Nairobi on April 24, 2015 listed four issues for determination which they determined as follows:

a. As to whether the appellant's summary dismissal of the respondent was lawful or whether it amounted to unfair termination of services it held that the burden of justifying the ground of summary dismissal lies upon an employer, and that the appellant failed to prove that the respondent used abusive language towards the Human Resource Manager, consequently dismissing the respondent summarily. The court agreed with the trial court that the respondent was entitled to an opportunity to be heard in any event.

b. On whether the respondent's demotion and reduction of salary was lawful, the learned judges held that the demotion of the respondent was justified as it was done within the appellant's Staff Policies and Procedures Manual and Performance Evaluation Policy which the respondent was aware of. They thus faulted the trial court which had held that the appellant had no legal right to reduce the respondent's salary based on an undated Performance Evaluation form.

c. As to whether the respondent was lawfully entitled to an award of damages in the sum of US$ 108, 000, the Court of Appeal found that to the extent that the trial judge did not state why he opted to give a remedy under section 49(1)(c), twelve months gross salary., and not the remedies under section 49(1)(a) or (b). The trial court ought to have been guided by the provisions of section 494 in setting aside the trial court's award. It thus stated as follows:

> "[paragraph 41] The respondent was serving a two-year contract of employment which was terminable by one month's notice or one month's salary in lieu of notice. Had the appellant complied with the requirements of sections 41 and 45 of the *Employment Act*, the summary dismissal would have been a fair one. But to the extent that the appellant did not follow the statutory procedure the dismissal was found to be unfair, which we agree. Taking all this into consideration, we think that the respondent was not entitled to twelve months gross pay as compensation for wrongful dismissal. In our view, since the contract of employment was terminable by one month's notice, we believe that an award of one month's salary in lieu of notice would have been reasonable compensation. The trial court awarded that, albeit at a higher rate of US$9000 instead of US$5,075 plus twelve months salary amounting to US$108,000. We hereby set aside the award of US$9000 as one

month's pay in lieu of notice and stitute therefor US$5075. The award of US $108,000 is set aside in its entirety." [Emphasis added]

d. The other issue was whether the respondent was lawfully entitled to an award of US $ 33,000 on account of underpaid salary for the period between October, 2008 and March 15th 2010 and unpaid leave days for the years 2008 and 2009. On this issue, the Court held that the respondent's demotion was lawful and consequently, the setting aside the claim for US $ 33,000 on account of underpayment did not arise.

35. Is the Court of Appeal's decision in this appeal inconsistent with the *CMC Aviation Case*? Having read through the Court of Appeal's decision in the *CMC Aviation Case*, we are of the firm opinion that the facts in that case are different from the facts in the instant case. For instance, in the *CMC Aviation Case*, the respondent was summarily dismissed pursuant to section 44 of the *Employment Act*, though both the trial court and the Court of Appeal found the termination unfair as it failed to comply with the said section. However, in the instant case, the appellant terminated the respondent's employment by invoking the contract clause on termination, though both the trial court and the Court of Appeal also found the termination to be unfair.

36. We have also read the appellate court's decision in the *CMC Aviation* case and its decision in this appeal and we have indeed noted no inconsistency but a mere variation of no stance at all in its determination on the issue of damages. In the *CMC Aviation* case, having found the respondent's termination unfair, the Court of Appeal found to the effect that the respondent was only entitled to an award of one month's salary, the equivalent of the notice period as per the employment contract, as compensation. However, in the instant case, the same court differently constituted. found that the trial judge's award of 12 months gross salary as damages for unfair termination was a proper exercise of Judicial discretion. The court also found that the ex gratia payment by the appellant was based on an established practice of the appellant company for which the respondent was entitled to, though not provided for in the Act. Consequently, the ex gratia payment of Kes 3,258,245 was held to be independent from the award of Kes 8, 11,344.00 under section 49.

37. We have also taken note that the ex gratia payment was never an issue in the *CMC Aviation* case although the question on how binding company policies are in employment matters came up when the learned judges found in the *CMC Aviation* case, that the respondent's demotion was done according to the appellant's Staff Policies and Procedures Manual and Performance Evaluation Policy which the respondent was aware of. In the instant case, the Court of Appeal found that the payment of Kes 3,258,245.00, was not ex gratia as alleged by the appellant but a payment made based on an established practice of the appellant company. We therefore do not find any inconsistency in the Court of Appeal's determination on the extent to which company policies or put differently, company practices are binding. We indeed note that the Court of Appeal was consistent in its determination in both cases and therefore do not find any basis to make any further pronouncement on the issue.

38. What then should be the correct award on damages be based on? Having keenly perused the provisions of section 49 of the *Employment Act*, we have no doubt that once a trial court finds that a termination of employment as wrongful or unfair, it is only left with one question to determine, namely, what is the appropriate remedy? The Act does provide for a number of remedies for unlawful or wrongful termination under section 49 and it is up to the judge to exercise his discretion to determine whether to allow any or all of the remedies provided thereunder. To us, it does not matter how the termination was done, provided the same was challenged in a court of law, and where a court found the same to be unfair or wrongful, section 49 applies.

39. This court has in its previous decisions cautioned itself against interfering with the superior court's exercise of jurisdiction in a number of its decisions. For instance, in the case of *Daniel Kimani Njihia v Francis Mwangi Kimani & another*, SC Application No 3 of 2014; [2015] eKLR, we acknowledged the nature of the discretionary powers of the Court of Appeal and pronounced ourselves as follows [paragraph 21]:

> "Not all decisions of the Court of Appeal are ject to appeal before this court. One category of decisions we perceive as falling outside the set of questions appealable to this court, is the discretionary pronouncements appurtenant to the appellate court's mandate. Such discretionary decisions which originate directly from the appellate court, are by no means the occasion to turn this court into a first appellate court, as that would stand in conflict with the terms of the *Constitution*." [Emphasis added.]

40. Similar decisions on the above point include *Teachers Service Commission v Kenya National Union of Teachers & 3 others*, SC Application No 16 of 2015 and *Musa Cherutich Sirma v Independent Electoral and Boundaries Commission & 2 others*; Petition 13 of 2018, [2019] eKLR. which decision we reiterate.

We certified this appeal as one involving a matter of general public importance, cognizant of the fact that similar disputes were likely to occur in other parts of the Country. Due to its importance, we can only interfere with the appellate court's exercise of jurisdiction in as far as the interference will give a clarity on the award of damages in employment claims.

41. Guided by the above analysis, we find that once a court has reached a finding that an employer has unlawfully terminated an employee's employment, the appropriate remedy is the one provided under section 49 of the *Employment Act*. We also need to clarify that a payment of an award in section 491(a) is different from an award under section 49(1)(b) and (c). Section 49 allows an award to include any or all of the listed remedies provided that a court in making the award, exercises its discretion judiciously and is guided by section 494(m).

42. What of the question of *ex gratia* payment *vis- a- vis* company policy? As indicated elsewhere in this judgment, the question of ex gratia payment was never a stantive issue in the *CMC Aviation case*. In the instant case, we note that the Court of Appeal upheld the payment amounting in total to Kes 4,669,677 to have been based on an established practice of the appellant company and was therefore not ex gratia. To that figure, Kes 676,362 and 137,866 constituting one-month salary in lieu of notice and leave pay, respectively, were added. Further, the court found that from the total of Kes 5,483,905 statutory deductions and the cost of the motor vehicle were tracted, leaving Khs 3,258,245. The Court of Appeal thus found the amount to be independent of the award of Ksh 8,116,344 under section 49 save that the same was ject to statutory deductions. We have perused the record and found that the Court of Appeal's finding on whether or not the amount of Kes 3, 258, 245 formed ex gratia payment or any other payment to be jected under -section 494.m. of the Act was a pure exercise of discretion. The appellant has not demonstrated how this exercise of discretion was an inconsistence in the two decisions, and how it was abused by the learned judges to enable us pronounce ourselves on the same in the interest of the general public. Consequently, we do not find any reason to interfere with the Court of Appeal's finding on this issue.

43. For the above reasons, the Appeal therefore fails and is dismissed. Costs follow the event and so the appellant shall bear the costs of the Appeal.

**E. Orders**

44. Consequent upon our findings above, the final orders are that:

1. The Petition of Appeal dated October 4, 2018 be and is hereby dismissed.
2. The appellant shall bear the costs of the Appeal.

45. Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JULY, 2019.**

**.....**

**P.M. MWILU**

**DEPUTY CHIEF JUSTICE & VICE PRESIDENT JUSTICE OF THE SUPREME COURT**

**.....**

**M. K. IBRAHIM**

**JUSTICE OF THE SUPREME COURT**

**.....**

**S. C. WANJALA**

**JUSTICE OF THE SUPREME COURT**

**.....**

**NJOKI NDUNGU**

**JUSTICE OF THE SUPREME COURT**

**.....**

**I. LENAOLA**

**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

**REGISTRAR**

**SUPREME COURT OF KENYA**