



**Republic v Retirement Benefits Appeal Tribunal & 2 others; Magoha & Seven others as Trustees of the University of Nairobi Pension Scheme) (Ex parte Applicant) (Civil Appeal 642 of 2019) [2026] KECA 849 (KLR) (30 April 2026) (Judgment)**

Neutral citation: [2026] KECA 849 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 642 OF 2019  
DK MUSINGA, M NGUGI & GV ODUNGA, JJA  
APRIL 30, 2026**

**BETWEEN**

**REPUBLIC ..... APPELLANT**

**AND**

**THE RETIREMENT BENEFITS APPEAL TRIBUNAL ..... 1<sup>ST</sup> RESPONDENT**

**JOHN NGUMI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ABIGAIL WANGUI DOUGLAS) ..... 2<sup>ND</sup> RESPONDENT**

**UNIVERSITY OF NAIROBI ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**PROFESSOR GEORGE ALBERT OMORE MAGOHA & SEVEN OTHERS AS TRUSTEES OF THE UNIVERSITY OF NAIROBI PENSION SCHEME) ..... EX PARTE APPLICANT**

*(Being an appeal from the Judgment and decree of the High Court, Nairobi (D. Majanja, J.). delivered on 4th October 2013 in Judicial Review Application No. 415 of 2012)*

**JUDGMENT**

1. The dispute giving rise to this appeal commenced when Abigail Wangui Douglas (Abigail), now deceased and represented by the 2<sup>nd</sup> respondent, who was an employee of the University of Nairobi ('the University'), had her employment terminated on 31<sup>st</sup> May 1989. As her pension dues were not paid in the manner she anticipated, she lodged a complaint with the Chief Executive of the Retirement Benefits Authority (the Authority) on 14<sup>th</sup> July 2007. The University opposed her claim, contending that she was not eligible for a pension on the grounds that she had been dismissed for fraud, dishonest and or gross misconduct, a fact she denied. The Authority found that following the termination of her



- services, she had been paid her retirement benefits in accordance with the provisions of the University of Nairobi Pension Scheme (the scheme) and the rules applicable.
2. Dissatisfied with that decision, Abigail lodged Tribunal Appeal Case No. 3 of 2007 to the Retirement (Benefits?) Appeals Tribunal (the Tribunal). On 28<sup>th</sup> February 2008, the appeal was allowed and the Scheme was directed to pay her benefits in terms of the Trust Deed and Rules of the Scheme which were in force at the time.
  3. The decision of the Tribunal was challenged by the Trustees of the Scheme through an application for Judicial Review lodged in the High Court to wit; Misc. Appl. JR No. 397 of 2008 Republic v The Retirement Benefits Appeals Tribunal ex-parte Professor George Magoha and Others. The learned Judge in that matter (Gacheche, J.), on 2<sup>nd</sup> August 2011, quashed the Tribunal's decision. In so doing, Gacheche J., dealt with two issues. The first one concerned jurisdiction. It had been argued by the Scheme that the Tribunal did not have jurisdiction to entertain Abigail's claim as it arose before the *Retirement Benefits Act* ("the Act") was enacted, and that the Act could not operate retrospectively. The learned judge dismissed this contention and found that the Tribunal had jurisdiction to deal with the dispute as the Act was meant to regulate, supervise and promote retirement benefit schemes, and it was clearly intended to have retrospective effect in order to achieve this purpose.
  4. The second issue concerned the contention as to whether the ex-parte applicant was accorded audience before the Tribunal prior to the decision being made. The court concluded that, on the facts, the ex-parte applicant was not accorded that opportunity, hence the Tribunal acted contrary to the principles of natural justice. It is for this reason that the judgment of the Tribunal was quashed.
  5. On rehearing the matter, the Tribunal, in its judgment dated 24<sup>th</sup> July 2012, directed the Scheme to pay Abigail her dues in accordance with the Trust Deed and Rules.
  6. The Scheme, aggrieved by the said decision instituted Judicial Review Application No. 415 of 2012, contending that the judgment was ultra vires the Tribunal's statutory authority since the Tribunal had no jurisdiction to deal with the issue of Abigail's termination by the University. The judicial review application was heard by Majanja, J.
  7. Before the learned Judge, the Scheme argued: that the Act defines the kind of disputes to be determined by the Authority, that is, complaints made by members of retirement benefit scheme who are dissatisfied with the decision of the manager's, administrators and/or trustees of the scheme; that the Tribunal, which is also established under the Act, determines appeals from persons aggrieved by the decisions of the Authority and or the Chief Executive of the Authority; that consequently, the Tribunal's appellate jurisdiction is limited to considering only the Authority's decision relating to retirement benefits schemes pursuant to the provisions of the Act and the Scheme rules; that the Tribunal misdirected itself and went outside its jurisdiction when it purported to deal with the manner in which Abigail was terminated as its jurisdiction did not extend to determining matters of employment; that all matters of employment and termination thereof were governed by the Employment Act (Act No. 11 of 2007) and the same can only be dealt with by courts of competent jurisdiction, which were the Magistrates' Court and the Industrial Court. That position was supported by the University.
  8. Abigail's position was that the proceedings were res-judicata in view of the decision of Gacheche, J., in Misc Appl. No. 397 of 2008 in which the learned Judge held that the Tribunal had jurisdiction to hear and determine the case. That judgment, according to Abigail, was conclusive on the issue whether the Tribunal had jurisdiction to deal with the matter and, as such, could not be re-litigated. Abigail, therefore contended that the Tribunal had jurisdiction to deal with the matter before it. Her



argument was that if the court were to accept the applicant's argument, then the Tribunal would remain a phantom tribunal without the power to determine issues before it.

9. In his judgment, the learned Judge picked out the issues for determination as:
  1. Whether the matter was res-judicata in light of the judgment in JR NO. 397 of 2008.
  2. Whether the Tribunal had jurisdiction to deal with matters of employment.
10. On res judicata, the learned Judge found that the issue of jurisdiction before Gacheche, J. was with respect to the question whether the Act was retrospective and that Gacheche J., held that the Tribunal had jurisdiction. According to the learned Judge, the issue of jurisdiction, as framed for consideration in the matter before him, was different as it concerned the Tribunal's jurisdiction to deal with the employment aspect of the case before it. The learned Judge further held that Gacheche, J. having quashed the initial decision, the Tribunal was entitled to hear the matter afresh, and it was that fresh decision which was under attack on the ground of jurisdiction, albeit on different grounds.
11. Regarding the issue of ultra vires, Majanja, J. held that the Tribunal is a statutory body whose jurisdiction is governed by section 48 of the Act and that it hears appeals from decision of the Authority or its Chief Executive pursuant to section 46(1) of the Act. Appreciating that the issue before him was whether, in exercising jurisdiction, the Tribunal could make a finding on the issue of Abigail's employment, the learned Judge cited this Court's decision in *Kenya Pipeline Company Limited v Hyosung Ebara Company Limited and Others Nairobi CA Civil Appeal No. 145 of 2011 (Unreported)* as well as the decision of Lord Reid in *Anisminic Limited v Foreign Compensation Commission [1969] 1 All ER 208, 213H – 214A* and found that the dispute before the Tribunal concerned an appeal from the finding of the Authority that Abigail was entitled to certain pension benefits. In his view, the issue of Abigail's entitlement was intimately connected with the manner in which she was terminated, hence the Tribunal had jurisdiction to deal with and apply its mind to all the issues necessary for the determination of the core issue before it.
12. According to the learned Judge, the jurisdiction of the Tribunal is to hear appeals from the Chief Executive of the Authority on complaints relating to Retirement Benefits Schemes, which are by their very nature related to employment. He appreciated that from many schemes, the payment of terminal dues is related to the manner in which the employment is terminated, thus, a decision as to whether retirements benefits are payable must ipso facto involve a determination of how the employment was determined, should a dispute arise. The learned Judge posited that the purpose and intent of the *Retirement Benefits Act* is to provide a dispute resolution mechanism for determination of such disputes that is efficient and effective. He held that as long as the issue for determination is connected to the primary issue of retirement benefits, then the Tribunal has jurisdiction to deal with it since the Act does not expressly bar either the Authority or Tribunal from dealing with employment issues as long as they are incidental to claim falling within the Act. It was his view that there is nothing in the Magistrates' Court Act or the Industrial Court Act that limits the jurisdiction of the Tribunal and Authority from determining the matters of employment that are incidental and ancillary to the core determination of retirement benefits disputes. To accede to such a position, he opined, would render the Tribunal a phantom body and undermine the rights of access to justice and fair, efficient and effective administrative action. From the foregoing findings, the learned Judge held that the Tribunal had the jurisdiction to deal with termination of Abigail's employment in so far as the matter was incidental to the determination of her retirement benefits.



