REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram; Ibrahim, Wanjala, Njoki, Lenaola & Ouko SCJJ)

PETITION NO. E008 of 2023

BETWEEN

KENYA PORTS AUTHORITY .....APPELLANT

AND

JOSEPH MAKAU MUNYAO .....1ST RESPONDENT

ELIAS NJOKA .....2ND RESPONDENT

STEPHEN BAYA MWANYULE .....3RD RESPONDENT

MWINYI SULEIMAN SIBABU .....4TH RESPONDENT

BWANA MOHAMMED BWANA.....5TH RESPONDENT

(Being an appeal from the Judgment and Orders of the Court of Appeal at Mombasa (Visram, Karanja, Koome (as she then was), JJ. A delivered in Civil Appeal No. 134 of 2018 on 11th July 2019)

Representation

Mr. Paul Gichuhi
Mr. Vincent Wesonga — for the Appellant
(Kaplan & Stratton Advocates)

Mr. Yusuf Aboubakar .....for the Respondents
(Aboubakar, Mwankitima & Co. Advocates)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] The petition of appeal dated 27th March 2023 and lodged on 31st March 2023 was filed pursuant to certification by the Court of Appeal (*Nyamweya, Lesitt & Odunga JJ.A*) in its Ruling dated 3rd March 2023 as one involving a matter of general public importance under Article 163 (4) (b) of the Constitution. The appellant is challenging the entire judgement and orders of the Court of Appeal (*Visram, Karanja & Koome (as she then was) JJ.A*) in Civil Appeal No. 134 of 2018 delivered on 11th July 2019.

[2] The petition raises the following substantive issue; 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.

B. BACKGROUND

[3] The Appellant is a State Corporation established under statute, Kenya Ports Authority Act, Cap 391 and mandated to *inter alia* manage and operate the Port of Mombasa and all scheduled seaports along Kenya's coastline. The Respondents were at the material time gantry operators employed by the appellant and were part of a larger group of approximately 94 gantry operators who had worked for the appellant for a period of between 14 and 30 years. For context, gantry is a large crane used to load and offload containerized cargo from ships.

[4] Prior to March, 2011, the gantry operators had demanded an increase in remuneration and a committee was formed comprising gantry operators' representatives and management to embark on a fact-finding mission by touring the various ports around the world to consider and make recommendations on the terms and conditions of the gantry operators. After its fact-finding mission, the committee proposed an increment of the gantry operators' dues by Ksh. 21,000/- which the gantry operators considered insufficient.

[5] According to the appellant, the respondents were part of a team of approximately 94 gantry operators who, on 29th and 30th March, 2011, commenced a go-slow following their unsuccessful demands. The appellant alleged that in its daily report of moves each gantry crane made for the two days reflected a huge variation from other days; that as a result of the go slow, it failed to meet its delivery targets resulting in a crisis at the port which involved backlog and delays. The gantry operators were issued with warning letters and immediately thereafter interdicted. The interdiction letters relayed the appellant's decision to suspend the operators pending investigations and also called on the gantry operators to show cause why they should not be dismissed on account of their conduct.

[6] Thereafter, the appellant carried out investigations to determine the gantry operators who were involved in the go slow and their level of involvement. Those found to have participated in the go slow either by actual participation or incitement were invited to attend a personal hearing on 8th July, 2011. Following the hearings, the interdictions of 48 employees including the respondents were lifted. They were however issued with a warning for participating in the go slow; surcharged an amount equivalent to between two and half to three months basic salary; and further placed on a 24-month (2 year) probation.

C. LITIGATION HISTORY

i. Before the High Court & Employment and Labour Relations Court.

[7] On 22nd June, 2012, the respondents filed a Constitutional Petition in the High Court at Mombasa, thereafter referred to as ***Petition No. 11 of 2015 Joseph Makau Munyao & 4 Others v. Kenya Ports Authority & the Managing Director Kenya Airports Authority*** alleging contravention of various constitutional rights. The petition was subsequently referred to the Employment and Labour Relations Court on 11th March 2014. The petition was converted into a claim which was re-amended on 22nd April, 2014. The respondents sought an array of orders which included special damages in terms

of refund of the amounts surcharged, allowances and salary increments they deemed were due to them; general damages; declaration that the warning and interdictions of the respondents were illegal and unwarranted; declaration that their constitutional rights had been violated; and reinstatement of their designation as gantry operators with all the allowances attendant to that position.

[8] The trial court in its determination found that in as much as there was evidence that a go slow took place on the material days the 1st and 5th respondents who were on standby and dormant shift could not have taken part in the said strike. The learned Judge (*Radido J.*) went on to declare the warnings issued to the respondents as unfair for the reason that they were not issued in conformity with the appellant's disciplinary procedure. Finally, he held that the conditions attached to the lifting of the respondents' interdictions amounted to unfair labour practice. Accordingly, the learned Judge issued orders in the following terms:

> *"150. Arising from the above the Court orders that*
>
> *a. 1st and 2nd Claimants be restored to their positions/ responsibilities as gantry operators with immediate effect.*
>
> *b. Each Claimant to be paid Kshs 800,000/- as general damages for unfair labour practice(s).*
>
> *c. Claimants surcharged should be refunded the amounts surcharged (Kshs 245,580/- each) forthwith.*
>
> *151. The Claimants to have costs of the Cause."*

ii. At the Court of Appeal

[9] Aggrieved, the appellant preferred an appeal dated 25th September, 2018; the respondents filed a cross appeal. The Court of Appeal noted that the appeal was centered around four grounds to the effect that the learned Judge erred by:

i. Directing the reinstatement of the 1st and 5th respondents to their positions as gantry operators despite the lapse of the statutory 3 years limitation period for issuing an order of reinstatement.

