Telkom Kenya Limited v Ngokonyo & 2 others (Civil Appeal 394 of 2017) [2024] KECA 880 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KECA 880 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 394 OF 2017

P NYAMWEYA, JM MATIVO & PM GACHOKA, JJA

JULY 26, 2024

BETWEEN

TELKOM KENYA LIMITED ..... APPELLANT

AND

FRANCIS WAITHAKA NGOKONYO ..... 1ST RESPONDENT

SUDI ABDALLA ..... 2ND RESPONDENT

ANDREW MUGA ..... 3RD RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Havelock, J) dated on 20th December 2013 in Civil Suit No. 357 of 1992 as consolidated with Civil Suit No. 412 of 1992 and Civil Suit No. 811 of 1992)

JUDGMENT

1. This appeal by Telkom Kenya Limited (the appellant) is against the judgment and decree of the High Court delivered on 20th December 2013 (Havelok, J) in Nairobi Civil Suit No. 357 of 1992 consolidated with Civil Suit Nos. 412 of 1992 and 811 of 1992. A brief account of the factual background to the dispute is necessary so as to contextualize the parties diametrically opposed arguments in support of their respective positions. Fortunately, the facts which triggered the litigation in the High Court are largely undisputed or common ground. Briefly, the 1st respondent, (Francis Waithaka Ngokonyo) was employed by the appellant as a pupil engineer on 10th June 1973. His employment was confirmed on 25th October 1973. Sudi Abdalla (the 2nd respondent) was employed by the appellant on 5th October 1971 as an Assistant Telecommunications Controller, Grade II, while Andrew Muga (the 3rd respondent) claimed that he was employed on 17th April 1961 (sic) as a Clerical Officer Grade II. The respondents maintained that by the time their services were terminated, they all had progressed through their respective job ranks and had been promoted as follows: - (a) the 1st

respondent was an Assistant General Manager (Data Processing); (b) the 2nd respondent was the Area Manager-Nairobi South; and, the 3rd respondent was a Senior Assistant Manager (Accounting).

2. It was the respondents' case that they worked diligently and from time to time they received commendations for their exemplary performance in their respective duties. However, on 19th July 1991, they all received letters directing them to proceed on compulsory leave and accusing them of persistent un-explained laxity. Afterwards, by a letter dated 22nd October 1991, they were retired in public interest. Aggrieved by the decision, they filed the above suits challenging their retirement on grounds that it was arbitrary and unlawful and seeking compensation. On 2nd July 1992, the three suits were consolidated.

3. The 1st respondent was the plaintiff in Civil Suit No. 357 of 1992. In his evidence before the trial court, he highlighted his career progression from the date of his employment up to the time he was retired. He stated that he earned a salary of Ksh.14,500/=, a house allowance of Kshs.4,200/=, leave subsistence of Kshs. 1,600/=, outpatient cover for Kshs.8,000/=, and an unlimited in patient cover. It was his testimony that had he retired at 55 years, he would have earned Kshs.10,560,286/= computed from the date of his unlawful retirement to his actual retirement age of 55 years. In his amended plaint dated 12th April 2006, he prayed for:-

   (a) special damages of Kshs.23,702,682/=;

   (b) general damages;

   (c) monthly pension of Kshs.32,831/= back dated to 1st April 2005;

   (d) costs of the suit and Interests;

   (e) interests on (a) – (d) above at court rates from the date of filing suit till payment in full;

   (e) cash award of Kshs.7,265/=, and,

   (f) such other reliefs as the court may award.

4. In support of Civil Suit No. 412 of 1992, the 2nd respondent also gave an account of his career progression up to the time he was retired. It was his evidence that during the period he worked, he never received any warning letter nor was he ever subjected to disciplinary proceedings. He urged the Court to allow his claim as follows: -

   (a) special damages- Kshs.21,367,752/=;

   (b) general damages and interests thereon;

   (c) monthly pension of Kshs. 31,600/= backdated to 1st November 2003;

   (d) costs of the suit;

   (e) such other relief as the court may deem fit to grant, and,

   (f) interests on (a) to (d) above at court rates from date of filing suit until payment in fill.

5. The 3rd respondent was the plaintiff in Civil Suit No. 811 of 1992. He also gave an account of his career progression from the date of appointment up to the time of the termination by which period he had worked for the respondent for 30 years. He described his termination as prejudicial to the posta-code and claimed that he was never served with a warning letter. However, he admitted he was paid his salary in lieu of notice. He prayed for: -

(a) special damages – Kshs.2,734,804/=;

(b) general damages and interests thereon;

(c) monthly pension of Kshs.14,603/= back dated to April 1996;

(d) interests on (a) – (d) above at court rates from date of filing suit, and,

(e) such other remedies that the Court may grant.

6. The appellant filed substantially identical amended defences dated 27th April 2006 in each of the three suits. Essentially, it denied the respondents' claims and maintained that the retirements complied with the law and that the respondents were all paid their terminal dues. Mr. Isaiah Kandie, the appellant's former Human Relations Officer testimony was that the respondents were offered an opportunity to respond to the letter dated 19th July 1991 before they were retired on 22nd October 1991. He also stated that the claim for allowances, salaries and benefits which are ordinarily payable to those in employment is untenable in this case because the respondents were retired as opposed to being terminated from their employment. It was his evidence that the respondents were paid their outstanding salaries or benefits in accordance with the retirement regulations, therefore, they had no other claims against the appellant.

7. In the impugned judgment, the learned Judge held that: -

> " 20. In as much as the termination in the public interest was not necessarily as a result of a disciplinary process as enunciated in D.K Njagi Marete v Teachers Service Commission (supra), Regulation 4(b) as applied in Peter Ndungu v K.P & T.C (supra) applying Ridge v Baldwin (supra), clearly provides that the employer when taking such action as the termination of the employment/ services of an employee, due processes have to be followed so as to ensure that the employee is accorded a fair hearing and an opportunity to be heard. This is similarly so stipulated under the provisions of the Employment Act Cap 226 of the Laws of Kenya at Section 45 as read with Sections 46 and 49 thereof. As was further provided in Personnel Circular No. 4 'C' of 1974, the Plaintiffs were accordingly not invited to say why the action by the Defendant should be taken and neither were they notified of the intended action. In the premise, therefore, this Court finds that the Plaintiffs were not properly accorded an opportunity to defend themselves, and condemns the decision by the Defendant's Board to terminate their services. I find that the Plaintiffs were unlawfully retired by the Defendant.
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> 24. the circumstances in the instant case, however, are that there were no procedural precedents in the termination of an employee on public interest grounds. There is no procedure as to the period of notice required, the requirement for a response by the Plaintiffs nor what measure of damages or loss of benefits the employer has to contribute to mitigate the termination of the employee...
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> 26 ....the Court enters Judgement for Kshs. 14,965,568/= to the 1st Plaintiff, Kshs. 12,783,404/= to the 2nd Plaintiff and Kshs. 1,874,676/30 to the 3rd Plaintiff together with interest thereon at Court rates from the date hereof until payment in full. Costs in any event, are awarded to the Plaintiffs."

8. Aggrieved by the said decision, the appellant appealed to this Court. Its memorandum of appeal dated 22nd November 2017 faulting the learned judge for:-

   (a) awarding the respondents 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 respondents 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 to those who has 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 consider the appellants' submissions and authorities on the question of anticipated salaries and allowances;

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

   (j) failing to appreciate that the maximum amount of damages payable to the respondents under the Employment Act, 2007 was 12 month's salary; and

   (k) misdirecting himself even after considering numerous authorities submitted before him by holding that cases involved summary did not apply to this case.

9. The appellant 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 respondents' claims with costs of the appeal to the appellants.

10. Aggrieved by the same judgment, the respondents filed a cross appeal citing five grounds as follows: -

   (a) the learned judge erred by 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 respondents' their correct monthly pension of Kshs.32,831/=, Kshs.31,600/=, and Kshs.14,603/= respectively effective from 1st April 2005 for the 1st respondent who would have retired on 10th October 2003, for the 2nd respondent who would have retired on 31st March 1996 and for the 3rd respondent 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 respondent 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 respondents and in not awarding interest on the monthly pension together with gratuity till payment in full;

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

11. The respondents prayed for: -

(i) their unlawfully deducted judgment amounts of Kshs.1,119,053/=, Kshs.724,287/= and Kshs.860,127.70 respectively;

(ii) prayer (e) in their respective amended plaints dated 12th April 2006 be allowed;

(iii) prayer (e) of the 1st and 3rd respondents amended plaint and prayer (f) of the 2nd respondent's amended plaint be allowed;

(iv) prayer (f) of the 1st respondent's amended plaint be allowed together with interest from the year 1991 plus costs of the suit.

12. The appeal was canvassed by way of written and oral submissions. In its submissions, the appellant addressed 4 issues, namely: -

(i) whether the learned judge failed to consider its authorities;

(ii) whether the respondents were entitled to be awarded anticipatory salaries and anticipatory allowances and whether the said awards amount to unjust enrichment;

(iii) whether the respondents had an obligation to mitigate their losses, and,

(iv) whether the cross appeal for recovery of deductions, monthly pensions and interests lacks merit.

13. Regarding the question whether the learned judge failed to consider its authorities, the appellant argued that there are conflicting High Court and Court of Appeal the bulk of which have held that awarding loss of salary until an employee attains retirement age constitutes an unjust enrichment and it offends the principles governing employment remedies. The appellant faulted the learned judge for disregarding those decisions and instead distinguished the decision in Rift valley Textiles Ltd vs Oganda [1990] EA 526 holding that it involved summary dismissal and not unlawful termination. It was the appellant's position that the reliefs granted on retirement or unfair termination are the same and the relevant principles do apply in both situations. Therefore, the learned Judge failed to appreciate the existence of an employment contract that stipulates the notice period and that the respondents were only entitled to one month's salary in lieu of notice.

14. On whether anticipatory salaries are payable, the appellant argued that under both the repealed Employment Act and the Employment Act, 2007, there is no provision for award of anticipatory salaries until the date the respondents were expected to retire at the age of 55 years, therefore, the award under the said head was not founded in law and ought to be set aside. The appellant cited Cyrus Nyaga Kabute vs Kirinyaga County Council [1987] eKLR where this Court held that it does not give an individual benefits until he attains his retirement age and that damages are awarded at the termination

of an employment contract. The appellant also submitted that the award of anticipatory salaries and allowances until the respondents' retirement age was speculative because there was no guarantee that the respondents would have worked until the age of retirement.

15. Regarding the award of anticipatory allowances, the appellant maintained that upon termination of their employment, the respondents were not entitled to allowances because they were no longer the appellant's employees and cited this Court in Kenya Ports Authority vs Edward Otieno [1997] eKLR that allowances and other benefits were not to be enjoyed by those who are retired.

16. Addressing the issue whether anticipatory salaries and allowances amount to unjust enrichment, the appellant argued that employees whose services have been unfairly terminated are entitled to remedies for wrongful dismissal and unfair termination under section 48 of the Employment Act, 2007 and that the remedies are not intended to punish the employer or to unjustly enrich the employee at the expense of the employer. The appellant cited the dictum in James Omwoyo Nyang'au vs Heritage Insurance Company Limited [2014] eKLR that remedies in employment wrongs are aimed at redressing the economic injury suffered by the employee as a result of the wrongful action by the employer but not to punish the employer or unjustly enrich the employee. The appellant also cited the East African Court of Justice in Southern Highlands Tobacco vs McQueen [1960] EA 490 that a wrongfully terminated employee has a duty to mitigate his loss.

17. Regarding the respondent's cross appeal, on the recovery of deductions, monthly pensions and interest, the appellant submitted that the respondents were bound by their pleadings and having conceded the deductions, they cannot resile from that position without amending their pleadings in the High Court. The appellant maintained that the alleged unlawful deductions will only be relevant if this Court rejects the appellants' appeal and allows the award for anticipatory salaries and allowances. It also submitted that the claim for enhanced monthly pension of Kshs. 32,831/=, Kshs.31,600/= and Kshs.14,603/= was speculative and without any basis and the same ought to be disallowed because the appellant was not responsible for computing or administering the respondents' pension dues, which is a function of the appellant's pension scheme, an entirely separate entity, therefore, the respondent ought to have directed their claims to the said body.

18. In addition, the appellant submitted that it cannot be compelled to pay the 1st respondent a bonus of Kshs.7,265/= as claimed or at all since the bonus was payable on merit and at the discretion of the employer. It cited Frank N Kamau vs Tusker Mattressess Ltd [2018] eKLR where this Court held that payment of bonuses is discretionary and falls within the realm of managerial prerogative where the court should steer clear from.

19. Lastly, the appellant maintained that the respondents had an obligation to mitigate their losses by securing alternative employment after the termination.

20. In opposing the appeal and in support of their cross-appeal, the respondents submitting on ground one of the cross-appeal argued that the computations were made and filed in Court pursuant to a consent recorded in Court and the judge in the judgment deducted Kshs.1,119,053/=, Kshs.724,287/= and Kshs. 860,127.70 from their respective awards. (See pages 759 and 760 of the record of appeal) Consequently, the deductions from the amounts awarded in the judgment constitutes double deductions from their claims.

21. Regarding their second ground of the cross-appeal, the respondents submitted that the learned judge awarded lump sum pension but erred in not awarding monthly pension calculated as per the applicable legal notice appearing at page 620 of the record of appeal using a multiplier of 480 as per the computation at page 650 of the record of appeal. (See page 376 of the record of appeal). The respondents maintained that their rightful monthly pension is Kshs.32,821/=, Kshs.31,600/= and

Kshs.14,603/= respectively which was not contested by the appellants. Therefore, the said claim ought to have been awarded because the court ordered the calculations to be made and the amounts were agreed by consent.

22. Concerning ground 3 of the cross-appeal, the respondents maintained that the bonus award in respect of the 1st respondent who qualified for 20 years of service in 1991 is stipulated as half month salary as at 1st July 1991 which salary was Kshs.14,530/= and half of his salary is Kshs.7,265/= which was due as at 1st July 1991 and the same ought to be paid with interests from the due date of 1st July 1991.

23. Addressing grounds 4 and 5 of the cross-appeal, that is, the alleged failure to award the rightful monthly pension to the respondents and in not awarding interest on the monthly pension together with gratuity till payment in full and failure to award the respondents interests progressively on monthly salaries and allowances from the date of filling suit, the respondents submitted that the learned judge erred in granting interests on gratuity due as at their retirement dates till payment in full. Furthermore, the respondents submitted that interests ought to have also been awarded progressively on monthly salaries and allowances on the due dates and not from the date of filing suit.

24. In opposition to the appeal, the respondents cited this Court's decision in Kenya ports Authority vs Silas Obengele [2008] eKLR that the loss of pension should be worked out on the basis of the number of months an employee would have worked had he retired at the age of 55 years less what he was paid. The respondents also cited the finding in Southern Highlands Tobacco vs McQueen (Supra) where the East Africa Court of Justice held that it is the duty of the plaintiff to seek and accept employment but he is not required to seek or accept employment of an unsuitable nature. The respondents also distinguished the case of Cyrus Nyaga Kabute vs Kirinyaga County Council (Supra) on grounds that it was a case of dismissal as opposed to retirement on public interest.

25. On the propriety of the award on anticipatory salary and allowances, the respondents submitted that the amounts were justified in the circumstances and cited the dictum in Hassan Magiya Kiage vs Hon Attorney General & Tourism Finance Corporation [2017] eKLR where this Court stated that the remedies available must be proportionate to the economic injuries suffered by the employee and that the remedies are not aimed at facilitating the unjust enrichment of aggrieved employees but to redress economic injuries in a proportionate way.

26. We have considered the record, the parties' submissions and the law. This being a first appeal, we are cognizant that our primary role is to re-evaluate the evidence before the High Court and draw our own conclusions. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is open for reconsideration both on questions of fact and law. The judgment of the appellate court must reflect its conscious application of its mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the Appellate Court. A first Appellate Court has jurisdiction to reverse or affirm the findings of the trial court, but while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. In addition, we bear in mind that we, unlike the trial Court, we did not have the benefit of seeing and hearing the witnesses testify. (See Kenya Ports Authority vs Kuston (Kenya) Limited (2009) 2EA 212).

27. Principally, this appeal will turn on the following issues: -

    (a) whether this Court has the jurisdiction to determine computation of the respondents' pension;

    (b) whether the learned judge ignored the authorities presented by the appellant;

(c) whether anticipatory salaries and allowances are payable up to the age of retirement;

(d) whether interests ought to have been awarded on anticipatory salaries and allowances;

(e) whether the respondents mitigated their losses, and,

(f) whether the 1st respondent was entitled to bonus awards.

28. On the question of this Court's jurisdiction to determine computation of the respondents' pension, we have carefully evaluated grounds 1, 2 and 4 of the respondents' Cross Appeal, in which the respondents fault the trial judge for failing to award them their rightful monthly pensions of Kshs.32,831/=, Kshs 31,600/= and Kshs.14,603/= respectively effective 1st April 2005. We find guidance in the words of this Court of in Kenya Port Authority vs Modern Holding (EA) Ltd. [2017] eKLR that: -

> " We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised: "....at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the Court itself - provided only that where the Court raises it suo motu, parties are to be accorded an opportunity to be heard."

29. A reading of grounds 1, 2 and 4 of the respondents' cross appeal shows that the respondents are faulting the learned judge for failing to award them monthly pensions of Kshs.32,831/=, Kshs 31,600/= and Kshs.14,603/= respectively effective from 1st April 2005. Our understanding of the law is that computation of pension is purely a matter left for the professionals and therefore this Court and the superior court are ill equipped to determine pension computations. A reading of section 46 (1) of the Retirement Benefits Act leaves us with no doubt that this Court lacks jurisdiction to determine pension computations. The section provides:

> " 46
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> (1) Any member of a scheme who is dissatisfied with a decision by the manager, administration, 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 of the Act under which the scheme is established".

30. Where a statute expressly provides for a mechanism for addressing a dispute, courts ought to be slow to delve in such matters except where the body vested with powers refuses to perform its statutory ordained functions. The statutory ordained forum should be the first port of call after which the aggrieved party can seek court intervention by way of review or appeal. We may usefully cite the High Court (Mumbi Ngugi, J as she then was) in the Rich Productions Limited vs Kenya Pipeline Company & Another [2014] eKLR where the learned judge stated:-

> " (14) The reason why the Constitution and the law establish different institutions and mechanism for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the Court retains the inherent and wide jurisdiction under Article 165 to supervise bodies...such supervision is limited in various respects which I need not go into here. Suffice to say that in (the court) cannot exercise such jurisdiction in circumstances where parties

before it seeks to avoid mechanisms and processes provided by law, and convert the issues in dispute into constitutional issues when it is not." (Emphassis added).

31. In any event, if at all there was any doubt on the question of the trial court's jurisdiction to entertain pension dispute after the employer/employee relationship has ceased as had happened in this case, the Supreme Court settled the law in Albert Chaurembo Mumba & 7 Others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) vs Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) [2019] eKLR, (P.M. Mwilu D.C.J & V-P, Ojwang, Wanjala, Njoki & Lenaola SCJJ) where it held:-

"[146] In our view, once a member leaves the employment of a Sponsor, by becoming a pensioner, there is no longer a relationship of employer-employee that exists between such a pensioner and the sponsor. The relationship that exists in that case becomes that of trustee and beneficiaries (members) of a trust and that relationship is governed by the Retirement Benefits Act, Trustee Act Cap 167 of the laws of Kenya and the general common law on the law of trusts. It is important to note that nowhere in the Employment and Labour Relations Court Act is there jurisdiction conferred on the Employment and Labour Relations court to resolve issues between trustees of a pension scheme and members of the scheme (pensioners)."

32. It is noteworthy that the current Retirement Benefits Act may have been enacted after the respondent left the appellant's employment. Nevertheless, in terms of procedure for resolving the dispute, the Act must apply as stipulated by section 57 of the Retirement Benefits Act. The above being the law, we find that both the Superior Court and this court are bereft of jurisdiction to determine at the first instance matters of computation of the respondents' pension. Consequently, ground 1, 2 and 4 of the respondents' Cross-appeal are unmerited.

33. We will now address the appellant's grounds of appeal. At the outset, it is important to note that the respondents were retired on public interest on 22nd October 1991. Being aggrieved they filed a suit in which they sought general damages and special damages comprising of anticipatory salaries and allowances up to the date of their retirement as well as costs and interests of the suit. The applicable law in 1991 when the cause of action accrued and when the suit was filed in 1992 was the Employment Act, Cap 226 (repealed). Consequently, the dispute ought to have been determined in accordance with the prevailing law at the material time and not the Employment Act, 2007. This is because unless a statute provides otherwise, laws do not apply retrospectively. This position was emphasized by the Supreme Court in Samuel Kamau Macharia and Another vs Kenya Commercial Bank Ltd and 2 Others [2012] eKLR as follows: -

" As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (Halsbury's Laws of England, 4th Edition Vol. 44 at p.570). A retroactive law is not unconstitutional unless it:

(i) is like a bill of attainder;

(ii) impairs the obligation under contracts;

(iii) divests vested rights; or

(iv) is constitutionally forbidden."

34. Clearly, the Employment Act, 2007 had no retrospective application.

35. Next, we will consider the ground that the learned judge ignored the appellant's authorities. Undeniably, in evaluating authorities cited by the parties, it is imperative that a Court considers all the authorities cited and not to be selective in determining what to consider. However, some authorities may be found to be irrelevant, or in applicable. The best indication that a court has applied its mind to the law and authorities cited in the proper manner is to be found in its reasons for the judgment including its reasons for the acceptance and the rejection of the respective authorities. However, we must make it clear that by requiring the trial court to consider and weigh all the authorities does not meant that the judgment of the trial court must also include a complete embodiment of all the authorities cited, as if it comprises a transcript of the proceedings and parties' submissions. All it means is that the summary of the law must entail a complete embodiment of all the authorities found to be relevant to the case before the Court. Therefore, to determine whether there is merit in the appellants complaint that its authorities were ignored, this court must determine the law as understood by the trial Court within the totality of the circumstances of the case, and compare it to the factual and legal findings made by the trial court and then determine whether the trial court applied the law or applicable legal principles correctly to the facts in arriving at its decision.

36. This means that if a Court of Appeal is of the view that a particular authority cited is so relevant and binding that it should have been followed by the trial Court, but such an authority was ignored completely in the judgment or merely referred to without considering its application, and as a result the trial Court arrived at the wrong finding, this will amount to a misdirection on the part of the trial court. The appeal court must then consider whether the said misdirection, viewed either on its own or cumulatively together with any other misdirections, is so material as to affect the judgment, in the sense that it justifies interference by the Court of Appeal.

37. We have analyzed the impugned judgment. We note that the judge summarized the legal and factual issues for consideration. At paragraph 23 of the judgment, the judge properly distinguished the authorities relied upon by the appellant and arrived at well reasoned findings on all the issues identified for determination. Accordingly, we are satisfied that the judge properly evaluated the evidence, the submissions and the authorities. Whether the learned judge arrived at correct or wrong findings is the subject of all the other grounds of appeal. Consequently, the argument that the judge ignored the appellant's authorities is devoid of merit.

38. Next, we will address the appellant's argument that the repealed Employment Act and the Employment Act, 2007 have no provision for award of anticipatory salaries and allowances to be computed and paid up to the respondents' expected retirement date, and whether the said awards ought to be set aside.

39. In Hema Hospital vs Wilson Makongo Marwa [2015] eKLR this Court adopted with approval the holding of the Labour Court of South Africa in Le Monde Luggage cc t/a Pakwells Petze vs Commissioner G. Dun and others, Appeal Case No. JA 65/205 which when applying provisions of the Labour Relations Act of South Africa held: -

> " The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from a wrongful act. The primary enquiry for a court is to determine the extent of that loss, taking into account the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This Court has been

careful to ensure that the purpose of the compensation is to make good the employee's loss and not to punish the employer."

40. While it is true that the respondents were employed on permanent and pensionable terms, there is no right for an employee to work for life. There is also no guarantee that an employee will work up to his retirement age which in this case was 55years. The services of an employee could also be terminated through redundancy, death or summary dismissal at any time on disciplinary reasons. Therefore, a blanket grant of anticipatory salaries and allowances is tantamount to reinstating the respondents to employment or paying for work not done. It is trite law and also public policy that salary is only payable for services rendered and not to ex employees.

41. In Elizabeth Wakanyi Kibe vs Telkom Kenya Ltd [2014] eKLR this Court dismissed a claim for anticipatory earnings that the appellant would have earned until her date of retirement after adopting with approval the sentiments of the (then) Industrial Court in Engineer Francis N. Gachuri vs Energy Regulatory Commission [2013] eKLR that:

> " 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 Claimants 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."

42. This Court in Kenya Revenue Authority vs Menginya Salim Murgani [2010] eKLR held that no damages are awardable for unlawful termination of contract until the age of retirement. Also, in Ethics & Anti-Corruption Commission vs Nicholas Mwenda Mtwaruchiu & 8 Others [2018] eKLR it was stated that a claim for unpaid salary until retirement cannot be maintained in law. Similarly, in D.K. Njagi Marete vs Teachers Service Commission [2013] eKLR the Employment and Labour Relations Court held that: -

> " 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 Claimant has moved on after the unfortunate and capricious decision of the TSC. He no longer renders any Labour to the Teachers Service Commission. The Employment Act 2007 requires he moves on as he has done, and mitigated the loss of his job .... An aggrieved employee must move on, and not sit back waiting to enjoy anticipatory remuneration."

43. On appeal to this Court against the above decision in D K Njagi Marete vs Teachers Service Commission [2020] eKLR it was held:-

> " 26. On the expectation of the employee as to the length of time that he would have continued to serve in the employ of the respondent, while it is true that the appellant was employed on permanent and pensionable terms, this, of itself, is not an indication that the appellant would have continued to be employed until the age of 60 years. In Elizabeth Wakanyi Kibe v Telkom Kenya Ltd [2014] eKLR (Civil Appeal No. 25A of 2013) this Court dismissed a claim for anticipatory earnings that the appellant would have earned until her date of retirement after adopting with approval the sentiments of the (then) Industrial

Court in Engineer Francis N. Gachuri v Energy Regulatory Commission [2013] eKLR (Industrial Cause No. 203 of 2011) which held as follows:

> "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"."

27. Thus, it is clear to us that the claim for anticipatory benefits was not anchored in law, and we therefore decline to review the judgment of the trial court on these terms. This ground of appeal therefore fails."

44. Regarding payment for allowances, this Court in Leonard Odindi vs Kenya Ports Authority [2011] eKLR had the following to say:

> " A claim of house allowance, medical and other allowances are claims which would best be made by serving employees. These are payments made, as this Court stated in the case of Kenya Ports Authority vs. Silas Obengele Civil Appeal No. 38 of 2005 to serving employees to enable them perform their work more conveniently and more efficiently. These were improperly claimed by the appellant since he had ceased working for the respondent. As stated earlier, had he adduced evidence of loss arising from his wrongful termination arising from the malicious nature of his termination, this Court would have been inclined to award some damages."

45. In East African Airways vs Knight [1975] EA 165. Law Ag. P delivering the leading judgment of the Court, which the other two members of the court agreed with, rendered himself in this manner: -

> " In assessing the damages to be awarded, the Judge used, as a basis for his calculations, the difference between Mr. Knight's probable earnings from the corporation, had he not been dismissed, and his earnings from Cassman Brown Ltd. He then deducted a substantial proportion on account of accelerated receipt of damages, and such contingencies as sickness, death and redundancy. In my opinion the Judge proceeded on a correct principle in this respect, and in accordance with what was said by this Court in Southern Highlands Tobacco v. McQueen [1960] EA 490."

46. In Southern Highlands Tobacco vs McQueen (Supra) the predecessor of this Court held,

> " 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."

47. In Kenya Ports Authority vs Silas Obengele Civil Appeal No. 38 of 2005 this Court held:

> " We think that the respondent was entitled to damages. True he was paid his retirement benefits. For those benefits, he had already qualified to get the same. He had not however, decided to retire as at the date the appellant terminated his employment. Had he been

given a hearing he would have perhaps convinced the Board of the appellant not to retire him at the time they did. In these circumstances what would have been the measure of damages? Certainly not the money he would have earned had he worked until he attained the compulsory retirement age of 55 years. There are several imponderables which affect an award of damages in such cases. We derive guidance from the case of Southern Highlands Tobacco v. McQueen [1960] EA 490...As we stated earlier the respondent's service with the appellant spanned a long time. He rose through the ranks and his service was exemplary. At the time his case was heard he had already attained the age which if he had continued with his employment he would not have been compulsorily retired. He was retired when he was 51 years old. He therefore lost about 4 years of service. That being the case no allowance would have been taken of death or sickness as he was healthy when his matter was heard. However, the issue of accelerated payment should have been considered and taken into account. It would also appear from the evidence of Joel Musese Kisembe (DW1) who was called by the appellant, that housing allowance was regarded as remunerative as it was taken into account in computing pension. In our view therefore, considering the facts and circumstances of this case the trial court should have discounted a percentage of the award made on salary for accelerated payment. However, considering that the respondent's salary would probably have been adjusted upwards through annual increments or promotion the trial court should have but did not take that into account. Such an increment would probably have affected the total pension. Bearing the foregoing in mind we interfere with the award on the head of salary by increasing it by a conservative 5%. We would then discount the total award by 3% to allow for the accelerated payment with the net result that the award on loss of salary is increased by two per cent."

48. Conversely, in Rift Valley Textiles Limited vs Edward Onyango Oganda [1994] eKLR this Court held:

> " 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."

49. It is our position that the claim for anticipatory salaries and allowances/future earning lost due to the retirement on public interest before retirement age is not awardable since the same is not provided for under statute. Furthermore, to grant the request would be tantamount to reinstating an employee to employment or paying for work not done which amounts to unjust enrichment. We therefore set aside the award of anticipatory salaries and allowances by the learned judge. This ground of appeal succeeds. However, grounds 1 and 5 of the respondent's cross-appeal fail.

50. Regarding the remedy for unfair termination which was equivalent of one month's notice as provided in the respondents' contracts of employment, we have already found that the applicable statute in this dispute was the Employment Act. Having concluded as aforesaid, we can profitably refer to Kenya Ports Authority vs Edward Otieno [1997] eKLR and Dalmas Ogoye vs Kenya National Trading Co.

Ltd. [1996] eKLR in which this Court reiterated the principle that a person whose services have been unlawfully terminated is only entitled to payment of such sums as he would have been paid had the termination been done in accordance with his contract of service.

51. As was held by this Court in Nyaga Kabute vs Kirinyaga County Council [1987] eKLR, even where the termination of employment is wrongful, what flows from the breach of conditions of service is damages according to the terms of the contract. The said decision was followed by this Court in Rift Valley Textiles Limited vs Edward Onyango Oganda [1994] eKLR in which it held:-

> " The Respondent had been paid damages according to the terms of his contract. He had worked for seven days in the month before he was wrongfully dismissed; he was paid shs.1, 495/= for that period.
>
> He had a notice period of three months and he was paid shs.19, 230/= for that. Again, he was entitled to a leave allowance of shs.600/= per year and he had not gone on leave for three years. He was paid shs.1, 800/= for that.
>
> Finally, he was entitled to gratuity payment upon the termination of his contract and on that head he was paid a total of shs.32, 050/=. In our view, even though the Respondent's summary dismissal was unlawful, he had been paid all that he was entitled to be paid under and in accordance with the terms of his contract with the Appellant."

52. In Paramount Bank Ltd vs Mohamed G. Qureishi & Another [2005] eKLR, it was stated that the traditional common law view has been that illegal termination of a contract of employment entitles the dismissed employee to damages and that the measure of damages is salary in lieu equivalent to period of the notice provided for under the employment contract. (See also Alfred Githinji vs Mumias Sugar Company Ltd Civil Appeal No. 194 of 2001 (un reported) and Central Bank of Kenya vs Nkabu [2002] 1 E.A. 34).

53. We have applied the facts of this case to the applicable law at the material time, which was the repealed Employment Act, Cap 226 and the relevant decided cases. We have no doubt that a contract of employment is terminable at any time by either party in accordance with its terms and conditions. In this case, the respondents' retirement on public interest vide letter dated 19th July 1991 was in accordance with the appellant's personnel circular No. 4 'C' of 1974 dated 23rd October 1974 which provided for payment of one month's notice in lieu of notice and indeed the respondents admitted having been paid their salary dues and one month's salary in lieu of notice, gratuity and pension. Consequently, we find that pursuant to the aforesaid personnel circular and the repealed Employment Act, Cap 226, the respondents were not entitled to payment of anticipatory salaries and allowances.

54. On the question whether the respondents were entitled to remedy their loss, the appellant maintained that the respondents had an obligation to mitigate their losses by securing alternative employment after the termination. In Southern Highlands Tobacco vs McQueen (Supra), the predecessor of this Court held:

> " 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. In the Elizabeth Wakanyi Kibe vs Telkom Kenya Limited [Supra], this Court held that employees have the obligation to move on, and look for fresh employment after termination, and not sit back in the hope of enjoying anticipatory remuneration. Employment remedies must be proportionate, and employees must be discouraged from replicating employment wrongs and multiplying remedies. These

principles were restated in Maria Kagai Ligaga vs. Coca Cola East & Central Africa Industrial Court Cause [Nairobi] Number 611 [N] of 2009. This decision was upheld by this Court in Coca Cola East & Central Africa Limited vs Maria KagaiLigaga [2015] eKLR. It is now settled law that employees are expected, under Section 49 (i) of the Employment Act, to reasonably mitigate their losses.

56. Irrefutably, at the time this dispute arose, there was no provision in the then Employment Act, cap 226 similar to section 49 (i) of the Employment Act, 2007. Therefore, section 49 (i) of the Employment Act, 2007 could not be applied retrospectively because the Employment Act, 2007 was enacted long after the respondents had been retired on public interest and also after they had filed their suit in court way back in the year 1992. Accordingly, this ground of appeal succeeds.

57. The respondents have in their Cross-Appeal invited us to find that the deductions of Kshs1,119,053, Kshs.724,287/= and Kshs. 860,127.70 from their awards amounted to double deduction. They also pray that interests on the amounts awarded be applied from the dates the sums became due as opposed to from the date of the judgment. We have already found that the anticipatory salaries and allowances were not available for the respondents. We have also held that this Court lacks the jurisdiction to delve into matters relating computation of pension benefits. The ripple effect of these findings is that the respondents claim for alleged double deductions and interests on the anticipatory salaries and allowances are bound to collapse.

58. Regarding the respondents' claim for long service bonus award of Kshs.7,265 with interest from the year 1991 when the said bonus ought to have been paid but was wrongly withheld by the appellant, we have considered the Personnel Circular No. 5 "B" of 1988. It is noteworthy that the 1st respondent wrote to the appellant demanding his long service bonus award in respect of which he qualified for on 1st July 1991. In determining this issue, the trial judge held that the Court accepts the amounts of special damages pleaded save for the long service award which is provided by the employer on merit and which is not awarded as a matter of course to all employees. We find no reason to fault this finding.

59. In any event, a claim for long service bonus is by its nature a claim for special damages which must be specifically pleaded and proved. We note that the 1st respondent's claim for long service bonus was pleaded in the plaint dated 23rd January 1992.

However, in the amended plaint dated 12th April 2006, the claim was omitted.

60. As for the 2nd respondent, the claim for Kshs.573,515/= was specifically pleaded in the amended plaint dated 12th April 2006. However, our appraisal of the entire record leaves us with no doubt that the 2nd and 3rd respondents failed to prove that they were eligible for the grant of the long service bonus. Specifically, the 2nd and 3rd respondents' names do not appear in the appellant's letter dated 23rd September 1991 in which it communicated the long service awards. In absence of evidence to the contrary, we find that the 2nd and 3rd respondents' names were not among the names of the staff who qualified for bonus awards 1991. It is only the 1st respondent's name that was on the said list, but, as we have pointed out, he never pleaded the said sum in his amended plaint dated 12th April 2006.

61. Flowing from our analysis of the law, the issues discussed herein above, the conclusions arrived at, above, and bearing in mind that the respondents were paid their terminal dues and one month's salary in lieu of notice, and bearing in mind that the appellants ground claiming that their authorities were not considered failed, we find that this appellant appeal succeeds partially. Accordingly, we issue the following orders: -

a) That the appellant's ground contending that their submissions were disregarded is dismissed for being devoid of merits.

b) The judgment delivered on 20th December 2013 by Havelok, J in Nairobi Civil Suit No. 357 of 1992 consolidated with Civil Suit Nos. 412 of 1992 and 811 of 1992 and all the consequential orders is hereby set aside and substituted with an order dismissing the respondents' suit.

c) The respondents' notice of cross of appeal dated 23rd April 2019 is dismissed for want of merits.

d) Each party shall bear own costs in this appeal.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JULY, 2024.

P. NYAMWEYA

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR