REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome; CJ &P, Wanjala, Njoki, Lenaola, & Ouko, SCJJ)

PETITION NO. E009 OF 2025

-BETWEEN-

FRANCIS WAITHAKA NGOKONYO........................1ST APPELLANT
SUDI ABDALLA..2ND APPELLANT
ANDREW MUGA...3RD APPELLANT

-AND-

TELKOM KENYA LIMITED.....................................RESPONDENT

(*Being an appeal from the Judgment of the Court of Appeal in Nairobi (Nyamweya, Mativo, & Gachoka, JJ.A) delivered on 26th July, 2024 in Civil Appeal No. 394 of 2017)*

Representation:

Mr. Nicholas Sumba for the Appellants
(N.O Sumba & Co. Advocates)

Ms. Noela Lubano, appearing together with Mr. Paul Kamara for the Respondent
(Oraro & Company Advocates)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] In this appeal, questions arise around the permanency of employment and the expectation that employees on permanent and pensionable terms have an assurance that, so long as they serve

diligently, the employment will run its natural

course until the mandatory retirement age; that it is a promise of stability, predictability, and security, underpinned by the doctrine of legitimate expectation. The appellants were retired in public interest prior to their scheduled retirement age by their employer, the respondent. The question that has been argued in the two courts below and now before this Court is whether the appellants are entitled to be paid their salaries and allowances, which they reasonably anticipated to earn up to their official mandatory retirement date.

B. BACKGROUND

[2] The appellants were employed by the now-defunct Kenya Posts and Telecommunications Corporation, the predecessor of the respondent, in different capacities and on various dates. The 1st appellant was employed as a pupil engineer on 10th June 1973. The 2nd appellant was employed on 5th October 1971 as an Assistant Telecommunications Controller, Grade II, while the 3rd appellant was employed on 17th April 1961 as a Clerical Officer Grade II.

[3] It is common ground that the appellants served diligently, earning promotions and receiving commendations for their performance throughout their service. However, on 19th July 1991, they were placed on compulsory leave on grounds of persistent laxity, the particulars of which were not disclosed. Their efforts to seek audience with the respondent came to nought. On 22nd October 1991, they were formally retired in public interest. At the time of their retirement, they had risen through the ranks to senior managerial positions, with the 1st appellant having been promoted to the position of Assistant General Manager (Data Processing), the 2nd appellant to Area Manager–Nairobi South, and the 3rd appellant to Senior Assistant

Manager (Telephone Accounts). They were aged 41, 43 and 50 respectively. Following their retirement, the appellants were paid gratuity and cumulative pension payments.

[4] Aggrieved by their premature retirement, each of the appellants instituted separate suits in the High Court, being ***HCCC No. 357 of 1992***, ***HCCC No. 412***

of 1992, and ***HCCC No. 812 of 1992***, which were later consolidated and ***HCCC No. 357 of 1992*** was declared the lead file. They contended that the circumstances leading to their retirement in public interest were neither understandable nor justifiable, considering their distinguished careers and exemplary performance. The appellants maintained that their premature retirement, before attaining the mandatory retirement age of fifty-five (55), amounted to wrongful termination. They therefore sought general and special damages, as well as pension and other benefits.

[5]The consolidated suit was first determined by *Hayanga, J.,* who, in a judgment dated 11th April 2001, awarded the appellants Kshs. 15,722,087.40/=, Kshs. 10,588,424.40/=, and Kshs. 2,782,285.29/=, respectively. That judgment, for some strange reason, was pronounced on behalf of the Judge by a Deputy Registrar. On appeal, and for this reason, the Court of Appeal nullified the judgment on 2nd July 2004, holding that it offended Order XX, Rule 2(2) of the Civil Procedure Rules. The matter was remanded to the High Court for re-hearing.

C. LITIGATION HISTORY

i) Proceedings at the High Court

[6] For the second time before the High Court, the appellants restated their individual positions. The 1st appellant's case was that had he served until the retirement age of 55 years, he would have earned over Kshs. 10.5 million and was entitled to special damages of Kshs. 23,702,682/=, general damages, a backdated monthly pension of Kshs. 32,831/=, costs, and interest. The 2nd appellant's claim was for special damages of Kshs. 21,367,752/=, general damages with interest, a backdated pension of Kshs. 31,600/=, costs, and other

appropriate remedies. The 3rd appellant, similarly, claimed special damages of Kshs. 2,734,804/=, general damages with interest, and a monthly pension of Kshs. 14,603/= backdated to 1996. He, however, acknowledged receipt of payment in lieu of notice. Collectively,

the appellants urged the court to find that their retirements were unlawful and accordingly they were entitled to compensation.

[7]The respondent, however, denied liability and maintained that the retirements were effected in accordance with their terms and conditions of employment, as well as the provisions of Section 17(c) of the repealed Employment Act, Cap 226. Through the testimony of Mr. Isaiah Kandie, the respondent's former Human Relations Officer, the respondent argued that the appellants had been given an opportunity to respond to the letter dated 19th July 1991 before they were retired on 22nd October 1991. In the respondent's view, both Posta Code J and the Kenya Posts and Telecommunications Corporation (Approved Special Retirement Scheme) (Pensions) Regulations, 1985) ***(the Regulations)*** provided for the retirement of employees on the grounds of public interest, and that there were no procedural requirements in the Regulations that needed to be adhered to in respect of retirement in public interest; that the appellants having been retired, not terminated, they were not entitled to salaries, allowances, or benefits accruing to employees in active service. The respondent maintained that all terminal dues had already been settled.

[8] In its judgment of 20th December 2013, the High Court *(Havelock, J.)* found as a matter of fact that the appellants were long-serving employees of the respondent, who served with diligence, commitment, and dedication, and even received commendations for their exemplary performance. Against this backdrop, the Judge observed that their sudden retirement, on grounds of persistent laxity, must have come as a shock to the appellants; and that despite their repeated requests for a hearing before the management or board of the respondent, the respondent went ahead and terminated their services.

[9] The court found, on the basis of these facts, that the respondent's actions violated the principles of natural justice, in particular the rule of *audi alteram partem* (the right to be heard); that the respondent had acted in blatant breach of Regulation 4(b) of the Regulations, which expressly required the Managing

Director to notify employees of any imminent adverse action and allow them to make representations before retirement in the public interest; that by failing to discharge this mandatory duty, the Managing Director of the respondent deprived the appellants of a fair opportunity to defend themselves against allegations of laxity. On that basis, the court concluded that the appellants' retirements were unlawful.