ii. *Assessing and awarding Kshs.800,000 to each respondent as general damages.*

iii. *Directing the refund of Kshs.245,580 to each of the respondents being the amount surcharged without any basis.*

iv. *Failing to exercise his discretion properly with respect to costs of the suit.*

[10] On the other hand, the cross appeal was premised on the grounds that the learned Judge erred to the extent of:

i. *Declining to award special damages to the respondents.*

ii. *Failing to expressly declare that the warnings issued to the respondents were unlawful.*

iii. *Failing to find that the interdiction of the respondents was unwarranted and/or illegal.*

[11] The superior court noted that at the heart of the appeal was the determination of who between the parties, if any, met their respective burden of proof as espoused under Section 47(5) of the Employment Act; did the respondents demonstrate that the disciplinary process and sanctions issued thereunder were unfair or did the appellant justify the reason(s) for the disciplinary sanctions in issue?

[12] The court held that that the redeployment of the 1st and 5th respondents in the face of evidence of the appellant having undergone restructuring was not practical. On the reinstatement of the 2nd to 4th respondents, the court noted that it was not a ground of appeal in both the appellant's appeal and the respondent's cross Appeal. The Court further found that the award of Ksh.800,000/- as damages for unfair labour practices was not in conformity with the principles for awarding damages as the trial Judge did not explain how he arrived at the said figure and therefore elected to interfere with it. The Court of Appeal reversed the decision but issued an award of four (4) months gross salary in favour of the 1st and 5th respondents, and one (1) month's gross salary

for the 2nd to the 4th respondents. On the validity of the surcharged amount, the court found that there was no basis for it because though the appellant's claim was based on alleged financial loss as a result of the go slow, there was no evidence concerning the said loss. Further, the act of surcharging the respondents was against the appellant's internal disciplinary procedures and they could not fault the trial judge for awarding a refund of the surcharged amount.

[13] As for the other special damages sought by the respondents' including bonuses and salaries, the court found the trial judge was right in declining to grant it. The allowances were only payable to gantry operators when on duty; the respondents since interdiction had not worked as gantry operators therefore there was no basis for awarding the same.

[14] The Court of Appeal ultimately set aside the order directing the reinstatement of the 1st and 5th respondents to their previous positions as gantry operators; the award of damages for unfair labour practice of Kshs.800,000 to each respondent and substituted the same with an award equivalent to 4 months gross salary in favour of the 1st and 5th respondents and I month gross salary for the 2nd, 3rd and 4th respondents; and the order of costs, substituting the same with an order that each party should bear its own costs at the ELRC.

i. At the Supreme Court

[15] The appellant has now moved this Court citing six (6) grounds of appeal claiming that the learned Judges of Appeal;

a. *Erred in law in failing to appreciate and find that Section 49 of the Employment Act applies to remedies for wrongful dismissal and unfair termination of employment whereas, the Respondents employment contracts were not terminated by the Appellant.*
b. *Erred in law in finding that the 2nd, 3rd and 4th Respondents had engaged in a go slow and then failing to consider the illegality*

thereof and/or breach by the Respondents of the terms and conditions of employment and the law in that regard.

c. *Erred in law in failing to take into account the mutuality of both parties' obligations to each other and their conduct in the circumstances in making an award of damages in favour of the Respondents.*

d. *Erred in law for failing to consider or take account of the crisis and potential damage to an employer's business arising from an employee's wilful engagement in an unlawful industrial action warranted a reasonable reaction by the employer to protect its assets and its business.*

e. *The Honourable Judges of the Court of Appeal failed to apply a reasonable and/or fair standard in considering the Applicant's reaction to the go slow in the circumstances by holding it in breach of its Disciplinary Handbook in circumstances not contemplated therein.*

f. *The Honourable Judges of the Court of Appeal erred in law in finding that anything that may alter or affect an employee's rights under the employment contract should be set out in the contract by failing to take into account that the go slow amounted to an extenuating illegality not reasonably foreseeable to have been included in the Applicant's Disciplinary Handbook.*

[16] Consequently, the appellant seeks the following reliefs;

(a) *A finding that Section 49 of the Employment Act does not provide for damages or any relief where the employee has not been dismissed or the contract of employment has not been terminated.*

(b) *Part of the Judgment of the Court of Appeal substituting the award of damages for unlawful labour practices of Kshs.800,000/- to each Respondent with an award equivalent to 4 months gross salary in favour of the 1st to 5th Respondents and 1 month gross salary for the 2nd, 3rd and 4th Respondents be set aside.*

(c) *The costs of this Appeal be paid by the Respondents.*

[17] The respondents filed a Response in opposition to the Petition of Appeal dated 15th May, 2023. The Respondents have also filed a Notice of Cross of Appeal pursuant to Rule 47 of the Supreme Court Rules, 2020 dated 11th April, 2023 contending that the decision of the Court of Appeal ought to be varied or reversed to the extent or in the manner and on the following grounds:

