



SUPREME COURT OF KENYA
KENYA PORTS AUTHORITY VERSUS JOSEPH MAKAU MUNYAO & 4 OTHERS

S.C. PET. NO E008 OF 2023
DATE OF JUDGMENT: 28TH DECEMBER 2023
MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.

Order: The Petition of Appeal dated 27th March 2023 and lodged on 31st March 2023 succeeds only to the extent that the Court of Appeal erred in its reliance of Section 49 of the Employment Act. The Cross appeal is dismissed with each party bearing its own costs.

BACKGROUND

- [1] The genesis of the dispute between the parties was that the respondents were alleged to have been in a go-slow between 29th March 2011 to 31st March 2011. Both the Employment and Labour Relations Court and the Court of Appeal found that there was no indication that the 1st and 5th Respondent participated in the go-slow. The courts equally found that due procedure was not adhered to and that the disciplinary measures taken by the appellant were not anchored in law nor in the disciplinary handbook. The Employment court issued a sum of Kshs. 800,000/= on account of general damages for unfair labour practices. The Court of Appeal on the other hand relied on the provision of Section 49 of the Employment Act and reversed the award of general damages to 4 months gross salary in favour of the 1st and 5th Respondent and 1 month's gross salary in favour of the 2nd, 3rd & 4th Respondent.
- [2] The appellant contended that the Court of Appeal was wrong in their reliance on the provisions of Section 49 of the Employment while clearly in this case the respondents were not dismissed from their employment.
- [3] In certifying the matter as one involving a matter of general public importance the Court of appeal urged the Supreme Court to determine the parameters of Section 49 of the Employment Act and in particular the question of the nature and categories of wrongful dismissal and unfair termination the section applies to.

The Court delineated the following issues for determination:

- i. *The nature and categories of wrongful dismissal and unfair termination that section 49 of the Employment Act applies to and in particular; whether Section 49 applies where an employee has not been dismissed or the contract of employment terminated.*
- ii. *Whether the respondents' cross appeal is valid; and*
- iii. *Who should bear the costs of the suit?*

Issue 1: The Court found that from the wording of Section 49 as read with Section 50 the same applies only in instances of wrongful dismissal and unfair termination and does not apply in an instance where

an employee has not been dismissed or the contract of employment terminated. In such instance's courts ought to be guided by the provisions of Section 12 of the Employment and Labour Relations Act which grant the Employment and Labour Relations Court power to issue reliefs as contemplated under the Act or any other written law.

Despite the Court of Appeal's reliance on the provisions of Section 49; the Court reassessed the award of damages for unfair labour practice and came to the same conclusion that the claim was merited and the award was fair and reasonable. The Court did not therefore disturb the award issued by the Court of Appeal.

Issue 2: The Court found that the cross-appeal urged the Court to re-assess factual dispositions and make a finding that the respondents are entitled to special damages; the grounds clearly do not relate to the issue for consideration before it, being the parameters of the application of Section 49 of the Employment Act. The grounds of the cross-appeal do not raise any constitutional questions for determination or interpretation of the Constitution. The Cross- appeal is hereby dismissed.

Issue 3: Each party to bear their own costs.

[4] Consequent upon our conclusion above, we finally order that;

- a) *The Petition of Appeal dated 27th March 2023 and lodged on 31st March 2023 succeeds only to the extent that the Court of Appeal erred in its reliance of Section 49 of the Employment Act.*
- b) *The Cross appeal is hereby dismissed.*
- c) *Each party to bear the costs of the Appeal.*

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