[10] Having so held, the court awarded the 1st, 2nd, and 3rd appellants Kshs. 14,965,568/=, Kshs. 12,783,404/=, and Kshs. 1,874,676.30/=, respectively, with interest at court rates from the date of judgment until payment in full. In arriving at these figures, the court deducted amounts it found were strictly not due. For the 1st and 2nd appellants, these included concessionary loans, sums already received as pension and gratuity and long-service awards which the court stated were discretionary. The 3rd appellant's award was similarly reduced by all the amounts of pension and gratuity already paid. The court also awarded the appellants the costs of the consolidated suit. The court, however, dismissed the claim for general damages and interest on the principal sums.

ii) Proceedings at the Court of Appeal

[11] Aggrieved by the decision of the High Court, the respondent moved the Court of Appeal vide ***Civil Appeal No. 394 of 2017,*** on 11 grounds as set out in the Memorandum of Appeal. Those grounds are, *inter alia,* that the learned Judge erred in fact and law by:

a) awarding the respondents (the appellants herein) the loss of anticipated salaries and allowances until their projected retirement age;

b) failing to appreciate that anticipatory salaries and allowances

are too speculative and it is not a fair and reasonable remedy;

c) *failing to appreciate that the appellants were expected to mitigate their losses by securing alternative employment;*

d) *failing to appreciate that an award of anticipatory salaries and allowance amounts to an unjust enrichment;*

e) *failing to consider that employment remedies are not aimed at facilitating the unjust enrichment of aggrieved employees but rather are meant to redress economic injuries in a proportionate way;*

f) *failing to appreciate that allowances are enjoyed by those in actual employment and not by those who have ceased to be employees;*

g) *failing to appreciate that there was no provision for payment of damages up to the date of retirement, both under the repealed Employment Act and the Employment Act, 2007;*

h) *failing to consider the respondent's submissions and authorities on the question of anticipated salaries and allowances;*

i) *failing to appreciate that under common law and the repealed Employment Act, the respondents' remedy for unfair termination was the equivalent of one month's notice as provided in their contract of employment;*

j) *failing to appreciate that the maximum amount of damages payable to the appellants under the Employment Act, 2007 was 12 months' salary; and*

k) *misdirecting himself even after considering numerous authorities presented to him by holding that cases that involved summary dismissal and not unlawful termination did not apply to this case.*

[12] The respondent prayed that the appeal be allowed, that the award of anticipated salary until retirement be set aside and or

substituted with an order dismissing the appellants’ claims with costs of the appeal to the respondent.

[13] Partly aggrieved by the same judgment, the appellants filed a cross appeal premised on 5 grounds, *inter alia,* that the learned Judge erred in fact and law by:

a) deducting Kshs.1,119,053/=, Kshs.724,287/= and Kshs. 860,127.70/= respectively from the judgment amounts when the same had already been deducted as per the computation ordered by the court, which computation was filed and produced in court as an exhibit; therefore, it amounted to double deductions.

b) failing to award the appellants their correct monthly pension of Kshs.32,831/=, Kshs.31,600/=, and Kshs.14,603/= respectively effective from 1st April 2005 for the 1st appellant who would have retired on 10th October 2003, for the 2nd appellant who would have retired on 31st March 1996 and for the 3rd appellant who would have already retired. Further, the court having awarded Kshs.14,965,568/=, Kshs.12,873,404/= and Kshs.1,874,676.30/= respectively, upon the application of the formula used in calculating the claim for gratuity as awarded in the judgment, the award for monthly pension ought to have followed as a matter of course;

c) failing to award the 1st appellant his rightful bonus of Kshs.7,265/= with interests from 1991 when the said bonus ought to have been paid but was wrongly withheld by the appellant;

d) failing to award the correct monthly pension to the appellants and in not awarding interest on the monthly pension together with gratuity till payment in full; and

e) failing to award the appellants interest progressively on monthly salaries and allowances from the date of filing suit and during the period during which they were illegally retired in public interest.

[14] For these reasons, they prayed for a refund of the unlawfully

deducted sums, payment of their proper monthly pensions and the withheld bonus, and progressive interest on all dues together with costs of the suit.

[15] In its judgment of 26th July 2024, the Court of Appeal *(Nyamweya, Mativo & Gachoka, JJ.A)* framed the main issues as: whether the court had the jurisdiction

to determine computation of the appellants' pension; whether the learned trial Judge ignored the authorities presented by the respondent; whether anticipatory salaries and allowances are payable up to the age of retirement; whether interests ought to have been awarded on anticipatory salaries and allowances; whether the appellants mitigated their losses; and, whether the 1st appellant was entitled to an award of bonus.

[16] On the first question on *jurisdiction to determine computation of the appellants' pension*, the court, while relying on Section 46 (1) of the Retirement Benefits Act, Cap 197, concluded that computation of pension was purely a matter for professionals in that field and therefore the courts were ill-equipped to determine pension computations. In the court's view, the first port of call was Section 46 (1) of the Retirement Benefits Act, which grants any aggrieved member of a scheme to request the Chief Executive Officer to review the impugned decision; and that it was only after complying with that provision that an aggrieved party can seek court intervention by way of review or appeal. Relying on the case of ***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) Vs 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)*** [2019] KESC 83 (KLR) the Court reiterated that even when the employer-employee relationship has ceased, the courts do not have the jurisdiction to determine at the first instance, matters of computation of their pension. That while the current Retirement Benefits Act may have been enacted after the appellants left the respondent's employment, in terms of procedure

for resolving the dispute, the Act must nevertheless apply as stipulated by Section 57. Consequently, the court concluded, both the High Court and Court of Appeal lacked jurisdiction to address pension computation in the first instance.

[17] On the applicable law, the court found that the governing statute was the repealed Employment Act, Cap 226, since the cause of action arose in 1991 and the suit was filed in 1992. The Employment Act, 2007, could not apply retrospectively. Turning to *the claim that the High Court ignored authorities*, the Court of Appeal held that the trial judge had indeed considered and distinguished the authorities and reached reasoned findings, hence, that ground of appeal failed.

[18] *Whether anticipatory salaries and allowances could be awarded until retirement age,* constituted the substantive issue in the first appeal, as it is in this appeal. The appellate court held that such awards were speculative and amounted to unjust enrichment, as there was no guarantee of service until retirement. In addition, the court explained that employment could also end lawfully through redundancy, dismissal, or death. Since neither the repealed nor the current Employment Act provided for such awards, the claim failed. The court further noted that the appellants' contracts permitted termination of service with one month's notice, which had in fact been paid alongside gratuity and pension. Accordingly, the anticipatory salary claims and related demands for interest and alleged double deductions could not stand.

[19] *On the claim for a long-service bonus*, the court found that while the 1st appellant had initially pleaded it in the original plaint, the claim was omitted in the amended plaint, making the claim untenable. As for the 2nd and 3rd appellants, they had neither specifically proved nor shown eligibility for such awards, and their names did not appear in the respondent's list of beneficiaries.

[20] Ultimately, the Court of Appeal partly allowed the respondent's appeal to the extent explained, set aside the High Court's judgment,

and substituted it with an order dismissing the appellants’ suit. The cross-appeal was dismissed, with parties ordered to bear their own costs.

iii) Proceedings at the Supreme Court

[21] Aggrieved by the judgment of the Court of Appeal, and upon certification by that court under Article 163(4)(b) of the Constitution, the appellants have now lodged the instant appeal. In its ruling dated 21st February 2025, the Court of Appeal certified the matter as one of general public importance and framed the issue for determination by this Court in the following terms:

> ***"From the foregoing, the applicants have in this regard raised a substantial issue regarding anticipatory salaries and allowances in circumstances where employees in the public sector are asked to retire early from employment in the public interest, or for the common good of the government. The applicants have met their obligation to identify and concisely set out the specific elements of 'general public importance' that they attribute to the matter for which certification is sought.***
>
> ***This issue transcends the circumstances of this particular case, and amounts to a substantial point of law, with a significant bearing on the public interest. We think that it is necessary that the Supreme Court settles the jurisprudence as mandated by the Constitution and the Supreme Court Act."*** [Our emphasis]

[22] The appeal is challenging the decision of the Court of Appeal on the following eight summarized grounds, to the effect that the court:

i. Erred in law by setting aside the appellants' award of

anticipated salary and allowances up to the date of retirement as granted by the High Court;

ii. *Failed to consider and unjustifiably ignored its own binding precedents, namely Civil Appeal No. 336 of 2005,* ***Gad David Ojuando Vs Prof. Nimrod Bwibo & Others*** *and Civil Appeal No. 38 of 2005,* ***Kenya Ports Authority Vs Silas Obengele****, which had been cited by the appellants in support of their case;*

iii. *Erred by setting aside the compensation awarded by the High Court without granting any alternative or commensurate compensation, despite the uncontested finding that the appellants' retirement in the public interest was not only unlawful but also inhumane;*

iv. *Failed to award any form of compensation which amounted to a gross miscarriage of justice;*

v. *Failed to consider the appellants' unchallenged evidence demonstrating that their forced retirement in the public interest was a stigmatizing and unlawful act which effectively barred them from securing alternative employment;*

vi. *Erred in holding that the High Court lacked jurisdiction to award pension benefits, notwithstanding that the appellants' cause of action arose in 1991, prior to the enactment of the Retirement Benefits Authority Act, and that the High Court had properly assumed jurisdiction in its judgment of 20th October 2013;*

vii. *Wrongly found that there was no assurance the appellants would have served until the mandatory retirement age, despite clear evidence of their intended retirement dates and proof that they were blacklisted and unable to secure alternative employment thereafter; and*

viii. *Erred in dismissing the appellants' notice of cross-appeal dated 23rd April 2019, contrary to the weight of the evidence and representations made in the matter.*

[23] Accordingly, the appellants seek the following reliefs:

i. *The judgment delivered by the Court of Appeal on 26th July 2024 in* ***Civil Appeal No. 394 of 2017*** *be set aside in terms of orders (b), (c), and (d) granted thereof which in effect dismissed the appellants' suits consolidated in* ***HCCC No. 357 of 1992;***

ii. The appellants' notice of cross appeal dated 23rd April 2019, filed in ***Civil Appeal No. 394 of 2017,*** *be allowed in terms of prayers (a), (b), (c), (d), and (e); and*

iii. The respondent be condemned to pay the costs of this appeal, the costs in the Court of Appeal and the High Court.

[24] The respondent has filed a replying affidavit sworn by Stella Wawira on 3rd April 2025, challenging, among other things, the jurisdiction of this Court under Article 163(4)(b) of the Constitution. The appellants, in turn, filed a further affidavit sworn by Francis Ngokonyo on 8th April 2025 in response.

D. PARTIES' SUBMISSIONS

i. The Appellants' Submissions

[25] In their written submissions dated 17th April 2025, the appellants fault the Court of Appeal for setting aside the High Court's award of anticipatory salaries and allowances that they would have earned until attaining retirement age. They argue that under Posta Code J, employees retired in the public interest are entitled to earned leave, pension, and gratuity under the Pensions Act or, in the case of unestablished or subordinate staff, under the Provident Fund Act. Such retirement, they submit, carries full benefits, unlike dismissal, which disentitles an employee. They cite ***Peter J. Ndungu Vs Kenya***

Posts and Telecommunication Corporation, Nairobi High Court Civil Suit No. 920 of 1977 and ***Nyamodi Ochieng Nyamogo Vs Telkom Kenya Ltd,*** Nairobi High Court Civil Suit No. 1736 of 1993, where the courts awarded the petitioners therein

anticipated salary and allowances until retirement, with compensation running into tens of millions after being retired in public interest.

[26]The appellants further argue that the appellate court erred in disregarding its own binding precedents, particularly ***Gad David Ojuando Vs Prof. Nimrod Bwibo, Prof. N. Onyango & Maseno University***, Kisumu Court of Appeal Civil Appeal No. 336 of 2005 ***(Ojuando Case)***, and ***Kenya Ports Authority Vs Silas Obengele***, [2008] KECA 103 (KLR) ***(Obengele Case)***. In the ***Ojuando Case***, the Court of Appeal held that an employee unlawfully retired was entitled to salary arrears and benefits for being prematurely retired before the retirement age. It did not award salary up to the retirement age, while in the ***Obengele Case*** the court held that loss of house allowance is a benefit enjoyed by staff who is still in employment; and that the respondent was not entitled to the money he would have earned had he worked up to the compulsory age of retirement. The court, however, awarded pension loss. The appellants contend that the appellate court departed from these established principles without justification.

[27] The appellants also take issue with the fact that the Court of Appeal set aside the High Court's compensation without substituting it with any commensurate relief. This, they submit, amounted to a gross miscarriage of justice, especially since the events predated the 2010 Constitution and Employment Act, 2007, which cannot apply retrospectively to the facts in this dispute. The appellants maintain that the court failed to appreciate the gravity and implications of their forced retirement in the public interest. Their premature retirement, they argue, was unlawful, stigmatizing, and compounded by blacklisting that left them unemployable and denied them any meaningful opportunity to seek alternative employment. This

evidence, they note, was uncontroverted. By the time of trial, all the appellants had reached the age at which they would have ordinarily retired, underscoring the prejudice suffered.

[28] On the High Court's jurisdiction to award pension benefits, the appellants maintain that Section 46(1) of the Retirement Benefits Authority Act, enacted in 1997, did not apply to their case, as their cause of action arose in 1991. They add that the High Court relied not on its own computations but on the respondent's formula and conversion tables contained in the respondent's final personal circular issued shortly before their mandatory retirement dates.

[29]The appellants further challenge the appellate court's assertion that there was no guarantee they would have remained in service until the retirement age of 55 years, terming the conclusion misleading. At the time of their retirement, they were only 41, 43, and 50 years, respectively and after that, none of them obtained alternative employment. The appellants emphasize that the respondent, then a monopoly in the telecommunications sector, not only orchestrated their premature retirement but also actively impeded their future employability. Worse still, the respondent revoked the 1st appellant's telecommunications licence just three months after reissuing it, an act which, they submit, exemplifies deliberate exclusion from the profession. In this context, the appellants have urged that the appellate court's reasoning was a misrepresentation of the clear and uncontested realities of their professional isolation and economic hardship.

[30] Lastly, on their cross-appeal before the Court of Appeal, the appellants posit that their entitlement to pension was not disputed at trial and was affirmed by the respondent's witness, who provided detailed testimony on the applicable pension formula. They further argue that interest ought to have been awarded progressively on the due dates of the unpaid monthly salaries and allowances, rather than from the date of filing suit, as these amounts were continuously

accruing during the period of their unlawful retirement in public interest. For these reasons, they urge this Court to allow their cross-appeal.

[31] In light of the foregoing, the appellants submit that the Court of Appeal erred in setting aside the High Court's decision and in further dismissing their notice of cross-appeal. Accordingly, the appellants pray that this appeal be allowed.

ii. The Respondent's Submissions

[32] The respondent, in submissions dated 9th May 2025, counters each of the appellants' arguments. On jurisdiction, it maintains that the appeal does not raise issues of general public importance but instead concerns a narrow question: whether employees retired in the public interest before the 2010 Constitution and Employment Act, Cap 226, are entitled to anticipatory salaries until retirement age. Framing the matter in the manner presented, the respondent argues, shows that the appellants are improperly seeking to expand the Supreme Court's jurisdiction beyond Article 163(4)(b) of the Constitution.

[33] As to the appellants' claim for anticipatory salaries and allowances, the respondent insists they were entitled only to a month's salary in lieu of notice plus accrued terminal dues, gratuity, and pension, payments that were indeed made. The payments, the respondent notes, were grounded in Circular No. 4 'C' of 1974 and Posta Code J3 iii(f)–iv(f). The appellants have therefore failed to point to any statutory basis for the extra damages they seek.

[34] On precedent, the respondent rejects the suggestion that the appellate court ignored binding authority. As a matter of fact, the respondent argues that the court relied on more than thirteen Court of Appeal decisions supporting its conclusion on the question, namely, that the measure of damages is limited to salary in lieu of notice for the contractual notice period, together with accrued terminal dues. This included reliance on the ***Obengele Case***, which clarified that damages cannot be assessed on the basis of earnings an employee would have received up to compulsory retirement.

[35] On the failure of the appellate court to grant an alternative relief upon setting aside the High Court's award, the respondent

contends that under the repealed Employment Act and the former Constitution, there was no right to fair labour practices, no requirement to give reasons for retirement in the public interest, and

no link between reasons for termination and computation of benefits. Thus, the
appellants’ reliance on “unfair termination” is misplaced.

[36] On jurisdiction to award pension, the respondent insists that the High Court lacked jurisdiction, echoing the Court of Appeal’s reasoning; and that the appellants have cited no legal basis for the High Court's jurisdiction over the computation of pension benefits. Citing this Court’s decision in ***Mumba*** *(supra)*, the respondent notes that even the Employment and Labour Relations Court lacks the power to adjudicate disputes between pension trustees and members, and the same principle must apply here. For these reasons, the respondent submits that the appeal is devoid of merit and should be dismissed with costs.

E. ISSUES FOR DETERMINATION

[37] This appeal, having been certified as one involving a matter of general public importance by the Court of Appeal, and guided by the language of the appellate court at paragraph 21 of the ruling of 21st February 2025, we reiterate the following single issue under (i) below for determination:

i) Whether premature retirement of public officers in the public interest creates a legal or contractual basis for the payment of anticipatory salaries and allowances.

ii) What reliefs should issue?

F. ANALYSIS AND DETERMINATION

[38] We begin by noting, with considerable regret, that this matter has been in the court system for over three decades. The reason for this delay has been explained in paragraphs [4] and [5] of this

judgment. The consolidated suit ***HCCC No. 357 of 1992*** was concluded by *Hayanga, J.* in a judgment dated 11th April 2001. That judgment, on appeal, was nullified by the Court of Appeal on 2nd July 2004 for the reason that it was pronounced on behalf of the judge by a Deputy Registrar contrary to Order XX, Rule 2(2) of the Civil Procedure Rules. The matter was

remanded to the High Court for re-hearing. These factors, along with numerous applications before the two superior courts, were the main reasons for the delay.

[39] As regards the Court's jurisdiction to determine the matter, this appeal was certified as raising a matter of general public importance on a solitary issue, whether premature retirement of public officers in the public interest creates a legal or contractual basis for the payment of anticipatory salaries and allowances. That being so, the other grounds raised by the appellants outside this issue are extraneous. The appellants cannot expand their appeal beyond the issues delineated for consideration. See ***Muriithi (Representative of the Estate of Mwangi Stephen Muriithi) Vs Janmohamed SC (Executrix of Estate of Daniel Arap Moi) & another*** [2023] KESC 61 (KLR). For this reason, we decline the appellants' invitation to pronounce ourselves on all the other unrelated issues contained in their grounds of appeal.

[40] Did the former Constitution and the repealed Employment Act provide for legal or contractual entitlement to public officers to receive anticipatory salaries and allowances if their employment were prematurely terminated in the public interest? Asked differently, does an employment contract described as "permanent and pensionable" create a non-terminable engagement lasting until retirement age? To answer this question, we must emphasise that every employment contract must be construed on its own terms and conditions.

[41] The appellants urge that their retirement, unlike dismissal, carried full benefits, thereby entitling them to projected salaries and allowances until they reached the normal retirement age. In their view, having been employed on permanent and pensionable terms,

they had a legitimate expectation to work for the respondent until the retirement age of 55 years and were therefore entitled to anticipatory salary for the remaining period of their service; that they were stigmatized, and left unemployable at a time when they were still within productive working age; and that for these reasons the Court of Appeal erred in setting aside the High Court's award without substituting any commensurate relief. They

further contend that their pension entitlement was not in dispute, as the
computation of benefits was based on the respondent's own formula.

[42] On the other hand, the respondent resists these claims, stressing that employees retired in public interest before the 2010 Constitution and under the repealed Employment Act regime, were entitled only to the limited benefits provided under the Act, namely, salary in lieu of notice, accrued dues, gratuity, and pension, which in the present case were duly and fully paid. The respondent maintains that there was no statutory or contractual basis for the claimed anticipatory salaries, as correctly stated by the Court of Appeal.

[43] While permanent and pensionable employment does guarantee a higher degree of stability through long-term engagement, structured benefits, and predictable retirement planning, it does not create an absolute assurance that an employee will remain in service until retirement age. Such employment can still be lawfully terminated through resignation, dismissal for misconduct or poor performance, retrenchment, or the employee's death or permanent incapacity. This fact was considered by the House of Lords many years ago in the widely cited 1957 case of ***McClelland Vs Northern Ireland General Health Services Board*** [1957] 1 WLR 594, where Lord Evershed, writing for the court explained the application of the term "permanent and pensionable" as follows:

> ***"I should not regard the use of the word 'permanent,' even when the word 'pensionable' is added to it, <u>as sufficient in</u> <u>that context to create a promise of a life employment or to</u> <u>disable the respondents as employers from terminating the</u> <u>employee's contract of service upon reasonable notice</u> I***

do not, for my part, think that, in a contract of service, use of the word <u>'permanent' would be of itself sufficient to</u> <u>import the notion of a life appointment</u>. The word is clearly capable, according to the context, of many shades of meaning; and it seems to me of considerable importance, in

> ***interpreting its use in a contract of service, that such a contract cannot be specifically enforced."*** [Our emphasis]

The legal position has consistently remained that a contract of permanent and pensionable employment, like any other contract of service, remains terminable at the instance of either party, provided that termination is effected by giving a reasonable notice in accordance with the governing law and contractual procedures. It cannot connote employment for life. Conversely, an employee under a permanent and pensionable contract cannot be beholden to the employer until retirement. Any party can terminate the contract according to the terms and conditions provided in the letter of employment.

[44]We are cognizant of the fact that the repealed Employment Act did not define permanent employment or provide for retirement in public interest. Sections 14,15,16, 16A and 17 made general provisions for contracts of service, and specified, among others, contract of service for different periods, six months or more; a contract for daily wages, a contract to pay wages periodically at intervals of less than one month, and a contract *"to pay wages or salary periodically at intervals of or exceeding one month."* Such a contract would be terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing. See Section 14(5) (iii) of the repealed Employment Act. Either of the parties to a contract of service could, however, terminate the contract without notice upon payment to the other party of the wages or salary which would have been earned by that other party, or paid by him, as the case may be. A contract of service could also be terminated on account of redundancy under Section 16A upon satisfying certain conditions. Finally, upon proof of gross misconduct, an employee's

contract of service could be terminated through summary dismissal.

[45] The appellants' services were terminated on the ground of public interest; a term not defined or provided for in the repealed Employment Act. Its meaning has, however, received judicial confirmation in a number of decisions. For instance, the Employment and Labour Relations Court described what constitutes retirement in

public interest in ***D.K. Njagi Marete Vs Teachers Service Commission*** [2013] KEELRC 575 (KLR), a case decided under the Employment Act, 2007, as follows:

> ***"18. Retirement on public interest is a form of termination of employment, instigated by the employer, and would therefore fit the description of involuntary termination. It is not necessarily the result of a disciplinary process. It may for instance, result from an administrative decision by the employer, taken for the removal of persistent non- performers from the employer's business. As a decision based on public interest results in termination of employment, it would fall within the requirements of Section 43 of the Employment Act 2007. It is the responsibility of the employer to prove the reason or reasons for the retirement."***

[46]Under the Pensions Act, there can be termination of service in public interest. Under Section 8 thereof, an officer's service can be terminated on the grounds that, having regard to the conditions of the public service, the usefulness of the officer and all the other circumstances of the case, termination is desirable in the public interest. In principle, therefore, retirement in the public interest constitutes a form of termination of employment, and accordingly, the burden of proof to justify the grounds for such retirement rests with the employer. We reiterate that termination of service in the public interest does not necessarily arise from a disciplinary process. But in resorting to it, the employer must guarantee due process and ensure that the termination is effected in accordance with the terms of

employment and the law. Whereas the trial court found the respondent liable for failing to accord the appellants the opportunity to defend themselves before terminating their services, thereby rendering that decision unlawfully, the first appellate court for its part was persuaded that the appellants, having been paid their terminal dues and

one month's salary in lieu of notice, in accordance with the law and terms of service, were not entitled to any other compensation.

[47] The trial court awarded special damages based on the appellants' monthly salary and allowances that they would have earned from the date of termination of their employment until their actual retirement age of 55 years, constituting a claim for anticipatory salaries and allowances. There was no statutory authority for the award. The appellants have urged the Court to be persuaded by the decisions in ***Peter J. Ndungu Vs Kenya Posts and Telecommunication Corporation***, *(supra)*, ***Nyamodi Ochieng Nyamogo Vs Telkom Kenya Ltd***, *(supra)*, ***Gad David Ojuando Vs Prof. Nimrod Bwibo, Prof. N. Onyango & Maseno University,*** *(supra)* and ***Kenya Ports Authority vs. Silas Obengele*** *(supra)*.

[48] These decisions serve to demonstrate that anticipatory claims for salaries and allowances are not without precedent, as the courts have on various occasions been called upon to provide judicial guidance on similar claims. It is equally true that courts have not been unanimous on the issue of anticipatory salary, as we demonstrate below. Indeed, the Court of Appeal in the impugned judgment cited between paragraphs 39 to 49 several authorities to support its conclusion that no anticipatory salary is payable.

[49] In the case of ***Peter J. Ndungu Vs Kenya Posts and Telecommunication Corporation*** *(supra)* which was against the same respondent herein, the plaintiff was retired in public interest at the age of 44. The High Court *(Hayanga, J.)* held that he was entitled damages comprising his net salary and allowance for the number of years left to his normal retirement.

[50] In ***Nyamodi Ochieng Nyamogo Vs Telkom Kenya Limited***

[2012] KEHC 3658 (KLR), the High Court *(Nambuye, J., as she then was)* allowed a claim for future salary earnings for unlawful compulsory retirement at the age of

45 years. Although the cause of action arose in 1993 the case was not decided until 2012. The above decisions allowed claims for anticipatory salaries.

[51] In contrast, in ***Geoffrey Muguna Mburugu Vs Attorney-General*** [2003] KEHC 1 (KLR), the retirement of the plaintiff from the public service in the public interest was found to be wrongful and a nullity, as a result of which the court awarded salary arrears and other benefits, for the period dating back to the date of his termination.

[52] The Court of Appeal in the case of ***Kenya Ports Authority Vs Edward Otieno*** [1997] KECA 388 (KLR), where the respondent was compulsorily retired at the age of 51 held that:

> ***"...In our judgment, where, as in the instant case, a contract of service includes a period of termination of the employment, the damages suffered are the wages for the period during which his normal notice would have been correct. In the case of Rift Valley Textiles Limited vs. Edward Onyango Oganda Civil Appeal No. 27 of 1992 (unreported) the contract of service provided that it could be terminated by a three months' notice by either party. The judge awarded the respondent twelve months' gross salary as general damages in addition to the three months' salary in lieu of notice already paid. This Court stated as follows:-***
>
> > "*We have no doubt whatsoever that the law did not entitle the Judge to do any of these things. The contract of employment between the Appellant and the Respondent specifically provided for a notice period*

and it also provided for what was to be done if either party was unable to comply with the said notice period, namely, to pay the other party for the notice period. In our view, even though the Respondent's dismissal was unlawful, he had

<u>been paid all that he was entitled to be paid under and in accordance with the terms of his contract with the Appellant</u>."" [Our emphasis]

[53] In the ***Ojuando Case,*** which was decided in 2005 and on which the appellants rely, the appellant was unlawfully compulsorily retired by Maseno University before he had attained the age of retirement. The Court of Appeal granted salary arrears and benefits for being prematurely retired before the retirement age of 65. It did not award salary up to the retirement age.

[54] In ***Obengele*** *(supra)* which the appellants equally rely on, and which was decided in 2008, the Court of Appeal held that, in instances of early retirement, the measure of damages is not the remuneration the claimant would have earned had he remained in employment until the compulsory retirement age of 55 years. The court in that appeal was guided by a 1960 judgment in the East Africa Court of Appeal case of ***Southern Highlands Tobacco Vs McQueen*** [1960] EACA 46, where that court, while dealing with a claim for damages of breach of contract for personal services, held that:

> ***"A person wrongfully dismissed is entitled to be compensated fully for the financial loss he suffers as a result of his dismissal, subject to the qualification that it is his duty to do what he can to mitigate his loss."***

[55] By way of comparison under the current Employment Act, in 2012 the ELRC in ***Kenneth Njiru Nyorani Vs Dodhia Packaging Limited*** [2012] KEELRC 80 (KLR) stressed that:

> ***"... Compensation for loss of future earnings would be ordered by the court only in exceptional cases where***

there is impossibility or difficulty in the employee's capacity to mitigate such losses through obtaining alternative or other employment, or, if it is shown that the contract of

employment imposed irrevocable restriction on the employee to get into any gainful employment for the period between the termination and the retirement date or date of lapsing of the contract."

[56] In 2013, in ***D.K. Njagi Marete Vs Teachers Service Commission*** *(supra)* also decided under the current constitutional environment and the Employment Act, 2007, the ELRC expressed the following view regarding a claim for anticipatory salaries where the plaintiff was retired in public interest:

> ***"25. What remedies are available to the Claimant? This Court has advanced the view that employment remedies, must be proportionate to the economic injuries suffered by the employees. These remedies are not aimed at facilitating the unjust enrichment of aggrieved employees; they are meant to redress economic injuries in a proportionate way....***
>
> ***26. A grant of anticipatory salaries and allowances for a period of 11 years left to the expected mandatory retirement age of 60 years, would not be a fair and reasonable remedy. The Court would facilitate double remuneration of***
> ***the Claimant from public funds, while he is no longer rendering any legal services to the TSC. It is not in the interest of the public, and would offend the principle of a fair go all round.***
>
> ***27. In the High Court Civil Case No. 1139 of 2002 between Menginya Salim Murgani v. Kenya Revenue Authority, Hon Justice Ojwang' stated that it would be***

injudicious to found an award of damages upon sanguine assessments of prospects. In that case the plaintiff was 38 years old when

> ***his contract of employment was terminated. He asked for remuneration he would have received between the age of 38, and the expected mandatory retirement age of 55 years. The Court observed that the plaintiff was able bodied, intellectually and professionally well-endowed man, likely to find occupational engagement outside the defendant's employ. The Court applied the principle, then confined to civil law, that an aggrieved party has the obligation to mitigate his or her losses. An aggrieved employee must move on and not sit back waiting to enjoy anticipatory remuneration."***

The Court of Appeal upheld ELRC's decision and stressed that there was no statutory basis for a claim of anticipatory benefits. See ***D K Njagi Marete Vs Teachers Service Commission*** [2020] KECA 840 (KLR).

[57]The following year, in 2014, in the case of ***Elizabeth Wakanyi Kibe Vs Telkom Kenya Ltd*** [2014] KECA 765 (KLR) where the appellant had made a claim for an award for expected salary from the time of her wrongful summary dismissal up to her expected date of retirement, the Court of Appeal cited with approval the passage below from the case of ***Engineer Francis N. Gachuri Vs Energy Regulatory Commission,*** Industrial Cause No. 203 of 2011:

> ***"There is no provision for payment of damages to the date of retirement. This is because employment like any other contract provides for exit from the contract. The fact that the Claimant's contract was referred to as permanent and pensionable does not mean it could not be terminated and once terminated, he can only***

get damages for the unprocedural or lack of substantive reason for the termination. No employment is permanent. That is why the

Employment Act does not mention the word 'permanent employment".

[58] Earlier in the judgment, we observed that there are conflicting judicial authorities, especially those decided earlier by High Court under the repealed Employment Act. We also noted that the repealed Employment had no provision for anticipatory remuneration. While there exist outlier cases, like ***Peter J Ndungu*** *(supra)* and ***Nyamodi*** *(supra)* where the courts awarded anticipatory salaries, the weight of authority to the contrary affirms that such claims are not available in law and are inconsistent with the principles governing termination of employment. Apart from failing to provide the legal basis for the award of anticipatory salaries, the former decisions were decided by the High Court. Decisions from the Court of Appeal under the repealed Employment Act, such as the ***Obengele Case,*** rejected claims for anticipatory salaries, holding that such claims had no basis in law. Consequently, by virtue of the doctrine of *stare decisis*, the decisions of the Court of Appeal rendered under the repealed Employment Act remained binding on the High Court.

[59]According to Section 3 of the Supreme Court Act, the Supreme Court as the court of final judicial authority is required to, among other things, provide authoritative and impartial interpretation of the Constitution, develop rich jurisprudence and enable important constitutional and other legal matters to be determined with finality. By Article 163(7) of the Constitution all courts, other than the Supreme Court, are bound by its decisions.

[60] The common thinking and modern judicial consensus has steadily moved away from allowing claims for anticipatory salaries or future salary earnings up to the date of retirement, considering that

such awards not only amount to unjust enrichment, but offend public policy, and contradict the principle that contracts of employment are by their nature terminable. Employees are paid for services actually rendered. Once employment is terminated, lawfully or unlawfully, including through retirement in the public interest, the employment relationship

comes to an end. Any form of payment beyond that date, be they anticipatory salaries or allowances would lack any basis under the law. Damages for wrongful or unlawful dismissal are confined to what is contractually or statutorily provided for, such as pay in lieu of notice, accrued benefits, and pension entitlements. In other words, the court cannot grant anticipatory salaries and allowances for a period the employee did not render any service to the employer. Only damages for unfair termination can be awarded where the court is satisfied that the termination was unlawful. Even then, the remedies must be proportionate to the injury suffered and cannot extend to speculative or prospective benefits.

[61] The principle of mitigation of loss further obligates employees to take reasonable steps to find alternative employment, rather than sit back and expect a windfall. Damages in contract law aim to place the injured party in the position they would have been had the contract been lawfully performed. This principle is today codified in Section 49(4)(g) of the Employment Act, 2007, that in considering the remedies for wrongful dismissal and unfair termination, one of the factors to be taken into account is "*the employee's opportunity of securing comparable or suitable employment with another employer*." Even where an unlawfully dismissed employee cannot reasonably mitigate loss because of either incapacity or as a result of a contract in restraint of trade limiting the employee's ability to secure another job, all the court can do is to adjust damages it would have awarded upward to reflect actual loss, not as anticipatory salary but as compensatory damages.

[62] There cannot be legitimate expectation merely on the basis that the term of service is permanent and pensionable. The law does not protect every expectation save only those which are legitimate. In

addition, clear statutory provisions will override any contrary expectation, however founded. See ***Communications Commission of Kenya & 5 others Vs Royal Media Services Limited & 5 others*** [2014] KESC 53 (KLR) and also ***Tunoi & another Vs Judicial Service Commission & another,*** [2016] KECA 530 (KLR).

[63] Based on the authorities reviewed and on our own analysis, we come to the following conclusion before we finally answer the framed question:

i) The designation of employment as "permanent and pensionable" does not guarantee tenure until retirement age. Such contracts remain terminable, subject to the law and terms of service.

ii) Retirement in public interest constitutes a form of involuntary termination of employment. The employer bears the burden of proving that it is not in the public interest to retain the employee and must ensure compliance with due process.

iii) Claims for anticipatory salaries or future salary earnings lack a statutory foundation under both the repealed Employment Act (Cap 226) and the current Employment Act, 2007.

iv) The general measure of damages does not extend to salaries for the unexpired period to retirement age. Remedies are generally confined to notice pay, payment in lieu of notice, and contractual terminal benefits.

v) Awards of arrears of salary and benefits may be made in exceptional cases where the termination is declared unlawful and a nullity, effectively treating the employee as if still in service.

vi) An employee has a duty to mitigate any loss that may arise from unlawful termination of employment.

ii) What reliefs should issue?

[64] Whereas the High Court found that the appellants had unlawfully been retired, the Court of Appeal found that the appellants' retirement in the public interest was in accordance with the

respondent’s Personnel Circular No. 4 ‘C’ of 1974, which provided for payment of one month’s salary in lieu of notice. The appellate court found that the appellants had admitted having been paid their salary dues for the period and one month’s salary in lieu of notice, gratuity and pension. The Court of Appeal, however, did not consider the issue of whether the

procedure leading to the appellants' retirement was lawful and in accordance with

the respondent's terms of service.

[65] Retirement in public interest was provided for under Part Two of the respondent's Posta Code J. Regulation J 14 provided:

> **"J 14 - Termination of Service on Grounds of Public Interest**
>
> **An employee may be retired from the service on grounds which are neither wholly disciplinary nor wholly of health nature, provided that the best interests of the service are so served.**
>
> **The cases which commonly lend themselves to this procedure are those of general and sustained inefficiency which cannot clearly be attributed to negligence or failing mental or bodily health. Cases of persistent unsatisfactory conduct are not proper to be dealt with under this regulation, and should be dealt with by taking appropriate disciplinary action."**

In addition to the Posta Code J, the East African Posts and Telecommunications Corporation Personnel Circular No. 4 'C' of 1974 issued on 23rd October 1974 provided:

> **"Recent cases of retirement in the public interest have revealed that some controlling officers are not clear as to how such cases should be handled.**
>
> **Retirement in the public interest is applicable where an officer is inefficient for reasons that would not render him liable to disciplinary action. <u>Such officer is not only</u> <u>ineffective on duty but also of bad influence to</u>**

colleagues. His retention in the service for any length of time is therefore not

in the best interests of the Corporation; hence the purpose of seeking his retirement. This being the case it makes no sense to give the officer notice of retirement.

From what is said above, it will be seen that it is desirable that retirement in the Public Interest should become effective from the date the decision is communicated to the officer, it being borne in mind that he would already have been notified of the intended action and invited to say why it should not be taken. Therefore, the officer should be removed from duty immediately he receives the decision to retire him; but he should be allowed 1 months' salary as he would in any case have been given notice before he was laid off." [Our emphasis]

[66] It is not in dispute that the appellants were initially placed on compulsory leave on the grounds of "persistent laxity in their duties." In the context of Regulation J14 aforesaid, to justify the retirement of the appellants, the allegations for their retirement would have to fall under the ground of "sustained inefficiency". Consequently, the burden lay on the respondent to demonstrate that the conduct of the appellants amounted to "sustained inefficiency" so that it was in the best interests of the service to retire them. In line with the Personnel Circular 4 'C', the appellants were to be made aware of the allegations against them, have a chance to respond to the allegations and to explain why they should not be retired, after which the respondent's Board would then make an informed decision, taking

into consideration the appellants' representation. This is the import of the respondent's own Regulation 4(b) which provided that:

"**Where under these regulations-**

> **An officer is required by the Board to retire, the Managing Director shall notify the officer in writing that his compulsory leave is under consideration and**

ask the officer if he wishes to make any representations to the Board; and on receipt of the officer's representations, the Managing Director shall forward those representations to the Board together with his own comments, if any, and, where the Board is not satisfied with those representations it shall order the retirement of the officer concerned."

[67]It is common ground that the appellants were not given a chance to be heard as required and were instead eventually retired in the public interest. The appellants, having been sent on compulsory leave for persistent laxity in their duties, it was incumbent upon the respondent to give them a chance to defend themselves on the new allegations levelled against them.

[68] It is on record that both the 1st and 2nd appellants wrote to the Managing Director regarding the issue of compulsory leave, without receiving any response. The *audi alteram partem* rule, an essential principle of natural justice and fair play, requires that no person's rights be adversely affected without first being accorded a fair hearing.

[69] It will be appreciated that under the former constitutional and statutory regime, employment was largely treated as a matter of private contract governed by the repealed Employment Act (Cap. 226). Courts often invoked the classical common law position that the rules of natural justice could not be imported into the employment relationship unless expressly provided for in the contract or by statute. For example, in ***Rift Valley Textiles Limited Vs Edward Onyango Oganda*** [1994] eKLR the Court of Appeal was explicit that:

"With respect to the learned judge, the rules of natural justice have no application to a simple contract of employment, unless the parties themselves have specifically provided in their contract that such rules shall apply. Where

a notice period is provided in the contract of employment, as was the case here, then an employer need not assign any reason for giving the notice to terminate the contract and if the employer is not obliged to assign a reason, the question of offering to the employee a chance to be heard before giving the notice does not and cannot arise. Again if the employee were to be minded to leave his employment, say for a better paid job and he gives notice of his intention to leave, the employee is not obliged to assign any reason for his intention to terminate the contract and it would be ridiculous for the employer to insist that he be given a hearing before the employee leaves. As we have said, unless there be a specific provision for the application of the rules of natural justice to a simple contract of employment, those rules are irrelevant and cannot find a cause of action."

See also the ***Ojuando Case,*** which restated the same position.

[70]In this sense, under the former regime, the employer's prerogative to hire and fire was dominant, and termination was generally viewed as a contractual right subject only to the notice or pay in lieu of notice required by law or in terms of the contract of employment.

[71] The post-2007 statutory reforms, reinforced by the 2010 Constitution, radically shifted this position. Article 41 entrenches fair labour practices as a constitutional right, while Article 47 guarantees every person the right to fair administrative action. Similarly, the Employment Act, 2007 operationalizes these principles by requiring

substantive justification and procedural fairness before termination. Modern case law therefore treats disciplinary or termination decisions as administrative actions requiring compliance with the rules of natural justice, particularly the right to a fair hearing.

[72] Having been retired under the former regime, the position at that point in time was that the rules of natural justice did not apply unless specifically provided for under the contract of employment. In the instant case the respondent's own Regulations required that the appellants be given opportunity to make representations which would be considered by the Board.

[73] It is apparent to us from the record that all three appellants had stellar records of employment with the respondents. They were recruited as trainees at the entry level and rose through the ranks to the management echelons. They received awards and accolades for the service to the respondent. Accordingly, it was strange for the respondent to place the appellant on compulsory leave on the grounds of persistent laxity. They had not, prior to this occasion, received any warning on account of the alleged laxity in the performance of their duties. Given their clean record and exemplary service, it was incumbent upon the respondent to substantiate the allegations of persistent laxity. They had no opportunity to defend themselves against these allegations. Instead, their repeated requests for a hearing before the management or board of the respondent were ignored, and on 22nd October 1991, they were issued with termination letters. Given this procedural lapse, we find, like the High Court, that the appellant's retirement in the public interest was unlawful.

[74] What remedies would they be entitled to? We have already declared that claims for anticipatory salaries or future earnings lack a statutory foundation under both the repealed Employment Act (Cap 226) and the current Employment Act, 2007; that the general measure of damages does not extend to salaries for the unexpired period to retirement age; that remedies for wrongful dismissal or unlawful termination of employment are confined to notice pay, payment in lieu

of notice, and contractual terminal benefits. Applying these principles to the circumstances of this case, we find the appellants’ claims for special damages based on their anticipated salaries that they would have earned until their expected date

of retirement untenable as they have no legal basis. We reiterate the contents of Personnel Circular No. 4 ‘C’ that:

> **“…. Therefore, the officer should be removed from duty immediately he receives the decision to retire him; but he should be allowed 1 months’ salary as he would in any case have been given notice before he was laid off.”** [Our emphasis]

Further Regulation J 3(f) of Posta Code J provided as follows on Termination of Service on grounds of Public Interest:

> **“Where a permanent and pensionable employee’s services are terminated on grounds of public interest under the provisions of J14 he is entitled to the leave he has earned and receives a pension or gratuity in accordance with the provisions of the Pensions Act ”** [Our emphasis]

[75] Bearing in mind that the appellants were paid their terminal dues and one month’s salary in lieu of notice, in line with both their contractual terms and with Regulation J3(f) aforesaid, we find that this appeal has no merit. It is accordingly dismissed and we uphold the judgment of the Court of Appeal.

G. COSTS

[76] Bearing in mind the history of this appeal and the principles on the award of costs enunciated in ***Rai & 3 others Vs Rai & 4 others*** [2014] KESC 31 (KLR), we are constrained to order that parties should bear their own costs.

H. ORDERS

[77] In the premise, we issue the following orders:

i) ***The appeal dated 14th March, 2025 and filed on 18th March 2025 is hereby dismissed.***

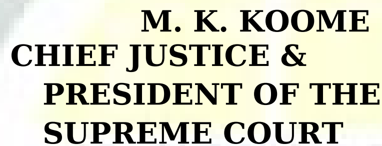
ii) ***The judgment of the Court of Appeal dated 26th July 2024 in Civil Appeal No. 394 of 2017 is hereby confirmed.***

iii) Each party will bear their own costs of the appeal before this Court.

iv) We hereby direct that the sum of Kshs. 6,000/- deposited as security for costs upon lodging of this appeal be refunded to the depositor.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **11th** Day of **December, 2025.**



……………………………………
M. K. KOOME
CHIEF JUSTICE &
PRESIDENT 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

…………………………………………
W. OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original.

REGISTRAR
SUPREME COURT OF KENYA