1. *The Court of Appeal erred in finding that 'it was not unreasonable for the 1st Appellant to believe that the 2nd, 3rd and 4th Respondents took part in the go slow when the same Court had found the following:*
    a. *The 1st Appellant's disciplinary process it had invoked lacked procedural and substantive fairness*
    b. *There was no evidence with regard to the extent of the alleged loss as neither Reginald nor Irene could quantify or tender evidence of the loss alleged to have occurred.*
2. *Consequent to the aforestated, the Court of Appeal erred in awarding the 2nd, 3rd and 4th Respondents only one-month gross salary as damages instead of four (4) months gross salaries as was the case to the 1st and 5th Respondents*
3. *The Court of Appeal erred in failing to find that, if it was not for the unfair interdiction, the Respondents would have continued working as gantry operators and would have earned the allowances and therefore bearing in mind the award of damages is intended at compensating the Respondents for the economic injuries suffered by them, they were entitled to be awarded the special damages they claimed from the 1st Appellant.*
4. *The Court of Appeal erred in finding that the Respondents did not prove the special damages when there was clear and uncontradicted evidence of the same.*

5. *The Court of Appeal erred in failing to appreciate that the Respondents proved their claim for unfair interdiction and were thus entitled to the costs of the trial Court.*

[18] Consequently, the Respondents pray for the following orders:

a) *The Court to set aside the Court of Appeal order awarding the 2nd, 3rd and 4th Respondents one-month gross-salary as damages and substituted the same with an order awarding their four (4) months gross salary as damages as was the case with the 1st and 5th Respondents*

b) *The Honourable Court do set aside the Court of Appeal Order that each party should bear its own costs at the ELRC and substitute the order awarding costs to the Respondents as awarding costs to the Respondents as awarded by the trial Court.*

c) *The Respondents be awarded costs of the appeal and the cross appeal.*

[19] In opposing the cross appeal, the appellant filed a Preliminary Objection dated 16th May, 2023 contending that the cross appeal does not fall under Article 163(4)(a) of the Constitution; the cross appeal had not been certified by either the Court of Appeal or the Supreme Court pursuant to Article 163(4)(b) of the Constitution and Section 15B of the Supreme Court; and Rule 47 of the Supreme Court rules does not confer jurisdiction on the Supreme Court as a second appellate court as this would be inconsistent with Articles 163(4)(a) and (b) of the Constitution and Sections 15A and 15B of the Supreme Court Act.

A. PARTIES' SUBMISSIONS

(a) The Appellant's case

[20] The Appellant relied on its Preliminary Objection as aforestated together with three sets of written submissions; in support of its Preliminary Objection dated 2nd June, 2023; in support of their Appeal dated 8th May, 2023; and in response to the Cross-Appeal dated 20th June 2023.

[21] *In support of its preliminary objection*, the appellant urged that the cross appeal does not satisfy either limb of Article 163(4) of the Constitution. Relying on the decisions in ***Gladys Wanjiru Munyi Vs. Diana Wanjiru Munyi*** SC Petition 31 of 2014 (2015) eKLR, ***Erad Suppliers and General Contractors Limited Vs. National Cereals & Produce Board*** SC Pet No. 5 of 2012 (2012) eKLR, it submitted that a cursory glance at the grounds of the cross-appeal yields the conclusion that the same does not raise any constitutional questions for determination or interpretation of the Constitution therefore the cross appeal does not lie as of right. Relying further on ***Suleiman Mwamlole Warrakah & 2 Others Vs. Mwamlole Tchappy Mbwana & 4 Others*** SC Pet 12 of 2018 (2018) eKLR, the appellant pointed out that the only alternative available to the respondents was for the cross appeal to fall within the ambit of Article 163(4) (b) of the Constitution but the respondents have failed to seek certification from either the Court of Appeal or the Supreme Court.

[22] To further assail the cross appeal, the appellant submitted that Rule 47 of the Supreme Court Rules does not aid the respondents' cross appeal. It was argued that the rule only sets out the contents of a notice of appeal but does not in any way supplant the provisions of Article 163(4) (a) and (b) of the Constitution; that any other interpretation of Rule 47 to infer that it confers jurisdiction to the Court to entertain an appeal, would be inconsistent and in conflict with Articles 163(4)(a) and (b) of the Constitution and Sections 15A and 15B of the Supreme Court Act. In this regard the appellant cited the case of ***Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)*** SC Petition No. 3 of 2019 [2019] eKLR

[23] *To support its appeal,* the appellant submitted that Section 49 of the Employment Act sets out the remedies for wrongful dismissal and termination, yet it is common ground that the respondents' contracts were not terminated; that the Court of Appeal erred in construing Section 49 of the Employment Act as applicable in the computation and award of damages to the respondents whose contracts were not terminated. Citing ***Republic Vs. Kenya School of Law & Another Ex Parte Kithinji Maseka Semo & Another (2019) e KLR*** and ***Sagoo Vs. Dourado [1983] KLR 365*** the appellant urged that the statute must be read as it stands and the courts may not write words into it or deduct words from it. It is contended that the language of Section 49 is that it applies only to cases of dismissal or termination of employment and therefore did not apply to the undisputed facts before the trial court.

[24] The appellant further contended that the Court of Appeal proceeded in error to award damages to the respondents despite determining that they were on a go slow and hence confirming that the respondents breached their terms and conditions of employment; that, both parties were in breach of their contractual obligations, in which case the respondents should not have been awarded damages under Section 49 of the Employment Act.

[25] *In response to the cross -appeal,* the appellant contended that the respondents have not in any way demonstrated any basis for the Court to disturb the findings of the Court of Appeal as it is trite law that special damages must be specifically pleaded and proved. Further, that it is not enough for the respondents to allege that they were entitled to the payment of special damages for a period they did not serve as gantry operators.

[26] On costs, the appellant submitted that the Court of Appeal explained the basis for its order on costs, in particular that each party having been partially successful, the appropriate order was for each party to bear its costs. Therefore, the respondents' claim for costs before the Court of Appeal is unsustainable.

(b) The 1st to 5th Respondents' Case

[27] The respondents rely on its response to the appellant's petition of appeal together with three sets of submissions; in response to the Preliminary Objection dated 14th August, 2023; in response to the appellant's Appeal dated 27th July, 2023; and in support of its Cross Appeal dated 3rd July, 2023.

[28] *In response to the Preliminary Objection* they contended that once an appeal is properly before the Supreme Court, under Section 21(1) of the Supreme Court Act, the Court has the power to make any order and grant any reliefs that could have been granted by the court or tribunal from which the appeal emanates. They urged that the reliefs sought in the cross appeal could have been granted by the Court of Appeal hence the Court has the jurisdiction to hear and determine the cross appeal pursuant to Section 3A of the Supreme Court Act, 2011.

[29] They pointed out that the legal effect of Rule 47 of the Supreme Court Rule 2020 is that the right to cross appeal is not limited to any category of appeal but rather is available to a respondent in an appeal initiated under Articles 163(3)(a), (4)(a) and (b) of the Constitution and Section 15, 15A, 15B and 15C of the Supreme Court Act, 2011. Further that a respondent is at liberty to challenge any part of the judgment provided they specify the grounds of contention and such respondent is also free to seek for any relief different in nature from that of the appellant.

[30] They urged that their arguments fall under Article 48 of the Constitution whose primary objective is the dispensation of justice. They add that the Supreme Court being the final call for judicial intervention in dispensing justice is given latitude to consider every aspect of a grievance that might have caused injustice. Due to the foregoing submissions, they implored the Court to find that the preliminary objection lacks merit and should be dismissed with costs.

[31] *In opposition to the Petition of Appeal*, the respondents submitted that the issue as certified by the Court of Appeal is whether the respondents are entitled to an award of damages under Section 49 of the Employment Act. They

submitted that their relationship with the appellant is contractual therefore the provisions of Section 12(1)(a) of the Employment Act are applicable to the terms of the contract; that the ELRC having found that the disciplinary process was unfair and this finding having been upheld by the Court of Appeal, then there was a clear case of a breach of contract of employment. They urged that the Court of Appeal reached the said finding after a lengthy analysis of the evidence on record and after taking note of fundamental facts established by the said evidence. They also argued that the Court of Appeal noted that the disciplinary proceedings were not produced as evidence as they would have shed more light on whether the respondents participated in the go slow or not. Further, the letters lifting the respondents' interdictions also failed to indicate the disciplinary committee's findings on that aspect. Relying on ***Halsbury's Law of England*, 3rd Edition, Volume 25 par. 990,** they submit that law requires that a party who has suffered a breach of contract is entitled to damages. They argue that they are therefore by law entitled to damages.

[32] They further conceded that there is no express provision in the Employment Act that provides for award of damages to an employee for breach of contract that does not lead to termination of the contract. They pointed out that the Court of Appeal relied on the provisions of Sections 43, 47 and 45 of the Employment Act in its analysis of the burden of proof. Section 49 of the Employment Act provides for cases of wrongful dismissal and unfair termination and the case before the court was neither of the two. It is their contention that recourse is therefore taken from the law of contract which supplements the Employment Act.

[33] It was therefore their case that they are entitled to general and special damages that the ELRC and the Court of Appeal declined to grant. Further, it was submitted that how these are calculated is left to the discretion of the Judge who may elect to award damages that could be measured against the circumstances of the case; that this is what *Radido J.* contemplated in awarding

the respondents Ksh. 800,000/= each, without reference to Section 49 of the Employment Act.

[34] They submitted further that *Radido J.* considered the interdiction without adherence to the disciplinary procedure, the redeployment of the respondents were trained as gantry operators to areas that were not related to gantry operations; their reduction in salaries due to denial of the fixed allowances only payable to gantry operators; the fact that despite notice being given, the appellant refused to produce the findings of the disciplinary process rendering the allegation of a go slow unproved.

[35] They urged that the Court of Appeal was wrong in interfering with the ELRC Award as they did not give justifiable reasons to interfere with the judge's exercise of discretion. They however urge that the Court of Appeal was right in awarding them damages.

[36] *In support of their Cross Appeal,* the respondents submitted that the Court of Appeal erred in differentiating the claim of the 2nd to 4th respondent with that of the 1st and 5threspondents despite the court establishing that the disciplinary process by the appellant lacked procedural and substantive fairness, and that the proceedings related to the disciplinary hearing were not produced.

[37] On their *claim for bonuses, allowances and salaries* that they should have earned had they not been interdicted and redeployed to other duties other than gantry operators, they contended that if employment remedies must be proportionate to the economic injuries suffered by the employee, then the Court of Appeal was wrong when it rejected their claim for bonuses, allowances and salaries that they should have earned. They submitted that the general principles as to the measure of damages or the standard or method by which the amount of damages is to be assessed is laid out in *Halsbury's Law of England*, and supports the award of all the special damages as pleaded by the respondents. Using the example of *restitution in integrum,* whereby the

wronged person must be put in the same position had he not sustained the wrong, they urge that they would have continued to earn the bonuses, allowances and salaries they had been earning before being wrongly interdicted. They urged that they are entitled to special damages and the ELRC, and the court of appeal were both wrong for denying them the same.

[38] They contended that they pleaded and proved the special damages by adducing their pay slips as evidence to demonstrate that they used to earn these allowances and that they were subsequently removed by the appellant.

[39] On costs, they submitted that they were entitled to costs as correctly awarded by the ELRC, which award was in line with this Court's decision in ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*** SC Petition No 4 of 2012; [2014] eKLR. They pointed out that despite their success, the Court of Appeal erroneously set aside the order of costs and substituted it with an order that each party bear its own costs at the ELRC. They note that the basis for this substitution was due to the Court of Appeal alluding to both parties having been partially successful in their respective cases. The respondents urged that the issue at the Court of Appeal was the amount of damages which it only reduced and this did not justify setting aside the award of costs; the Court of Appeal failed to demonstrate that the ELRC decision on costs was based on a whim, was capricious or was plainly wrong.

[40] Finally, it was urged that the respondents are also entitled to costs at the Court of Appeal having successfully defended the decision that their interdiction was unfair and having justified that they were entitled to costs despite the fact that the damages were reduced by the Court of Appeal.

D. ISSUES FOR DETERMINATION

[41] In the Court of Appeal 's Ruling delivered on 3rd March, 2023 the Court certified the matter as concerning issues of general public importance. In doing so the Court of Appeal did not delineate questions for the determination of the

Court but rather noted as follows regarding the issues for determination by the Supreme Court:

> *"12. Section 49 of the Employment Act provides for remedies for wrongful dismissal and unfair termination which includes compensation pegged on the wages or salary of an employee, reinstatement of an employee, reengagement of an employee in comparable or suitable work and wages.* ***In light of the observation made by this Court on the parameters of operation of section 49 of the Employment Act, we are of the view that this is a point of law of general importance which needs to be settled by the Supreme Court in light of reliance on the said section in employment disputes. In particular, the question of the nature and categories of wrongful dismissal and unfair termination that the section applies to needs to be settled****. We accordingly find that the threshold set in* ***Hermanus Philipus Steyn v Giovanni Gnecchi Ruscone(supra)*** *has been met, as the question of law raised by the Appellant is one of general public importance that transcends the dispute between the parties in this particular case."*

[42] A preliminary objection has also been raised as to the competence of the Respondents cross-appeal. We therefore find that the following issues emerge for the Court to determine;

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?*

E. ANALYSIS AND 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.

[43] While analyzing how to determine the intention of a statute, the Court of Appeal in ***County Government of Nyeri & Anor. Vs. Cecilia Wangechi Ndungu*** [2015] eKLR held that:

> "*Interpretation of any document ultimately involves identifying the intention of Parliament, the drafter, or the parties. That intention must be determined by reference to the precise words used, their particular documentary and factual context, and, where identifiable, their aim and purpose. To that extent, almost every issue of interpretation is unique in terms of the nature of the various factors involved. However, that does not mean that the court has a completely free hand when it comes to interpreting documents; that would be inconsistent with the rule of law, and with the need for as much certainty and predictability as can be attained, bearing in mind that each case must be resolved by reference to its particular factors.*"

[44] In ***Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others,*** SC. Pet. No. 26 of 2014 [2014] eKLR, this Court opined that a purposive interpretation should be given to statutes so as to reveal the intention of the statute. The court observed as follows:

> *"In Pepper vs. Hart [1992] 3 WLR, Lord Griffiths observed that the "purposive approach to legislative interpretation" has evolved to resolve ambiguities in meaning. In this regard, where the literal words used in a statute create an ambiguity, the Court is not to be held captive to such phraseology. Where the Court is not sure of what the legislature meant, it is free to look beyond the words themselves, and consider the historical context underpinning the legislation. The learned Judge thus pronounced himself:*

"The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."

[45] Section 49 of the Employment Act provides for remedies for wrongful dismissal and unfair termination when it provides as follows;

(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; 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 employees 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

[46] With regard to awards under Section 49, the legislature found it necessary to catalogue the factors to be considered in making an award as follows;

(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 any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee.

(m) any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee.

[47] Section 50 of the Employment Act also provides that in determining a complaint or suit under the Act involving wrongful dismissal or unfair termination of the employment of an employee, the Industrial Court shall be guided by the provisions of section 49.

[48] Part VI of the Employment Act makes a distinction between wrongful dismissal and unfair termination. A termination of employment by an employer is unfair in terms of section 45, if the employer fails to prove;

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

[49] Section 46 of the Employment Act provides occurrences that do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty. Specifically, it will be unfair if it relates to; (i) a female employee's pregnancy, (ii) the going on leave of an employee, (iii) an employee's membership of a trade union, (iii) the participation of an employee in the activities of a trade union, (iv) the employee's seeking office in a trade union, or his refusal to join or withdraw from a trade union, (v) an employee's race, colour, tribe, sex, religion, political opinion or affiliation, national extraction, nationality, social origin, marital status, HIV status or disability, (vi) an employee's initiation of a complaint or legal proceedings against the employer unless done irresponsibly, or (vii) an employee's participation in a lawful strike.

[50] Wrongful dismissal therefore occurs when the employee is dismissed without notice or with inadequate notice. The rationale of giving notice is to offer the affected parties' time, either to search for alternative employment or for the replacement of an employee, respectively. The parties, when entering into the contract of employment, may have agreed on the requirement of notice of termination of the contract.

[51] In ***Ken freight (E.A) Limited v Benson K. Nguti*** SC Pet. No. 37 of 2018 [2019] eKLR this Court explained the applicability of the provisions of Section 49 as hereunder;

".....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…."

[52] The Constitution of Kenya equally provides for Labour Relations under Article 41;

41. *Labour relations*

(1) Every person has the right to fair labour practices.

(2) Every worker has the right—

(a) to fair remuneration;

(b) to reasonable working conditions;

(c) to form, join or participate in the activities and programmes of a trade union; and

(d) to go on strike.

(3) Every employer has the right—

(a) to form and join an employers organisation; and

(b) to participate in the activities and programmes of an employers organisation.

(4) Every trade union and every employers' organisation has the right—

(a) to determine its own administration, programmes and activities;

(b) to organise; and

(c) to form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining.

[53] Black's Law Dictionary 9th Edition defines unfair labour practice as follows;

> *"Any Conduct prohibited by state or federal law governing the relations among employers, employees, and labour organisations. Examples of unfair labour practices by an employer include (1) interfering with protected employee rights, such as the right to self-organization, (2) discriminating against employees for union related activities, (3) retaliating against employees who have invoked their rights, and (4) refusing to engage in collective bargaining. Examples of unfair labour practices by a labour organization include causing an employer to discriminate against an employee, engaging in an illegal strike or boycott, causing an employer to pay for work not to be performed (i.e. featherbedding), and refusing to engage in collective bargaining…."*

[54] In ***Peter Wambugu Kariuki & 16 Others –Versus- Kenya Agricultural Research Institute*** [2013] eKLR the court explained the concept of unfair labour practice and its application under Article 41 thus;

> *"What is this right to fair labour practices? First, it is the opinion of the court that the bundle of elements of "fair labour practices" is elaborated in Article 41(2), (3), (4) and (5) of the Constitution……..These constitutional provisions constitute the foundational contents of the right to fair labour practices……..*
>
> *Secondly, it is the opinion of the court that the right to "fair labour practices" encompasses the constitutional and statutory provisions and the established work place conventions or usages that give effect to the elaborations set out in Article 41 or promote and protect fairness at work. These include provisions for basic fair treatment of employees, procedures for collective representation at work, and of late, policies that enhance family*

life while making it easier for men, women and persons with disabilities to go to work."

[55] From the above definition unfair labour practice encompasses all conduct prior to, in the course of employment, during and after termination of employment. The provisions of Article 41 therefore encompass the full spectrum of labour practices. The provisions of Article 41 are borne from the realization that employment and/or right to work is a human right. The right is also linked to other rights in the bill of rights more so the protection of life and the dignity of a person. The right is therefore a principle with legal obligations.

[56] Whereas the Employment Act is expressive of the rights under Article 41, we find that damages under the head of Article 41, as a constitutional provision, ought to be specifically pleaded and proved. Any other constitutional provisions that would have been infringed can equally be canvassed, alongside, and, under this head. This is different and distinguishable from the provisions under Section 49 as read with Section 50 of the Employment Act which are limited to the provisions under the Employment Act. The wording of the Employment Act under section 49 only relate to an instance where an employee has been terminated. This court determined in ***Ken freight (E.A) Limited v Benson K. Nguti (supra)*** that section 49 of the Employment Act is applicable upon the finding that a person has been unlawfully terminated.

[57] As to the nature and categories of wrongful dismissal and unfair termination that Section 49 of the Employment Act applies to, the provisions of Part V of the Employment Act refer to almost all instances of employment and circumstances that lead to termination of employment. *What about instances that necessarily don't lead to termination of employment?* Some provisions of the Employment Act refer to such circumstance providing penalties and sanctions therein. One such instance is set out in Part VII of the Employment Act; this is a distinct section of the Act that focuses on protection of children. The *Labour Relations Act, 2007* at Part X deals with lock- out and strikes. The

Labour Relations Act also provides for conciliation as a method of dispute resolution. The *Work Injury Benefits Act 2007* provides for compensation to employees for work related injuries and diseases contracted in the course of their employment and for connected purposes with the ELRC in the instance of the Labour Relation Act and the Work Injury Benefits Act acting as an appellate court and an enforcer.

[58] Does it therefore limit a judicial officer from relying on the principles outlined in Section 49 in deciding a matter not set out in the Employment Act and which necessarily don't lead to termination of employment. It all reverts back to the powers granted to the Court under Section 12 of the Employment and Labour Relations Act. Section 12 (3) of the Act grants the ELRC powers to make any of the following orders—

> (i) *interim preservation orders including injunctions in cases of urgency;*
> *(ii)a prohibitory order;*
> *(iii) an order for specific performance;*
> *(iv) a declaratory order;*
> *(v)an award of compensation in any circumstances contemplated under this Act or any written law;*
> *(vi) an award of damages in any circumstances contemplated under this Act or any written law;*
> *(vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or*
> *(viii) any other appropriate relief as the Court may deem fit to grant.*

[59] The wording of Section 12 grants the employment and labour relations court power to issue such orders as contemplated under the Act and any other written law, it also grants the court jurisdiction to issue any appropriate relief

as it may deem fit. 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"*

[60] From the above analysis and the wording of Section 49, it is clear to us that Section 49 applies to only instances as have been set out under the Act; Section 49 only applies where an employee is terminated; in any other instance the court is expected to exercise its discretion as granted by the constitution, the Employment and Labour Relations Act and any other statutory provisions. In exercising such judicial discretion, a judge or magistrate bears the burden of accounting for their decision and in order to discharge this burden, the judge or magistrate ought to explain the basis of their decision.

[61] How then do we relate the above analysis to the appeal before us, the appellant contends 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. The genesis of the dispute between the parties was that the respondents were alledged to have been in a go-slow between 29th March 2011 to 31st March 2011. A go-slow is a form of industrial action in which work or progress is deliberately delayed or slowed down. Both superior courts 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.

[62] Despite the internal dispute mechanisms between the parties, the Human Resource manual at clause 1.6. (v) allowed an employee to invoke the provisions of the Labour Relations Act, 2007. Section 2 of the Labour Relations Act defines a trade dispute to mean a dispute or difference, or an apprehended dispute or difference, between employers and employees, between employers and trade unions, or between an employers' organisation and employees or trade unions, concerning any employment matter, and includes disputes regarding the dismissal, suspension or redundancy of employees, allocation of work or the recognition of a trade union. Section 62 of the Labour Relations Act mandates the reporting of a trade dispute to the minister who thereafter appoints a conciliator. If the parties fail to reach a consensus Section 73 allows an aggrieved party to file a claim at the Employment and Labour Relations Court. Section 76 also allows an aggrieved party to take part in a protected strike after issuing a seven-day notice.

[63] The parties herein only refer to a private conciliation whereby they undertook a case study of other jurisdictions and an increment of wages was made. This, as alleged by the appellant, did not auger well with the respondent and they resolved to participate in a go-slow. From the reading of the Labour Relations Act, the immediate recourse was to report the aforesaid go-slow to the minister who would then have appointed a conciliator. Had the conciliation fell through then the matter would have been referred to the Employment and Labour Relations Court.

[64] Looking at the Disciplinary Handbook the same provides for various forms of punishment listed as follows; (a) verbal caution or warning, (b) suspension from duty for a period not exceeding three (3) days, (c) stoppage of annual increments (d) surcharge (e) termination of contract (f) forfeiture of appointment (g) retirement/termination on public interest (h) dismissal. We

therefore, agree with the superior courts that redeployment was not one of the punishments envisaged in the disciplinary handbook; we also agree that the appellant did not equate the loss incurred, and the surcharge was arbitrary and not in conformity with the disciplinary handbook which provided for a maximum of three-months surcharge.

[65] Were the superior courts then justified to issue general damages in favour of the respondents and if so, what criteria should the courts have adhered to. While the action in the trial court started its life as a constitutional petition the same changed character to an ordinary cause. The trial court did not particularise the various rights allegedly violated but dealt with the same under the respective reliefs sought ultimately awarding general damages of Kshs. 800,000/= in favour of the appellant. The Court of Appeal on the other hand found that the trial judge did not ascertain how he came to the award issued on account of general damages. In reversing the decision, the court relied on the provisions of Section 49 to justify its award.

[66] The petition and amended plaint were clearly anchored on Article 41 of the Constitution; the predominant claim was a claim for unfair labour practice. The respondent urges the court to rely on the claim for breach of contract; however, in the amended plaint the particulars of breach were not set out. The immediate recourse under Article 41 is to rely on Section 12 of the Employment and Labour Relations Act which grants the court power to issue an *award of compensation in any circumstance contemplated under the Act or any other written law*.

[67] As we have found above the activities are linked to an alleged go-slow. We have already set out the procedure that the parties ought to have undertaken before commencing the claim. We have arrived to the same finding that due procedure was not adhered to by the appellant; this justified a claim for unfair labour practice. We note that the appellant suffered loss as a result of the go-

slow, the same was however not quantified. Contributing of the loss was only apportioned to the 2nd, 3rd and 4th Respondent.

[68] It is our view that, where the court finds that the matters complained of was to any extent caused or contributed to by an action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding. Intentional conduct is regarded as a necessary prerequisite for reduction of compensation. Variation of an amount of compensation, therefore largely depends on the extent of contributory circumstances but does not bar recovery. In any industrial action the conduct of an employee in causing such industrial action to take place can be regarded as contributory fault.

[69] We have considered the parameters the Court of Appeal applied in the exercise of its discretion. Despite the Court of Appeal's reliance on the provisions of Section 49, in assessing the damages; their determination was pegged on the contribution of the respondents to the industrial action, the same applied in the Court of Appeal's award on costs, the court reversed the decision upon a finding that both parties partly succeeded in their claims, we therefore find no fault in the award issued and we shall therefore not disturb the same. We arrive at the finding that the appeal therefore succeeds only to the extent that the Court of Appeal erred in its application of Section 49 of the Employment Act.

ii. Whether the respondents' cross appeal is valid.

[70] The grounds raised by the appellant contesting the validity of the cross-appeal are three- fold; the cross appeal does not fall under Article 163(4)(a) of the Constitution; the cross appeal had not been certified by either the Court of Appeal of Supreme Court pursuant to Article 163(4)(b) of the Constitution and Section 15B of the Supreme Court; and, Rule 47 of the Supreme Court rules does not confer jurisdiction on the Supreme Court as a second appellate court as this

would be inconsistent with Articles 163(4)(a) and (b) of the Constitution and Sections 15A and 15B of the Supreme Court Act.

[71] The respondents align to the submission that the provisions of Rule 47 of the Supreme Court Rules are not limited to appeals filed as of right; the rule equally applies to appeals filed upon certification that a matter is of general public importance.

[72] Rule 47 of the Supreme Court Rules provide as follows;

> *47. Notice of cross-appeal*
> *(1) A respondent who intends to cross-appeal shall specify the grounds of contention, and the nature of the relief that the respondent seeks from the Court.*
> *(2) The respondent shall—*
> *(a) provide contact details including the names, postal address, telephone number and email address of any persons intended to be served with the notice; and*
> *(b) lodge eight copies of the memorandum of appeal and record of appeal in the registry within thirty days of service upon the respondent, or not less than thirty days before the hearing of the appeal, whichever is the later.*
> *(3) An application or notice to cross-appeal shall be as set out in Form I of the First Schedule.*
> *(4) In a criminal appeal, the Registrar of the court or tribunal from which an appeal originates shall prepare the record of appeal, and cause copies to be served upon the parties and to the Registrar.*

[73] This Court in the case of ***Communications Commission of Kenya & 3 others v Royal Media Services Limited & 7 others***, SC Petition No. 14 of 2014; [2014] eKLR and more recently in ***IEBC Vs Sabina Chege*** SC Pet no. 23 (E026) of 2022 (delivered on 12th September, 2023) (unreported) determined that a cross appeal is an action by a respondent, who intends to

counter an appellant's cause in an appeal, with the view of obtaining certain relief(s) from the Court and the same is filed pursuant to Rule 47 of the Supreme Court Rules, 2020. Further this Court in the case of ***Senate & 3 others v Speaker of the National Assembly & 10 others***, (Petition 19 (E027) of 2021); [2023] KESC 7 (KLR) and again in the case of ***IEBC Vs Sabina Chege (supra)*** the Court held that pursuant to Rule 47(2)(b) a respondent who intends to cross appeal is expected to lodge eight copies of the memorandum and record of appeal and not rely on other parties' pleadings as they have prayed. Failure to comply with Rule 47 renders a Cross Appeal incurably defective.

[74] The **Black's Law Dictionary, 9th ed** (at page 133) defines "cross-appeal" as follows:

> "*to seek review (from a lower court's decision) by a higher court" And "cross-petition" (p.433) as follows:*
>
> *"i. a claim asserted by a defendant against another party to the action;*
>
> *iii. claim asserted by a defendant against a person not a party to the action for a matter relating to the subject of the action."*

[75] In ***Communications Commission of Kenya & 3 others v Royal Media Services Limited & 7 others***, SC Petition No. 14 of 2014; [2014] eKLR we had this to say regarding filing cross-appeals and cross-petitions;

> *"...From the above definitions, there is a difference between a cross-appeal and a cross-petition. A cross-appeal is an action by a respondent, who intends to counter an appellant's cause in an appeal, with the view of obtaining certain relief(s) from the Court. A cross-petition on the other hand, is an action by a defendant in first-instance claims, intending to counter the claim of a petitioner with the view of obtaining certain remedies. The applicant, therefore, does not bear the right to file a cross-petition or even a cross-appeal, as this is a preserve of a respondent who has a claim*

against another party already in the appeal (cross-appeal), or another party to the suit (cross-petition)……"

[76] In ***Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others (supra)*** held that a cross appeal must at the onset fall within the jurisdictional sphere of the court as set out in the Constitution and must be limited to issues not already addressed by the appeal or those that cannot be argued during the appeal as a response. The court went on further to distinguish an appeal filed under Article 163 (4) (b) when it held as follows;

[181] Where the appeal requires certification as being a matter of great public importance under the provisions of Article 163(4)(b) of the Constitution, it is our position that during such certification, the respondent is at liberty to raise the cross appeal and the grounds applicable for such. In that instance, should the Court of Appeal or Supreme Court dealing with the certification find that the ground raised either in the application for certification and/or cross appeal qualifies as raising great public importance, then the issues and grounds will be framed as such to form the basis of certification of the appeal to the Supreme Court. With such certification, as may be reviewed by the Supreme Court where necessary, the respondent will be at liberty to file the cross appeal in accordance with the Supreme Court directions……"

[77] Probing the cross-appeal before us, the respondent lodged the appeal together with eight copies of memorandum of appeal and record of appeal; certification was not sought for grounds raised in the cross-appeal. Nevertheless, the grounds raised in the cross-appeal urged the court to re-assess the 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 us, 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.

Further, even if we were to make a finding that the same fits within the parameters of the question certified, we have already decided on the appeal and made findings with regard to the issues raised in the cross-appeal.

[78] On costs, we are guided by the decision in **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others SC. Pet. No. 4 of 2012 [2014] eKLR** which held that an order on cost is a judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice considering the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation. Accordingly, we order that each party bears their own costs.

E. ORDERS

[79] 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.***

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **28th** day of **December** 2023.

.....

M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....	.....
S.C. WANJALA	**NJOKI NDUNGU**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	.....
I. LENAOLA	**W. OUKO**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA