



Ngokonyo & 2 others v Telcom Kenya Limited (Civil Appeal (Application) 394 of 2017) [2025] KECA 316 (KLR) (21 February 2025) (Ruling)

Neutral citation: [2025] KECA 316 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 394 OF 2017
DK MUSINGA, F SICHALE & FA OCHIENG, JJA
FEBRUARY 21, 2025**

BETWEEN

**FRANCIS WAITHAKA NGOKONYO 1ST APPLICANT
SUDI ABDALLA 2ND APPLICANT
ANDREW MUGA 3RD APPLICANT**

AND

TELCOM KENYA LIMITED RESPONDENT

(Being an application for certification of the matter as of general importance qualifying for an appeal to the Supreme Court of Kenya from the Judgment of the Court of Appeal at Nairobi (Nyamweya, Mativo & Gachoka, JJ. A) dated 26th July 2024 in Civil Appeal No. 394 of 2017)

RULING

1. The applicants herein were the respondents in the appeal before this Court. The respondent asked the applicants to retire from their employment in public interest. The applicants were aggrieved by this decision and sought anticipatory salary and allowances until their respective retirement ages. The High Court awarded them almost Kshs.30,000,000. However, this decision was set aside by this Court leading to the present application.
2. Being dissatisfied with the judgment of this Court, the applicants filed the application dated 8th August 2024. The application is brought under the provisions of rules 1(2) & 41(2) of the Court of Appeal Rules, and Article 163(4)(b) of *the Constitution*. The applicants pray for orders that:
 - a. The court be pleased to certify this matter as raising pertinent issues of general public importance that are fit for an appeal to the Supreme Court.



- b. The court do grant leave to the applicants to appeal to the Supreme Court against the judgment delivered on 26th July 2024.
 - c. The respondent be condemned to pay the costs of this application.”
3. The application is premised on the following grounds:
- a. The applicants filed a notice of appeal dated 2nd August 2024.
 - b. The impugned judgment raises pertinent matters of general public importance that would be compelling to be revisited, considered, and determined by the Supreme Court.
 - c. Justice dictates that the application be allowed for the ends of justice to be met.”
4. The application is further supported by the affidavit of Francis Waithaka Ngokonyo, on his own behalf and on behalf of the 2nd and 3rd applicants as follows:
- a. The consolidated claims before the trial court were with regard to the terminal benefits owed to the applicants by the respondent, upon their retirement in public interest in 1991.
 - b. The applicants were awarded Kshs.29,623,648.30 by the trial court in its judgment dated 20th December 2013.
 - c. The judgment was set aside by this Court by its judgment dated 26th July 2024.
 - d. Being aggrieved, the applicants wish to appeal to the Supreme Court on the following grounds of general public importance:
 - i. The Supreme Court to settle the conflicting Court of Appeal decisions on the matter of rightful commensurate compensation on wrongful, unlawful termination of employees prior to the promulgation of the 2010 Constitution. For instance, in the cases of *Gad David Ojuando v Prof. Nimrod Bwibo & Others*, [*CA 336 of 2005*](#), and *Kenya Ports Authority v Silas Obengele*, [*CA 38 of 2005*](#), the Court of Appeal awarded employees compensation in terms of salaries and allowances for the remainder of the years they were to work as opposed to many other decisions to the contrary.
 - ii. The Supreme Court to settle the issue of whether under Section 46(1) of the [*Retirement Benefits Act*](#), the Court of Appeal has no jurisdiction to determine matters relating to the pension of employees.
 - iii. The Supreme Court to determine the legal regime in which the applicants qualify for compensation in damages, the cause of action having occurred before the 2010 Constitution.
 - iv. The Supreme Court to determine whether retirement in the public interest would legally be considered as falling under the general unlawful termination of employment.
 - v. The Supreme Court to determine whether the applicants’ retirement before the 2010 Constitution meant that they were not entitled to compensation in damages for wrongful termination.
 - e. This matter falls within the ambit of a matter of general public interest as the questions posed transcend an individual claim and it would be for the benefit of the general public and other employees.”



5. In response, the respondent in its replying affidavit sworn by Stella Wawira, the director, legal and regulatory affairs of the respondent, stated as follows:
 - a. The application does not meet the requisite threshold for certification because the issues raised are limited to contractual rights that concern an exceptional contract or clause which do not transcend the circumstances of this particular case or have a bearing on public interest.
 - b. The issues raised do not raise substantive points of law to warrant the invocation of the appellate jurisdiction of the Supreme Court.
 - c. The applicable law and legal regime for awarding damages for unlawful or unfair termination before the 2010 Constitution and the *Employment Act* of 2007 were repealed, and the issue was settled. The fact that there are two conflicting decisions on the issue does not render the law uncertain.
 - d. The law on the jurisdiction of the Court to hear and determine pension matters has been settled by the Supreme Court in the case of *Albert Cherambo Mumba & Others v Maurice Munyao & 148 Others* [2019] eKLR as being anchored on the fiduciary relationship between the pension scheme and the employee as opposed to an employer-employee relationship.
 - e. The issue of whether retirement in the public interest can be legally considered unlawful termination of employment and not a grave disgraceful retirement that would attract commensurate compensation is being raised for the first time and was not determined by the two courts below.
 - f. The application is unmerited and it ought to be dismissed with costs.”
6. When the application came up for hearing on 18th December 2024, the firm of N.O. Sumba appeared for the applicants, whereas the respondent was represented by the firm of Oraro & Company Advocates. Counsel relied on their respective written submissions, which they briefly highlighted.
7. Mr. Sumba wholly relied on his written submissions dated 16th October 2024 which mirrored the affidavit in support of the application herein, in submitting that where there are conflicting decisions of this regarding retirement in public interest and the Supreme Court is best placed to resolve the uncertainty.
8. The applicants relied on the Supreme Court case of *Telkom Kenya Limited v John Ochanda*, No. 17 of 2014 in which the Court set out the principles applicable in determining whether a matter is of general public importance. The Court also held that the issues, in that case, transcended the circumstances of the parties and had implications for other persons working in parastatals, dismissed on grounds of redundancy. They submitted that this matter falls within the same category, especially on the issue of retirement in the public interest.
9. The respondent relied on the case of *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* [2013] eKLR in setting out the applicable principles when determining whether a matter is one of general public importance and submitting that the intended appeal does not raise substantial grounds for certification.
10. The respondent submitted that a mere contradiction in the holding in two cases as against numerous cases does not reflect a conflict in the position in law as regards anticipatory salaries and allowances. While relying on the case of *Malcom Bell v Hon. Daniel Toroitich Arap Moi* [2013] eKLR, the respondent pointed out that this Court has the power to canvas legal principles and settle a technicality of law, and such a scenario would fall outside the ambit of matters of general public importance.



11. Citing the case of *Koinange Investment & Development Limited v Robert Nelson Ngethe* [2013] eKLR, the respondent noted that the Court held that it was not the role of the Supreme Court to deal with correction of errors in the application of settled law, even where such is shown to exist. The respondent submitted that there are several cases by this Court before the promulgation of the 2010 Constitution which hold that an aggrieved employee is entitled to damages provided for under the contract.
12. The respondent further submitted that there was no need for the Supreme Court to determine the issue of uncertainty in the law of compensation for unlawful termination before the current Constitution as the issue was already settled.
13. The respondent reiterated that pension is a private contract between an employee and the pensions scheme, and therefore, having been retired in the public interest, the applicants' case was limited to contractual rights that concern unique clauses and not in the interest of the public.
14. We have carefully perused the application, the rival affidavits by the parties, submissions by counsel, the authorities cited, and the law. The issue for determination is whether the application herein meets the threshold for certification.
15. Article 163(4) of *the Constitution* provides that appeals shall lie to the Supreme Court from this Court as of right, in any case involving the interpretation or application of *the Constitution*, and in any matter where it is certified that the appeal involves a matter of general public importance. The article provides thus:

“ Appeals shall lie from the Court of Appeal to the Supreme Court—

 - a. as of right in any case involving the interpretation or application of this Constitution; and
 - b. in any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).”
16. The applicants have lodged this application on the basis that the issues raised are matters of general public importance. The principles governing what constitutes matters of ‘general public importance’ were set out by the Supreme Court in *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscione*, (*supra*), as follows:
 - i. for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;
 - ii. where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;
 - iii. such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;
 - iv. where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;



- v. mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163 (4)(b) of *the Constitution*;
 - vi. the intending applicant has an obligation to identify and concisely set out the specific elements of “general public importance” which he or she attributes to the matter for which certification is sought;
 - vii. determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.”
17. The Supreme Court went on to answer the question of what constitutes a matter of general public importance as follows:
- “... “a matter of general public importance” warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: its impacts and consequences are substantial, broad-based, transcending the litigation-interests of the parties, and bearing upon the public interest. As the categories constituting the public interest are not closed, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern.”
18. The Supreme Court also defined what a matter of general public importance is, in the said case as follows:
- “In litigating on matters of “general public importance”, an understanding of what amounts to ‘public’ or ‘public interest’ is necessary.
- “Public” is thus defined: concerning all members of the community; relating to or concerning people as a whole; or all members of a community; of the state; relating to or involving government and governmental agencies; rather than private corporations or industry; belonging to the community as a whole, and administered through its representatives in government, e.g. public land.”
19. It is against the aforesaid principles that we consider this application. It is common ground that the issues raised by the applicants related to the termination of their contracts of employment and subsequent payment of terminal benefits. The cause of action arose from a contract of employment between an employer and an employee.
20. The applicants have placed more emphasis on the issue of conflicting decisions by this Court when awarding anticipatory salaries and allowances until retirement age. They listed two conflicting decisions in this regard. They argued that there are conflicting decisions on this question and that the opportunity is now for the Supreme Court to put the matter right. The respondent refuted this claim by stating that it is not the role of the Supreme Court to deal with the correction of errors in the application of settled law as such a scenario falls outside the ambit of general public importance.
21. It is trite that conflicting decisions of the Court on a particular issue do not by itself render such an issue to be one of public importance for purposes of Article 163(4) of *the Constitution*. The Supreme



Court expressed itself on that question in *Malcolm Bell v Daniel Toroitich Arap Moi And Others*, (supra), as follows:

“In the instant matter, the Court of Appeal alluded to the existence of conflicting decisions on the question: when does time begin running, in regard to the emergence of rights of adverse possession? That is a straightforward issue, which lends itself to resolution on the basis of a review of factual scenarios, and a review of the decisions of the superior Courts rendered over the years; and on that basis the Court of Appeal has it in its power to canvass the legal principles and to settle the technicality of the law, for the time being. Such a scenario falls outside the profile of “matter of general public importance.”

22. The applicants’ main concern regarding the decision of this Court appears to be that the High Court initially awarded them approximately Kshs.30,000,000.00 for wrongful termination, as anticipatory salary and allowances but this amount was set aside by this Court for not being provided for by statute. The applicants now seek a determination of whether they are entitled to those damages, given that their cause of action arose before the promulgation of the current Constitution. In the *Malcolm Bell* case, the Supreme Court held that:

“It is a principle embedded in this Court’s decision in the *Hermanus Steyn* case, that: “where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest.”

23. 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.

24. 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*.

25. It is our considered view that the present application has met the test established in the *Hermanus Steyn* case by reason that it has demonstrated to the Court's satisfaction the existence of specific elements of general public importance which are attributed to this matter.

26. In the result, we certify that this is a matter of general public importance and grant leave to the applicants to appeal to the Supreme Court.

27. As this is a matter in the public interest, each party shall bear its own costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY, 2025.

D. K. MUSINGA, (PRESIDENT.)

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.

