Murata Sacco Society Ltd v Banking Insurance and Finance Union (Kenya) (Civil Appeal 3 of 2020) [2025] KECA 173 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 173 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 3 OF 2020

SG KAIRU, F TUIYOTT & PM GACHOKA, JJA

FEBRUARY 7, 2025

BETWEEN

MURATA SACCO SOCIETY LTD ..... APPELLANT

AND

BANKING INSURANCE AND FINANCE UNION (KENYA) ..... RESPONDENT

(Being an appeal from the Judgment/Order of the Employment and Labour Relations Court at Nairobi (Monica Mbaru, J) dated 7th October 2014 in ELCR No. 616 of 2020)

JUDGMENT

1. Murata Sacco Society Ltd (Murata or the Sacco or the appellant) is aggrieved by the decision of the Employment and Labour Relations Court (Monica Mbaru, J) dated 7th October 2018 and urges us to set aside the order obliging it to pay a total sum of Kshs. 42,907,510.20 to various claimants (the Grievants) brought under the auspices of Banking Insurance and Finance Union (Kenya) (the Union or the respondent).

2. The Union is a Trade Union representing all unionisable employees in Banking, Saccos, Insurance Companies and Financial organisations, while Murata is a Limited Liability Savings and Credit Society registered under the *Co-operative Societies Act*.

3. Before the trial court, the Union asserted that it had signed a Recognition Agreement with the Sacco on 7th June 2005 and a Collective Bargaining Agreement (CBA) on 18th September 2006 (the 2006 CBA). The grievance by the Union is that on 18th May 2007, the Sacco wrongfully terminated the services of ninety-three (93) employees who are members of the Union under the pretext of re-organisation or retrenchment and voluntary early retirement. The wrongful termination was under Clause 12 of the CBA but done without consultation and following due process as envisaged in the said Clause.

4. The termination was communicated through letters dated 18th May 2007 written by the Sacco's General Manager which stated that the termination to be under either Clause 11 or Clause 12 of the CBA, depending on the age of the employee. The Union complained that the Sacco had ignorantly and motivated by malice refused to pay the terminal benefits to the Grievants under Clause 9(a) of the CBA which provided:

> " Terminal Benefits
>
> An employee whose service have been terminated, resigned, wrongly dismissed shall be entitled to all benefits provided the said employee has completed the probation period.
>
> Such an employee shall be paid gratuity calculated at the rate of two (2) months basic salary for each completed year of service at the time of termination.
>
> Where an employee is entitled to other benefits, e.g. Leave, Leave pay, etc. a prorata compensation shall be made at the time of discharge."

5. So as to resolve the grievance of these members, the Union reported the existence of a Trade Dispute to the Minister for Labour and Human Resources Development on 21st May 2007 and on the basis of section 4 of the Trade Dispute Act (now repealed), the Chief Industrial Relations Officer, in consultation with the Tripartite, accepted the dispute in accordance with section 7 of the Act and appointed Mr. J.A.M. Chigiti to endeavour to settle the dispute by investigation. The Minister made findings dated 27th November 2008 where it was recommended that ½ salary compensation for every year worked be paid to all Grievants. The Union complained that the Sacco had failed to honour the findings and recommendations and refused to pay the terminal benefits as per Clause 9(a) on terminal benefits of the CBA.

6. In an annexed Statement of Claim dated 27th June 2013, the Union elaborated the manner in which the Sacco had violated Clause 12 of the CBA; the termination on account of retrenchment was without just cause or excuse and in breach of the principles of natural justice and/or an act of mala fides by the Sacco; the Grievants were not informed or notified or consulted of the impending retrenchment; the principle of LIFO was not applied; the criterion employed by the Sacco as to who would go and who would remain was unclear; and taxation of the benefit was wrongly worked out which resulted in over taxation of the terminal benefits.

7. The Sacco resisted the claim through an amended Memorandum of Reply dated 23rd July 2013. In it, the Sacco averred that the parties had negotiated several CBA's, the last one being one dated 31st December 2009 covering the period 1st January 2006 to 31st December 2007. It explained that it operated a retirement benefit scheme established in 1996 for the pensionable employees, a scheme originally called Muranga District Cooperative Union Staff Pension Scheme renamed several times eventually to Murata Sacco Limited Staff Provident Fund.

8. The pension scheme morphed over time and eventually in January 2006 all accounts of members were updated resulting in top up payments being made to any employee whose account was not updated. The understanding of the parties, it was contended, when paying the lump sum into the scheme was that the benefit under the scheme would replace the gratuity referred to in Clause 9(a) of the CBA. In addition to the gratuity, the parties had negotiated a specific benefit of 23 days per completed year of service for retrenchment.

9. The Sacco explained why it released a total of 100 employees under Clause 11 and 12 of the CBA: computerization of services necessitated reduction of staff; the Sacco released those employees who were not able to be trained on use of computers due to their age; and there was a consideration of

productivity, performance and ability. Employees who had not attained the age of 45 years were released on retrenchment under Clause 12 of the CBA while those who were above 45 years were retired under Clause 11 of the CBA.

10. The Sacco contended that all employees were paid their benefits.

    Each employee acknowledged receipt and signed the letter forwarding the cheques in respect of payment. It asserts that all the affected employees accepted the payment of their terminal dues voluntarily.

11. As to why the Sacco rejected the Minister's recommendations, it averred that the recommendations were based on extraneous matters and wrong interpretation of the law in holding that; the employees were declared redundant without following the right procedure in the CBA; the CBA is not favourable as it contravenes the law particularly on the issue of notice; and most of the retrenched employees went home with nothing as they had outstanding loans which were demoralizing and put them in a total financial mess.

12. Elaborating as to why the recommendations of the Minister would be erroneous, the Sacco argued that the conciliator dealt with an issue not reported to the Minister and from the finding that the employees were declared redundant without following the right procedure, demonstrated that the conciliator had not familiarized himself with the provisions of the CBA which specifically provided for retrenchment. On the holding that the CBA was against the law, the Sacco took the position that it was not an issue in the dispute nor was the conciliator qualified to make a finding which was a matter of law and that in any case the clause was negotiated by the parties and registered in court, after approval of the CBA by the Minister. On the last finding, the conciliator's decision is criticized as neither supported by facts nor issues that would qualify for consideration. Further, it was contended, the employees admitted that they had been paid terminal dues some of which were utilized to pay their outstanding loans to the Sacco.

13. The trial court heard two witnesses on behalf of the union, Charity Wambui Wahinga alias Gitau and Benard Mucheru Muchiri, and James Kamau Gachau for the Sacco. The evidence of the witnesses substantially followed the averments in the pleadings.

14. In the impugned judgment of 7th October 2014, the trial Judge (M. Mbaru, J) framed three issues: what was the law applicable to the dispute; whether the retrenchment and voluntary early retirement were properly applied; and whether the claimants were entitled to the remedies sought.

15. To the first issue, as to the law applicable, the learned trial Judge held that the important date being 17th May, 2007, the date of termination, the operative law was the *Employment Act*, Cap 226 (now repealed). On whether the procedure for retrenchment or voluntary early retirement was followed, the trial court found both to have been breached.

16. Regarding the remedies, the trial court found that, in addition to a three (3) months gross salary as damages, the Grievants were entitled to gratuity computed at 2 months' basic salary for each completed year of service.

17. Although, the memorandum of appeal filed before us raises 22 grounds, Mr. Kamau Kuria Senior Counsel representing the Sacco, properly in our view, rallied the grounds under the three broad themes:

    a. Whether the learned Judge erred in holding that the termination of the appellant's former employees was wrongful.

    b. Whether the learned Judge erred in granting general damages for purported unlawful termination.

c. Whether the learned Judge erred in ordering the payment of gratuity despite the establishment of a provident fund.

18. It is argued by the Sacco, in its submissions, that the repealed *Employment Act* applied to the terms of service of its former employees which were contained in the 2006 CBA as the termination was undertaken on 17th May, 2007 and its document titled 'Agreement between management staff of Murata Sacco Society Ltd and Murata Sacco Limited Society' dated 18th September 2006. It is contended, therefore, that through the CBA, the Grievants, through the Union, had entered into an agreement with the appellant. Reference is made to the decision in National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR cited with approval in Five Forty Aviation Limited v Erwan Lanoe [2019] eKLR to support the argument that it is ordinarily not part of equity's function to allow a party to escape from a bad bargain except in special cases.

19. The Sacco asserts that section 16 of the repealed *Employment Act* provided that an employer may terminate the contract without notice upon payment of the employee wages or salary in respect of the period notice required to be given and as the evidence by the Union demonstrated, the Grievants received a month's salary in lieu of notice and salary for days worked. Similarly, from

Clauses 12 and 13 of the CBA, the Sacco was entitled to retrench or retire its employees and in that case, there was no provision for notification of the Union, however this was done by copies of the letters of retirement and retrenchment sent to the Grievants. Therefore, the former employees failed to tender evidence of the alleged unfairness of the termination. The Sacco thus argues that its actions were consistent with the repealed *Employment Act*, referencing the decision in Patrick Nyakonu Ombati v Credit Bank Limited [2016] eKLR, whose holding is that the remedy for wrongful dismissal under the repealed Act is the salary for the notice period outlined in the employment contract.

20. Connected, the Sacco submits that the ELRC awarded the former employees three months' gross salary as damages for unlawful termination and this is despite the fact that it had already paid one month's salary in lieu of notice and despite the provisions of section 16. Cited are the decisions in Unilever Tea Kenya Limited v John Kememia Gitau [2017] eKLR and Joseph Ileli Kikumbu v Central Bank Of Kenya [2019] KECA 747 (KLR), which held that the repealed *Employment Act*, at section 16, does not allow for damages in cases of wrongful termination. The Sacco challenges the award of general damages for unlawful termination, stating that neither the CBA nor the repealed *Employment Act* supports such damages.

21. On the issue of payment of gratuity, it is contended for the Sacco that the learned judge erred in awarding gratuity under clause 9 of the 2006 CBA when in fact the Sacco and the predecessor of the claimants had agreed to do away with the gratuity clause and instead established a pension scheme for its employees, though the changes were not effected in the CBA. In the said scheme, the appellant contributed 17% while the employees contributed 5% and none of them opposed that arrangement. In addition, each former employee was paid a severance pay. The appellant cites 748 Air Services Limited v Theuri Munyi [2017] eKLR and the English Court of Appeal case of Globe Motors Inc v TRW Lucas Variety Electric Steering Ltd [2016] EWCA Civ 396 to support the proposition that parties to a contract are free to agree on whatever terms they choose to undertake and even where the contract did not contain an oral variation clause, the parties could make a new contract varying the original contract by oral agreement. Cited also is Chitty on Contracts, General Principles, 26th edition at paragraph 876 that the subsequent actions of parties are inadmissible to interpret a written agreement, although they are admissible to show what the terms of a contract were, either originally or by variation, or as basis for an estoppel.

22. Elaborating, the Sacco asserts that 2 months' salary gratuity was deposited each year in each employee's pension account in 2005 and thereafter all the employees were beneficiaries of the defined contributory scheme to which contributions were made up to the time the employees were released in May 2007. That in addition, a subsequent CBA for the period 2008 to 2009 was entered in which clause 9(a) providing for gratuity pay had been deleted as agreed and replaced with the benefit under the pension scheme. Support of this argument was sought in the decision of Chengo Kitsao Chengo v Umoja Rubber Products Ltd [2017] eKLR where this court held that an employee is not entitled to service pay where he is a member of a pension or provident fund scheme or gratuity or service pay scheme established under a CBA. The Sacco urges this court to find that in light of the deposit of the gratuity being made in the provident fund scheme, the former employees are disentitled to gratuity as ordered by the trial court.

23. Before us, the Union was represented by learned counsel Mr. Kariuki and Mr. Munoru. In response, the Union submitted that the applicable law herein is the Trade Disputes Act Cap 234 (repealed) and the CBA for the 2006 to 2007 period at the time of termination. It is argued that the Union was not a party to the document allegedly signed on 18th September, 2006 which related to management staff and/or non-unionisable employees of the Sacco. It is contended that section 16 of the repealed *Employment Act* does not apply and any authorities in support thereof. That the Grievants' employment contracts were terminated by express application of clause 12 of the CBA which the Sacco did not adhere to save for the payment of twenty-three (23) days' salary for every year completed and one (1) month's salary in lieu of notice. That the Sacco avoided using clause 10 on redundancy as there was no evidence of inability to pay and which has a stricter procedure to comply. Thus, the termination was wrongful and unfair and the trial court was duty bound to enforce the obligation and order for damages/compensation for non-observance of the obligation by the Sacco.

24. The Union further contends that section 15 (1)(ii) of the Trade Disputes Act which was the applicable and appropriate law for compensation, gave the court the leeway to award up to a maximum of twelve months' wages compensation. Section 15 of the Trade Disputes Act is lauded as the basis of the progressive provisions of section 49 of the *Employment Act*, 2007. The Union cites the case of Kiambaa Dairy Farmers Co-Operative Society Limited v Rhoda Njeri & 3 others [2018] eKLR where the court supported the argument.

25. The Union further argues that the terms/benefits negotiated under the CBA are diverse and nothing stops the parties from agreeing on terms and conditions of employment over and above what is provided for under any written law. Similarly, under the management staff agreement, clause 7 provided for payment of terminal benefits which included gratuity at the rate of 2 months' current basic salary for each completed year of service. That the same agreement also had a separate provision for provident fund under clause 8 wherein the appellant was contributing 17% of the basic salary and the employee 5%. It is contended that gratuity is not exclusive of the provident fund but a standalone benefit upon termination of employment and the inclusion of the gratuity and provident fund was mutually agreed and the 2006 CBA terms under clause 9(a) on gratuity is binding upon the parties. The Union sought to distinguish the case of 780 Air Services Aviation v Theuri Munyi [2017] eKLR from the circumstances in the present dispute as the parties here had agreed to the changes in the future and not applying retrospectively and thus the deletion of clause 9(a) for the period of 2008 to 2009 was not to apply retrospectively. The Union cites the cases of Civil Appeal No. 31 of 2015; Kenfreight (E.A.) Limited v Benson K. Nguti [2016] eKLR and Supreme Court Petition No. 37 of 2018; Kenfreight (EA) Limited v Nguti (Petition 37 of 2018) [2019] KESC 79 (KLR) which held that company policies and practices are binding.

26. The Union submits that there was no material evidence of variation or consent placed before the trial court with regard to gratuity and the provident fund. The two were running parallel in the CBA even before the Union came to represent the unionisable employees. The Union points out that the pension/provident fund scheme did not start in 2005 as alleged by the Sacco and what the Sacco paid to the pension fund was demanded by the trustees as underfunding of the pension scheme as remittances were not up to date. That in addition, the Union draws strength from a similar case filed by it, Cause No. 83 (N) of 2009 Jackson Muchoki Mwangi v Murata Sacco Society, where it was held that the claimant was entitled to gratuity in 2009 and thus the Grievants herein who were terminated in May 2007 were entitled as well.

27. As a first appellate Court, our duty is to re-evaluate the evidence afresh and to draw our own conclusion having regard to the fact that, unlike the trial court, we did not see or hear the witnesses testify. This position was stated in the case of Selle & Another v. Associated Motor Boat Company Ltd. & Others [1968] EA 123 as follows:-

> " I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled.
>
> Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v. Ali Mohamed Sholan (1955) 22 EACA 210)."

28. Emerging from the pleadings and proceedings at trial, the memorandum of appeal and submissions by the parties, we agree that the issues identified by counsel for the appellant are the proper issues for our consideration. They are, it bears repeating:

    a. Whether the learned Judge erred in holding that the termination of the appellant's former employees was wrongful.

    b. Whether the learned Judge erred in granting general damages for purported unlawful termination.

    c. Whether the learned Judge erred in ordering the payment of gratuity despite the establishment of a provident fund

29. On 18th September, 2006, the Union and the Sacco signed a Collective Bargaining Agreement (the 2006 CBA) incorporating the terms of contract of service between the Sacco and all its unionisable employees, within which category the Grievants fell. Regarding the effective date of the CBA, it was agreed to be from 1st January, 2006 to 31st December, 2007. Then the CBA unequivocally avowed:

> "The terms of this agreement shall be subject to any relative legislation enacted during the period of the agreement which might be necessitating alteration or amendment to the agreement."

30. During the subsistence of the agreement, the statute that governed employment in Kenya was the *Employment Act*, Chapter 226 (the repealed statute) which was repealed by the *Employment Act*, 2007 which came into operation on 2nd June, 2008, a date after the lapse of the CBA. In effect, the relationship between the Grievants and the Sacco was governed by the 2006 CBA and the *Employment Act*, Chapter 226 and the learned Judge was spot on, on this. It is against the provisions of the 2006 CBA and the *Employment Act*, Chapter 226 that an examination of the legality of the termination of Grievants termination on 17th May, 2007 must be carried out.

31. As explained by the Union, borne out by the evidence and conceded by the Sacco, the termination fell into two categories; by retrenchment and by retirement. The differentiation was that the employees who had not attained the age of 45 years were released on retrenchment while those above 45 years were retired.

32. Regarding those who were retired, the Sacco invoked the provisions of clause 11(ii) of the CBA which reads:

> "(ii) An employee who is forty-five (45) years of age may retire or be retired by the Sacco with reasons after he/she has completed ten (10) years of continuous service and he/she be entitled to all normal benefits"

33. In the template letters of 18th May, 2007 regarding retirement, the SACCO gave the following as the reason for retiring the staff themselves:

> " As part of the above ongoing exercise, Murata Sacco Society Limited has had to take the inevitable step of reducing its staff outlay."

34. The giving of a reason was a requirement under clause 11(ii) and the Sacco ostensibly complied. It is argued for the Sacco that it was entitled to terminate the Employment of the Grievants without notice under section 16 of the repealed *Employment Act* which reads:

Payment of wages in lieu of notice.

> 16. Either of the parties to a contract of service to which paragraph (ii) or (iii) of subsection (5), or the proviso thereto, of section 14 applies, may 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, in respect of the period of notice required to be given under the corresponding provision of that subsection.

35. Yet, as is apparent from the express provisions of that section, it must be read in conjunction with paragraph (ii) or (iii) of subsection (5), or the proviso thereof. Section 14(5)(ii) and (iii) of the repealed statute reads:

> (5) Every contract of service not being a contract to perform some specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be:-
>
> (i) .....
>
> ii. Where the contract is to pay wages periodically at intervals of less than one month, a contract terminable by either party at the end of the period next following the giving of notice in writing;

ii. Where the contract is to pay wages or salary periodically at intervals of or exceeding one month a contract terminated by either party at the end of the period of twenty-eight days next following the giving of notice in writing:

Provided that this sub-section shall not apply in the case of a contract of service whose terms provide for the giving of a period of notice of termination in writing greater than the period required by the provision of this subsection which would otherwise be applicable thereto."

36. Regarding the 2006 CBA, it had a provision with respect to normal termination of employment in clause 9(b):

> "If the employer wishes to terminate the services of an employee, the employer shall give the employee three (3) months' notice or pay one (1) month salary in lieu of notice. On the other hand, any employee wishing to terminate his/her service with the employer, he/she shall give the employer three (3) months' notice or pay one (1) month's salary in lieu of notice."

37. It is clear to us, however, that the Sacco did not even pretend to invoke the provisions of clause 9(b) and was explicit that it was retiring those who were 45 years and over under the auspices of clause 11(ii). It does seem disingenuous for the Sacco to now call into aid the provisions of section 16 of the repealed Act. Indeed, not once in its amended Memorandum of Reply did the Sacco seek refuge under clause 9(b) or section 16 of the repealed statute. The appellant cannot be permitted to set up a defence it did not make at trial.

38. So we return to clause 11(ii) in respect to over 45 years' cohort. It bears repeating that the reason given for their retirement was the "inevitable step of reducing staff outlay". Yet, as is apparent from that reason, this was in fact a redundancy as contemplated by clause 10(a) (i) of the CBA and not a retirement. That clause reads:

> "Redundancy is understood to mean the loss of employment through no fault of employee caused by either excess of manpower or by financial inability on the part of the employer to continue pay salaries."

39. In tendering his evidence on behalf of the Sacco, Mr. Gachau stated as follows regarding the layoff;

> " In 2007 I was Senior Accountant and we computerized our services and found that the staff we had was excess and it was decided that we lay off the excess."

40. The exercise was clearly a redundancy disguised as a retirement or retrenchment and voluntary early retirement. Without a doubt, the Sacco wanted to achieve a redundancy without attending to the rigorous provisions on redundancy set out in clause 10 of the 2006 CBA or section 16A of the repealed Act. This more involved process included: the employer giving due regard to seniority in time and to the skill ability and reliability of each employee of the particular class of employees affected; the employer giving preference to the persons laid off should an employment opportunity arise in the same cadre of employment; the Union been informed of the reasons for and the extent of the intended redundancy; and termination of employment shall not be effected until the matter has been reported to the Minister For Labour for information.

41. There is then the pre 45 years old category. For this lot the Sacco invoked the provisions of clause 12:

> In case of retrenchment, the modalities to be followed shall be as follows:

(i) Voluntary subject to approval by the employer.

(ii) Twenty-three (23) days salary for every completed year.

iii. One (1) month salary in lieu of notice.

iV. Seminar/training to be offered.

V. Staff to be given clearance to collect pensions as provided in the RBA Act.

vi. In the case of retirement, the selection of the employees must be just and fair and the targeted employees to be informed in advance.

vii. The affected employees will be deemed to have retired normally.

viii. In case of Voluntary Early Retirement Scheme, the exercise shall purely be voluntary. There shall be no coercion, intimidation or undue influence on the part of the Society.

42. The reason for retrenchment was the same as that for retirement, that is reduction of staff outlay and so in much the same way as for their post 45 years counterparts, the process ought to have been a redundancy and would be wrongful for reasons we have already discussed. Yet even if it was to be assumed that this cohort was eligible for retrenchment and voluntary early retirement, it is common ground that, contrary to the provisions of clause 12, the retrenchment of the Grievants was not voluntary. And the retrenchment cannot be said to be voluntary simply because the employees acknowledged receipt of the payment made to them. The acknowledgement could not sanitize a process which was still born because of want of prior consent by the Grievants.

43. On our analysis we fully endorse the following finding by the trial court:

> " On the question whether the retrenchment and voluntary early retirement were properly applied, on the above analysis and finding that the entire process of retrenchment and voluntary retirement undertaken by the Respondent failed the statutory requirements, the same became of no consequence. Without evidence on the essence of the redundancy process undertaken, the grievants should have retained their employment with the respondent."

44. We turn to the award of damages. We start by observing that at the point of termination of the services, the employees were each paid a month's salary in lieu of notice. In making an award of damages of three (3) months gross salary for each Grievant, the trial Judge reasoned:

> " 57. The claimants are also seeking orders for reinstatement of the grievants. Termination was on 17th May 2007, a period of over seven (7) years ago. The Respondent must by now have undergone tremendous changes. Orders or reinstatement are also only granted in the rarest of cases as this would require specific performance. Noting the time taken to arrive at the conclusion of the matter, the number of employees involved and noting that some grievants have moved on to new employment like Bernard Mucheru who is now employed by Waumini Sacco Limited, reinstatement would not be an appropriate order.
>
> 58. The Claimant is in the alternative to the grant of reinstatement seeking compensation for wrongful termination of the grievants. The concept of unfair labour practice, unfair termination of employment is a matter now best

articulated under Article 41 of *the Constitution*, 2010 and section 45 of the *Employment Act*, 2007. *The Constitution*, 2010 and *Employment Act*, 2007 only came into force after the 17th May 2007 after the cause of action arose. Compensation as claimed cannot be granted in the contest of this case as that would be to apply the law retroactively. The transitional provisions of the *Employment Act*, 2007 do not apply in a case like this one. This will not be granted.

59. However, upon the finding that the grievants were wrongfully terminated and should have retained their positions with the Respondent as at 17th May 2007, this Court is empowered to make orders that are deemed fit, just and reasonable in the circumstances of the case. Damages are herein appropriate. This is assessed at three (3) months of gross salary for each grievant based on the last salary received at of 31st April 2007."

45. Counsel for the Sacco faulted this finding arguing that neither the CBA nor the repealed *Employment Act* provided for general damages for breach of contract. Yet to be fair to the learned Judge she never christened the damages she awarded as general damages. We therefore take the submissions by counsel for the Sacco to be an invitation to us to consider whether, in the first place, the trial court had jurisdiction to award the damages she did under the repealed *Employment Act*.

46. A complete answer is to be found in section 15 of the Trade Dispute Act which was repealed on 26th October, 2007 with the coming into force of the *Labour Relations Act*, No. 4 of 2007. The Trade Dispute Act was in operation at the time of the wrongful termination of the Grievants. The repealed statute established the Industrial Court under section 14. Although not occupying the more elevated status and given the constitutional anchor of the Employment and Labour Relations Court, the Industrial Court was the forerunner of the current Court.

47. Section 15(1) of the Trade Dispute Act listed remedies available to an employee who had been wrongfully dismissed by his employer and which the Industrial Court could grant. It reads:

" Reinstatement of employees.

15. (1) In any case where the Industrial Court determines that an employee has been wrongfully dismissed by his employer, the Court may order that employer to reinstate that employee in his former employment, and the Court may in addition to or instead of making an order for reinstatement, award compensation to the employee:

Provided that such compensation shall not exceed

–

i. in a case where reinstatement is ordered, the actual pecuniary loss suffered by the employee as the result of the wrongful dismissal;

ii. in any other case, twelve months monetary wages.

2. Without prejudice to any other remedy, any compensation awarded under this section may be recovered summarily as a civil debt.

3. Any person who without lawful excuse fails to comply with an order for reinstatement shall be guilty of an offence, and shall be liable to a fine of

two thousand shillings for every month or part thereof during which the commission of the offence is continued.

4. Any court imposing a fine under subsection (3) may award compensation to the employee who is the subject of the order for reinstatement for the loss suffered by him as the result of the failure of his employer to comply with the order, and for that purpose the court may pay to the employee the fine or such part of it as the court may think fit.

5. An award of compensation to a person under subsection (1) shall be a bar to proceedings at the suit of that person in any other court in respect of the same wrongful dismissal."

48. Clearly, the learned trial Judge had power to award compensation not exceeding twelve months monetary wages. Further, the judge cannot be faulted for calling that compensation "damages" as damages is "money claimed by, or ordered to be paid, to a person as compensation for loss or injury" (Black's Law Dictionary, Tenth Edition).

49. In considering whether or not to interfere with the damages awarded by the trial court, we acknowledge our circumscribed power to do so explained, time without number, by this and other courts. See for instance the oft cited decision of Butt v Khan [1968] eKLR, where Law JA held:

> " An appellate court will not disturb an award of damages unless it is inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

50. The convention is that where a contract of service contains a termination clause with a notice period, damages or compensation would be limited to the period of notice or the agreed pay in lieu of notice (see for example the decision in Walter Musi Anyanje v Hilton International Kenya Ltd & another [2008] eKLR). However, there may be instances which call for an award beyond the notice clause. For instance, where the possibility of the employer securing alternative employment is low.

51. In this matter it was pleaded and proved that: the termination was without notice; the termination was without adherence to the law and the provisions of the contract between the parties; and that some of the employees whose contracts were terminated would be unable to secure alternative jobs due to their advanced age and nature of the employment. Regarding the latter, the Sacco had expressly pleaded that it released those employees who were not able to be trained on use of computers due to their age. The employer was therefore well aware of the vulnerability of the released employees. There was sufficient reason for the trial court to order compensation that was more than the contracted one- month salary in lieu of notice. The trial court chose to award compensation equivalent to 3 months' gross salary and not the maximum available of 12 months. This cannot be said to be excessive or unjustified. We cannot in good conscience disturb it.

52. This brings us to the penultimate limb of the appeal. At the heart of the appellant's contention that the trial court should not have awarded Gratuity is that the Union and the Sacco had agreed to do away with the Gratuity clause and instead establish a Pension Scheme for its employees. It being contended that, even though the changes were not effected in the 2006 CBA in operation at that time, the parties duly varied the same through conduct. It is asserted that the evidence was that this had been effected in the year 2005 by the creation of a Contributory Scheme to which the appellant first deposited a lump

sum equivalent to 2 months' salary gratuity in each of employee's account up to the year 2005 and thereafter the Sacco contributed 17% to the Scheme while the Grievants contributed 5%.

53. The long and short of the proposition by the Sacco is that the provisions of the 2006 CBA coupled with the subsequent actions of the parties altered the terms of engagement, rendering the Gratuity clause non-operational and in its place, establishing a Pension Scheme.

54. On our part we think that the force of the Sacco's argument suffers an insurmountable setback when contents of 2006 CBA are juxtaposed with the CBA that replaced it, being the CBA dated 11th November, 2008 (the 2008 CBA). In the 2006 CBA, the Gratuity provision is to be found in clause 9(a). In the same CBA, and separate from the Gratuity provision, is clause 34 on the Provident Fund which reads:

> " The employer and representative of employees shall operate a contributory provident fund in accordance with Retirement Benefit Rules and the Provident Funds Deed.
>
> The employer shall contribute 17% of an employee's basic salary towards the Provident Fund monthly.
>
> The employee shall contribute 5% of his/her basic salary towards the Provident Fund monthly.
>
> The fund shall be operational starting on the employee's engagement date.
>
> The employees shall be represented in the Provident Fund in line with the Retirement Benefit Authority's Rules."

55. In the 2008 CBA, the provisions on Gratuity are altogether excluded but retained word for word, again as Clause 34, is the operation of a Provident Fund.

56. What does this say of the intention of the parties? By having both the Gratuity provision and that creating the Provident Fund in the 2006 CBA, the intention of the parties at that time was that the Grievants would be entitled to gratuity as part of their terminal benefits but still enjoy benefits of the Provident Fund. So the Grievants would be entitled to both benefits. This was expressly altered by the 2008 CBA when the benefit of Gratuity was excluded from the package of the terminal benefits and those under the Provident Fund included in the following way:

> " An employee whose service has been terminated, has resigned or has been wrongly dismissed, shall be entitled to all benefits provided the said employee has completed the probation period.
>
> Such benefits will be paid in accordance with the provisions of the *Retirement Benefits Act* and the staff retirement benefits scheme deed.
>
> Where an employee is entitled to other benefits, e.g. Leave, leave pay etc., a pro rata compensation shall be made at the time of discharge."

57. If it is true, as submitted by counsel for the Sacco that his client contributed 17% to the Scheme while the Grievants contributed 5% during the period when the 2006 CBA was in force, then it could never be that it was because the intention of the parties was to replace the Gratuity clause by establishing a Pension Scheme. On the contrary it was in fulfilment of the express provisions of the 2006 CBA which provided for both benefits.

58. Gratuity, typically monetary, is a token payment made by an employer to an employee in appreciation of services rendered and as a terminal benefit. Important to note is that it is only payable if provided in the employment contract or CBA or if required by statute. We see no reason why, if expressly agreed by the parties in a CBA, like here, Gratuity should not be paid to an employee in addition to benefits under a Provident Fund. In making this finding we do not derogate from the past decisions of this Court that in the absence of an agreement to the contrary, between the parties, membership to a pension scheme or provident fund disentitles an employee to service pay (see for example Chengo Kitsao Chengo (supra) cited to us by Senior Counsel for the Sacco). The Sacco, no doubt, gave in to generous terms perhaps living up to its name "Murata", a friend in the Kikuyu language. It should not be permitted to ungive this benefit. Again, we conclude that the learned Judge was right in finding that the Grievants were entitled to payment of Gratuity.

59. That said there is one other matter which falls for our consideration. Emerging from the evidence is that a lump sum equivalent to each employee's gratuity for the period until December 2005 was transitioned to the defined contribution scheme in each employee's pension account as from 1st January 2006. This is indeed conceded by one of the Grievants , Bernard Mucheru Muchiri, in cross examination. It is argued by the Sacco that the Grievants could not claim Gratuity as well as their entitlements under the contributory scheme as it is clear that the gratuity in form of lump sums were converted to entitlements under the contributory scheme and those sums were released together with interest to the Grievants when they were paid. Is this a claim for double pay as contended by the Sacco?

60. As we understand it, prior to the conversion of the Provident Scheme into a defined contributory scheme, the scheme was non- contributory. Had the scheme remained non-contributory then at the point of termination, the pension to each Grievant would have been worked on the basis that the scheme was non-contributory and by dint of the 2006 CBA, each Grievant would have been entitled to Gratuity as well. However, when the Pension scheme was converted into a Contributory Scheme in the year 2006 and the gratuity of each Grievant, up to December 2005, paid into the scheme as employee contribution, that contribution became available to the Grievant as part of pension. It is clear to us therefore that the Gratuity that each Grievant was entitled to up to December 2005 was indirectly paid when pension was paid. To that extent a claim for Gratuity up to December 2005 would be a claim for double payment. The short period after January 2006 is different because, henceforth, the contribution by each Grievant to the Provident Scheme was 5% of basic salary and not through his/her gratuity. For this reason, as regards the period after January 2006, payment of both Gratuity and Pension is justified.

61. Indubitably, there is merit in the argument by the appellant that a second payment of the gratuity which had been transitioned as contribution into the provident fund is not defendable. Only to that extent does the appeal succeed. That is, the Grievants are not entitled to gratuity for the period up to the last day of December 2005. Each party to bear its own costs of this appeal.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF FEBRUARY, 2025.

S. GATEMBU KAIRU, FCIArb.

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

M. GACHOKA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.