13. Addressing the issue whether the Tribunal could deal with the matter of termination, including allegations of fraud and gross misconduct which necessitate a full hearing of the matter involving taking of oral evidence, examination or cross examination of witnesses, the learned Judge's position was that whether or not the Tribunal could deal with employment issues does not depend on the manner the inquiry would be conducted, and that the Authority and/or Chief Executive has power and authority, to investigate the complaint submitted by examining documents, taking oral evidence, or any other means that is necessary, provided the process is fair. The Tribunal, on the hand, is an appellate Tribunal whose procedure is governed by the Retirement Benefits (Tribunal) Rules 2000 which includes the rules for taking evidence where necessary. He concluded that there is no reason or difficulty in the Authority/Chief Executive or Tribunal dealing with employment issues that arise in the cause of its proceedings. The learned Judge found the Notice of Motion dated 11<sup>th</sup> December 2012 lacking in merit and dismissed it.
14. That is the decision that provoked the present appeal, which is based on the grounds that the learned Judge erred in law: in holding that the Retirement Benefits Authority and/or the Tribunal had jurisdiction to determine employment contracts and specifically the manner of termination of Abigail's employment; in holding that the Authority and/or the Tribunal had jurisdiction to call evidence relating to employment disputes; in failing to appreciate that the determination of an employment contract was a judicial process conferred expressly by *the Constitution* and by statute upon the courts and not upon subordinate tribunals such as the Retirement Benefits Authority and the Retirement Benefits Appeals Tribunal; by holding that the Authority had the power and authority to examine the documents and take oral evidence for purposes of determination of the employment dispute arising in the cause of its proceedings; and in failing to find that the Tribunal acted ultra vires its statutory duty by dealing with Abigail's termination by the University; and in dismissing the appellant's application dated 11<sup>th</sup> December 2012.
15. We heard this appeal on this Court's virtual platform on 14<sup>th</sup> January 2026 when learned counsel, Mr Kahura, appeared for the appellant while learned counsel, Mr Mwangi, held brief for Mr Agimba for the respondents. Learned counsel relied on their respective written submissions with minimal highlighting.
16. On behalf of the appellant, it was submitted, based on the preamble to the *Retirement Benefits Act*, sections 46(1), and 48 (1)(2) of the said Act as read with the Supreme Court decision in *Mumba & 7 others v Munyao & 148 others* [2019] KESC 83 (KLR) and this Court's decision in *Kenya Railways Corporation v Ododa & 126 others* [2024] KECA 1620 (KLR), that the dispute between the parties was the circumstances under which Abigail's employment had been terminated. According to the appellant, the Tribunal's appellate jurisdiction is limited to considering only the Authority's decision relating to retirement benefits schemes pursuant to the provisions of the Act and the scheme rules under which a particular scheme is established. It was noted that the Tribunal, in its judgment, appreciated that the main bone of contention was the manner of termination of Abigail's employment and correctly held that this was not a dispute within its jurisdiction but was solely a dispute between an employee and an employer whose first port of call for determination was the Industrial Court. Only after the mode of termination was determined, it was submitted, could an issue of pension entitlement arise. To the appellant, it would be contrary to law and public policy for the Tribunal to be allowed to decide matters not within the Act that establishes it, and it would be a dangerous precedent to encourage specialist tribunals to decide matters outside their mandate and expertise. Before us, Mr Kahura contended that the jurisdiction of the Tribunal and the Employment and Labour Relations Court (ELRC) is clearly delineated, and that the issues concerning termination of employment can only be determined by the ELRC.



17. The respondent, in his submissions, equally cited the preamble to the *Retirement Benefits Act*, sections 46(1), and 48 (1)(2) of the said Act and contended that the Tribunal, as an appellate body, is not merely a reviewer, but must evaluate whether the Authority correctly applied the Act, scheme rules, trust law principles and relevant factual circumstances. This, it was submitted, requires examining facts surrounding the termination only to the extent necessary to determine pension entitlement. To seek to isolate termination from pension entitlement, it was submitted, is contrary to the statutory mandate of the Authority, trust law (where a beneficiary's rights flow from factual circumstances), the purpose of the pension law as social protection and the binding judicial authority. Since Abigail was denied her employer's contribution on allegation of misconduct, it was contended, on the authority of the case of *Albert Chaurembo Mumba & 7 Others v Maurice M. Munyao & 148 Others* [2016] KECA 160 (KLR), that her pension entitlement could not be determined without resolving whether the termination was on the basis of misconduct because termination was the legal trigger for forfeiture. In the respondent's view, the claim before the Tribunal was not about unfair termination but was about whether: the appellant's benefits under the scheme were correctly computed; the trustees correctly applied the Scheme Rules when categorising the appellant as having been terminated for gross misconduct; and whether the purported categorisation unlawfully reduced the respondent's pension benefits. These matters, it was contended, squarely fall under section 48 of the Act which gives the Tribunal power to determine any dispute relating to the management, administration and application of the Scheme Rules and is permissible under section 51(1) of the Act. The Tribunal, according to the respondent, must examine the termination documents because the amount payable under a pension scheme depends on the nature of exit; if the employer misapplies the exit, the member's benefits are unlawfully reduced; and trustees must verify the accuracy of employer records before applying the rules. Consequently, jurisdiction would be incomplete unless the Tribunal examined the evidence behind the label.
18. The respondent was of the view that the appellant's argument would render the Tribunal toothless as the employer could, based on wrongly labelling termination, reduce a member's benefits and claim that no retirement benefits forum could question the label. Citing the case of *Blassio Ondiek v Retirement Benefits Appeal Tribunal & 950 others* [2021] KEHC 13238 (KLR), it was submitted that when an employment related fact affects pension rights, the Tribunal may inquire into that fact without usurping labour jurisdiction. We were urged to defer to the Tribunal's factual finding since, according to the respondent, the decision in *Selle v Associated Motor Boat Co. Ltd* [1968] EA 123 is inapplicable to this matter and to dismiss the appeal.
19. We have considered the submissions made in this appeal.

In our view, the single issue for determination is whether, in the circumstances of this appeal, the learned Judge was correct in finding that the Tribunal had the jurisdiction to deal with the issue of termination of Abigail's employment. In determining this issue, we are called upon to interrogate sections 46(1) and 48 of the Act. It is not in doubt that the Tribunal hears appeals from decisions of the Authority or its Chief Executive under section 46(1) of the Act which provides;

Any member of a scheme who is dissatisfied with a decision of the manager, administrator, custodian or trustees of the scheme may request, in writing, that such decision be reviewed by the Chief Executive Officer with a view to ensuring that such decision is made in accordance with the provisions of the relevant scheme rules or Act under which the scheme is established.



20. Section 48 of the Act, on the other hand, provides as follows:
1. Any person aggrieved by a decision of the Authority or of the Chief Executive Officer under the provisions of this Act or any regulations made thereunder may appeal to the Tribunal within thirty days of the receipt of the decision.
  2. Where any dispute arises between any person and the Authority as to the exercise of the powers conferred upon the Authority by this Act, either party may appeal to the Tribunal in such manner as may be prescribed.
21. According to its preamble, the *Retirement Benefits Act* is:
- An Act of Parliament to establish a Retirement Benefits Authority for the regulation, supervision and promotion of retirement benefits schemes, the development of the retirement benefits sector and for connected purposes.
22. Clearly therefore, the mandate of the Chief Executive Officer of the Authority, as stated in section 46(1) aforesaid, is to ensure “that decision of the manager, administrator, custodian or trustees of the scheme is made in accordance with the provisions of the relevant scheme rules or Act under which the scheme is established”. In its judgment in *Mumba & 7 others v Munyao & 148 others* (supra), the Supreme Court held that:
- “(89) It is clear that the powers of adjudication given to the CEO under the said provision is in respect of the application of the rules of a retirement benefits scheme and the prevailing written law under which the scheme is established, in this case the Deed of Trust establishing the Kenya Ports Authority Pension Scheme.”
23. It is clear from the decision of the Tribunal that it delved into the manner in which Abigail’s employment was terminated. The Tribunal found that the reason for the termination of Abigail’s employment was devoid of merits. In its view, the Authority should have considered the manner in which Abigail’s employment was terminated.
24. In our view, Abigail’s claim was hinged upon a finding on whether or not her employment was lawfully terminated. It was only upon a finding that she was not lawfully terminated that her claim could succeed. That finding was therefore a prerequisite to her success. A finding as to whether an employee was properly terminated, in our view, cannot be equated to a finding “in respect of the application of the rules of a retirement benefits scheme and the prevailing written law under which the scheme is established.” The Supreme Court appreciated this when it held in the above case that “the purpose of the RBA Act as a whole would be best served by reading the words as imperative terms that require, in the absence of any contrary laws, a strict interpretation of its provisions”.
25. We reiterate the legal position that in testing whether a statute has conferred jurisdiction on an inferior court or a tribunal, the wording must be strictly construed: it must, in fact, be an express conferment and not a matter of implication since a tribunal, being a creature of statute, has only such jurisdiction as has been specifically conferred upon it by the statute. Therefore, where the language of an Act is clear and explicit, the court must give effect to it because the words of the statute speak the intention of the legislature. See *Warburton v Loveland* [1831] 2 DOW & CL. (HL) at 489.
26. The jurisdiction to deal with matters relating to the propriety or otherwise of termination of an employment is reserved for the Employment and Labour Relations Court pursuant to Article 162(3)



of *the Constitution* as read with section 12(1)(a) of the *Employment and Labour Relations Court Act* which provides for the jurisdiction of that court in the following terms:

1. The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including— (a) disputes relating to or arising out of employment between an employer and an employee. [Emphasis ours].
  
27. Therefore, where a determination by the Tribunal is dependent on a finding that ought to be made by the Employment and Labour Relations Court, as is the case here, it is imperative that such a finding be made prior to the Tribunal being seized of jurisdiction. We are persuaded by the views of Madan, J. (as he then was) in *Choitram and Others v Mystery Model Hair Saloon* [1972] EA 525 where he held that:  
  
“Lack of jurisdiction may arise in various ways. There may be an absence of these formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry...Powers must be expressly conferred; they cannot be a matter of implication.” [Underlining ours].
  
28. It is therefore our view that the Tribunal had no jurisdiction to embark on the investigation as to whether Abigail’s employment was properly terminated. That was a jurisdiction reserved for the predecessor of the Employment and Labour Relations Court, which was the Industrial Court.
  
29. We find merit in this appeal, set aside the learned Judge’s decision, in Nairobi High Court Judicial Review Application No. 415 of 2012, dismissing the Notice of Motion dated 11<sup>th</sup> December 2012, and substitute therefor an order allowing the application.
  
30. In the circumstances of this case, where Abigail is deceased, we make no order as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF APRIL 2026.**

**D. K. MUSINGA (PRESIDENT)**

.....

**JUDGE OF APPEAL**

**MUMBI NGUGI**

.....

**JUDGE OF APPEAL**

**G. V. ODUNGA**

.....

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**

