National Social Security Fund v Peter & 47 others (Civil Appeal E020 of 2021) [2023] KECA 804 (KLR) (30 June 2023) (Judgment)

Neutral citation: [2023] KECA 804 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL E020 OF 2021

F SICHALE, LA ACHODE & WK KORIR, JJA

JUNE 30, 2023

BETWEEN

NATIONAL SOCIAL SECURITY FUND ..... APPELLANT

AND

PETERKEEN MWIU KIMWEL ..... 1ST RESPONDENT

KAMAU JOHN PETER ..... 2ND RESPONDENT

SUZANNE A OGUTU ..... 3RD RESPONDENT

ELIAS K BORONA ..... 4TH RESPONDENT

VICTORINE RA WEBUYE ..... 5TH RESPONDENT

KHAMIS H OMAR ..... 6TH RESPONDENT

FRED M KAPLAIGIYA ..... 7TH RESPONDENT

AGGREY O NYANDONG ..... 8TH RESPONDENT

DONDE D MUDEMBEI ..... 9TH RESPONDENT

ALICE N KAMURI ..... 10TH RESPONDENT

PATRICK M KIRUJA ..... 11TH RESPONDENT

OBANDA DO MAGOMERE ..... 12TH RESPONDENT

ENID G RWANDA ..... 13TH RESPONDENT

CHARLES N NJERU ..... 14TH RESPONDENT

BANCY M IRERI ..... 15TH RESPONDENT

LEAH W NJUGUNA ..... 16TH RESPONDENT

MARTIN GIKUNDA ..... 17TH RESPONDENT

MICAH KIMUGE ..... 18TH RESPONDENT

EVANS ORENGE ..... 19TH RESPONDENT

JACQILINE RM WANYONYI ..... 20TH RESPONDENT

ROSE ROBINA ASIAGO ..... 21ST RESPONDENT

DANIEL M MUNGUTI ..... 22ND RESPONDENT

SOPHIA J KOIMUR ..... 23RD RESPONDENT

DAVID JM CHELIMO ..... 24TH RESPONDENT

SAMWEL K SIGEI ..... 25TH RESPONDENT

ESTHER C SAIKWA ..... 26TH RESPONDENT

RHODA J MULWA ..... 27TH RESPONDENT

KEFA B MOINDI ..... 28TH RESPONDENT

LAWI GIKUNDI INOTI ..... 29TH RESPONDENT

PHILIP K SAMBU ..... 30TH RESPONDENT

ALOISA N OSIR ..... 31ST RESPONDENT

ISSAC K CHEROP ..... 32ND RESPONDENT

ANGELA M MUNYAO ..... 33RD RESPONDENT

FLORENCE M NZIOKI ..... 34TH RESPONDENT

MARY J KIPTALA ..... 35TH RESPONDENT

PAUL KIPTOO KIBET ..... 36TH RESPONDENT

PAUL MUOKI NDUVA ..... 37TH RESPONDENT

DANIEL M KIILU ..... 38TH RESPONDENT

DINAH C KIRUI ..... 39TH RESPONDENT

VALENTINA N MULLI ..... 40TH RESPONDENT

NDUKU MBITHI ..... 41ST RESPONDENT

SYLVESTER S MPESHA ..... 42ND RESPONDENT

GAUDENCIA K OCHWADA ..... 43RD RESPONDENT

PHILIP K LANGAT ..... 44TH RESPONDENT

MAUREEN C INDULI ..... 45TH RESPONDENT

ROSE JERUTO KIBET ..... 46TH RESPONDENT

FITZ B SHIROYA ..... 47TH RESPONDENT

EUNICE N IKIUGU ..... 48TH RESPONDENT

(An Appeal from the Judgment, Order and Decree of the Employment and Labour Relations Court at Nakuru (M. Mbaru, J.) dated 24th August 2020 in ELRC Cause No. 212 of 2017)

JUDGMENT

A. Introduction

1. The appellant, the National Social Security Fund (NSSF), is a state corporation established under the repealed *National Social Security Fund Act*, Cap 258 Laws of Kenya Currently (No. 45 of 2013). The respondents led by Peterkeen Mwiu Kimweli were employees of the appellant as at 30th April, 2014. This Court has been moved by the appellant who is dissatisfied with the judgment delivered on 24th August, 2020 by M. Mbaru J. of the Employment and Labour Relations Court (ELRC) at Nakuru in Cause No. 212 of 2017. As per the Memorandum of Appeal dated 9th March 2021, the appellant's dissatisfaction with the said judgment is founded on the grounds of appeal as follows:

> "i. That the Learned Judge erred in law and fact by not appreciating the evidence of the Appellant hence arriving at a wrong decision by awarding the underpayments to the Claimants when they had failed to proof their case on a balance of probability;
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> ii. That the Learned Judge erred in law by ordering the Respondent to calculate underpayments based on Cost of Living Adjustment with interest without specifying the cost of living parameters to be used and the source of the said parameters;
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> iii. The Judge erred in law by awarding underpayments on annual leave which was not pleaded and proved through evidentiary support hence a miscarriage of justice;
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> iv. That the Learned Judge erred in law by disregarding to examine the question whether the Claim was time barred or not as per Section 90 of the *Employment Act* which jurisprudence has been echoed by this Honorable Court to the extent that where court lacks jurisdiction then it should down its tools;
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> v. That the Learned Judge disregarded the submissions filed by the Appellant and failed to consider the submissions filed in court and raising serious legal and factual issues to the extent that the Respondents had not established any baseline for underpayments or whether the Appellant had discriminated against the Respondents hence leading to miscarriage of justice."

B. The Background of The Dispute

2. From the pleadings and evidence, it emerges that the seed of the respondents' grievances was planted in 2009 when the appellant engaged PricewaterhouseCoopers International Limited (PwC) to undertake a job evaluation and restructuring hence reviewing the appellant's organizational structure. The specific assignment to PwC was the development of a new structure, manpower planning and determination of the ideal staffing numbers as well as salary scales for the new structure. PwC completed this assignment and its report titled "National Social Security Fund (NSSF) Kenya, Final Report-Job Evaluation Consultancy Services" (hereinafter the PwC Report) was adopted by the appellant's Board of Trustees (hereinafter the Board). One of the recommendations was the collapsing

of the staff grading system from 14 to 8 and the introduction of a new salary structure for the new job groups. In 2011, the appellant engaged Deloitte & Touche to implement the PwC Report. Subsequently, the new grades and salaries took effect on 1st November 2011.

3. During the implementation, the respondents who were in the management cadre were moved to grades 5 & 6 of the new structure. They were paid consolidated salaries, which they argued, were outside the agreed and approved salary notches as per the guidelines of the PwC Report. It was the respondents' view that as per Clause 8.3.4 of the PwC Report, the employees whose salary fell within the recommended salary scales were to have their salaries adjusted to the next notch within the grade. They asserted that this was not the case with their salaries and that the failure to implement the said advisory led to their underpayment hence creating a salary disparity between them and the other employees.

4. On 18th September 2012, the appellant's Board at its 160th meeting approved another salary adjustment of two incremental credits for all management staff which was backdated to 1st July, 2012. The respondents asserted that as a result of the errors committed during the implementation of the PwC Report in 2011, they were disadvantaged in realizing the new increments. The respondents maintained that, in their case, they received less than two incremental credits as their salaries still hanged in-between the notches. In a bid to have their grievances resolved, the respondents lodged a complaint with the appellant. Meanwhile, on 1st March, 2013 the appellant invited employees to apply for retirement under the Voluntary Early Retirement Scheme (VERS) and some of the affected employees yielded to this invite and left the service. However, the respondents did not ascribe to the VERS.

5. The appellant implemented another salary review in July 2014. According to the respondents they were again disadvantaged because of the errors committed in November 2011, which had not been corrected, coupled with the errors resulting from the salary increase in July, 2012. It was the respondents' case that upon the escalation of their complaint, the appellant in May, 2014 constituted an in-house committee led by Ms Milkah Bwondara (hereinafter the Bwondara Committee) to investigate their complaint and propose solutions. In the Committee's report titled "Committee on Management Salary Disparities, Grades 5 and 6 Report, May 2014", it was found that there were salary disparities which amounted to discrimination and that this situation was inconsistent with salary administration practices. According to the Bwondara Committee, the respondents had been underpaid as from 1st November, 2011 up to April, 2014. The Committee recommended that salaries hanging in-between notches ought to be adjusted to the next step within the grade as per the PwC Report. It further recommended that the salaries of the respondents should be adjusted to reflect the two incremental credits awarded to the rest of staff.

6. On 21st November, 2014 the appellant's Human Resource Manager, Mrs Carolyn Okul, prepared a Board Paper, "Management Salary Disparities, Grades 5 and 6" (hereinafter referred to as the Board Paper), on the respondents' complaints. In forwarding the recommendations to the Managing Trustee, the Human Resource Manager noted that although she had recommended adjustments to the earnings of the respondents, there was a pending job evaluation which would sort out the issues raised by the respondents. The Managing Trustee concurred with her that further action should await the job evaluation and this was the position apparently adopted by the Board. However, the respondents' position was that the new job evaluation could not apply to employees who had left employment.

7. The internal mechanism having failed to yield a favourable outcome, the respondents on 9th May, 2016 escalated their grievances to the Commission on Administrative Justice (CAJ). Subsequently, CAJ wrote to the appellant and on 21st February, 2017 the appellant responded to the CAJ that it had decided to address the employee complaints through a new job evaluation. The CAJ, nevertheless,

took up the complaint and rendered its decision on the matter in a communique dated 5th July, 2017 concluding that the appellant was under obligation to implement the recommendations of PwC and the Bwondara Committee on salary adjustments. It also directed the appellant to factor in the two increment credits awarded to the rest of the employees in July 2012. The appellant was further directed to pay the respondents the salary difference between grades 5 and 6 in arrears as from July 2012.

C. The Cases for Parties At The Trial

8. The respondents who were the claimants at the trial based their claim on the Memorandum of Claim dated 15th May, 2017 as amended on 11th October, 2018 and further amended on 21st June 2019 and the witness statement of Peterkeen Mwiu Kimweli filed on 15th May, 2017. The respondents' claim at the trial was that the appellant's failure to realign their salaries in accordance with the recommendations of PwC and the subsequent failure to pay their salary arrears was unconstitutional and contravened Articles 28, 41, 47 and 50 of *the Constitution* and the conventions of the International Labour Organisation. The respondents also averred that the appellant's actions were discriminatory against them and subjected them to unfair labour practices; and that a fresh job evaluation could not cure the past underpayments as some of the aggrieved employees had retired.

9. Consequently, the respondents sought a declaration that they were wrongfully and unfairly underpaid from 1st November, 2011 and that this amounted to an unfair labour practice on the part of the appellant. They also sought a declaration that the appellant unconstitutionally and discriminatively failed to pay them proper remuneration. The respondents further sought orders for the payment of the actual pecuniary loss suffered as a result of the alleged wrongful salary underpayments amounting to Ksh. 17, 016, 599 accompanied by related benefits and adjusted to the cost of living pursuant to the PwC recommendations. Additionally, the respondents sought an order compelling the appellant to compute their respective pension under-contributions both for employee and employer at 8% and 16% respectively based on the new salary as from 1st November, 2011. Also sought was an order compelling the appellant to remit the pension contributions to the Staff Pension Scheme including the interest that would have been earned. The respondents finally prayed for general damages for the alleged constitutional violations, interest on the awards and costs of the claim.

10. For the appellant, their case was based on the statement of defence dated 6th July, 2020 which had amended the statement of defence dated 12th September, 2017. It was supported by the witness statement of Ms Regina Ndunge Mua. The appellant's case was that some of the respondents were its former employees who exited employment through the Voluntary Early Retirement Scheme (VERS) on 30th April, 2013. On this basis, the appellant raised a preliminary objection that the claims were time-barred as they violated Section 90 of the *Employment Act* having been filed over three years after the cause of action accrued. The appellant also averred that the Memorandum of Claim as drafted was evasive, obscure and concealed the real question in issue between the parties and therefore sought its dismissal.

11. The appellant nevertheless admitted the existence of the PwC Report and its implementation in 2011. Also admitted was the existence of the report of the Bwondara Committee, as well as the fact that the salaries of the appellant's employees had been reviewed in 2012 and 2014. However, the appellant held the view that according to the recommendations of PwC, the respondents were not supposed to receive any salary increment. The explanation tendered for this view was that the respondents' salaries were above the benchmark salaries as per the salary survey. The appellant also stated that its Board awarded the respondents a 10% salary increment to cushion them against inflation resulting in their salaries falling in-between notches. According to the appellant, the effect of the 10% increment was also visible when in 2012 the Board resolved to award two incremental credits to employees in grades 5 and 6; and

that this led to disparity in salaries among employees in these two groups as some employees' salaries were hanging in-between notches contrary to the design of the salary structure proposed by PwC.

12. The appellant did not dispute the findings of the Bwondara Committee but asserted that the Committee's recommendations were subject to ratification by its Board. The appellant stated that in its 174th meeting, the Board declined to approve the recommendations of the Bwondara Committee and instead directed that an organizational review through a job evaluation be undertaken to address the issue of organizational structure, salary disparities and notches, grading and career progression. The appellant's position was that the respondents had not been underpaid as they were earning their rightful wages. The appellant maintained that the recommendations of the Bwondara Committee were not binding as the Board had the discretion to either approve or disregard them based on the interests and well- being of the appellant. Finally, the appellant asserted that the claim by the respondents that there was a legitimate expectation of a salary increase based on the recommendations of PwC and the Bwondara Committee was invalid. The appellant therefore prayed for the dismissal of the claim with costs.

D. Judgment of The Trial Court

13. Among the issues identified by the trial court for determination were whether the respondents' claim was time- barred and whether the respondents were discriminated and subjected to unfair labour practices. On the issue as to whether the respondents' claim was statute-bared, the court held that it was functus officio having addressed itself to the issue of jurisdiction in its ruling of 15th May, 2018. On whether the respondents were discriminated against and subjected to unfair labour practices, the court agreed with the respondents that they were unfairly treated with regard to salary reviews. In the end, the trial court made the following orders:

> "(1) The respondent shall take the list of 48 claimants and tabulate the dues owing in underpayments with regard to salary by placing each claimant in grade 5 and 6 at the next step of the notch/salary grind. Such tabulation shall also include underpayments in cost of living adjustment; pension under-contributions for both employee and employer with interest accruing thereof from the date due until the judgement date on court rates; and underpaid annual leave allowance based on the annual gross salary.
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> (2) There was/is no termination of employment. The claimants were underpaid in salaries and attendant dues and benefits. Upon award of underpayments as set out above, these shall be adequate compensation to the claimants. Each party shall meet own costs.
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> (3) Tabulations above shall be submitted by the respondent within 14 working days. Where there is no compliance the claimants shall submit own tabulations for the adoption of the court.
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> (4) Secure a mention date at the court registry."

E. Submissions Before This Court

14. This matter came up for virtual hearing on 28th February, 2023 with Mr. Masese appearing for the appellant and Mr. Onyony acting for the respondents. Both parties had filed their written submissions which they adopted and supplemented with limited oral highlights. We summarize the submissions as hereinunder.

15. Mr. Masese submitted that the recommendations of the Bwondara Committee upon which the respondents' claim was founded did not carry any legal effect. In counsel's view, no legal right accrued to the respondents from an administrative process which in its nature was meant to satisfy the appellant's human resource function. Counsel referred us to the holding of Rika J. in *Ongoro Oyuga Weda v Kenya Airports Authority* (KAA) [2018] eKLR that the Managing Director of KAA was not bound by the findings and recommendations of a committee of inquiry, and urged us to be persuaded by that decision as the facts in that case were similar to the facts in this appeal. According to counsel, the findings of the Bwondara Committee were not binding as they were subject to review and approval by the Board. Counsel also relied on the Supreme Court decision in *Kenya Vision 2030 Delivery Board v Commission on Administrative Justice & 2 others* [2021] KESC 35 (KLR) for the definition of the term "recommendation" and that any recommendation is always subject to the discretion of and review by the recipient. Counsel argued that the issue raised in the respondents' pleadings was administrative in nature and the respondents had acknowledged that the appellant had already commenced the rectification of the disparities in the notches and job grades.

16. Mr. Masese further submitted that the respondents' salaries remained within their respective salary scales even after the 10% increment in 2011. According to counsel, there was therefore no wrong, discrimination or unfair labour practice committed by the appellant. It was counsel's position that the trial court failed to consider the guidelines established by the *Supreme Court in Kenya Vision 2030 Delivery Board v . Commission on Administrative Justice & 2 others* (*supra*) for dealing with recommendations. Specifically, counsel pointed out that the Supreme Court held that recommendations were not binding on the recipient State entity; and that the discretion in implementing the recommendations may only be interfered with where there was gross abuse of discretion, manifest injustice or abuse of authority. According to counsel, the respondents had not proved that the appellant's Board exercised its discretion with manifest injustice and gross abuse of authority.

17. Still on the issue of salary disparities, Mr. Masese pointed out that Chapter 5 of the NSSF Human Resource Manual mandated the appellant to implement performance-based increment and also to offer annual increment to cover inflation. Counsel submitted that the respondents had not adduced any evidence to show that they were not beneficiaries of these policies. Counsel also submitted that despite failure by the respondents to demonstrate that they had not benefited from annual increments, the learned Judge made a finding on the cost of living adjustment which, in his view, was in any event not pleaded. Counsel relied on the case of *Independent Electoral and Boundaries Commission v . Stephen Mutinda Mule & 3 others* [2014] eKLR for the submission that parties are bound by their pleadings and that the learned Judge erred in rendering herself on the issues of cost of living adjustment and underpayments on annual leave allowance as the issues were never pleaded by the respondents.

18. Counsel relied on *Peter K. Waweru v . Republic* [2006] eKLR as defining the meaning and scope of discrimination. In urging us to find that the respondents did not prove discrimination, counsel relied on Sections 108 and 109 of the *Evidence Act* and the Supreme Court pronouncement in *Raila Odinga & others v . IEBC & others*, Petition No. 5 of 2013 to submit that the burden of proving discrimination and unfair labour practice reposed on the respondents and it was only after the discharge of this burden that the appellant could be called upon to rebut it. According to the appellant, the respondents had failed to discharge the onus or even tender any evidence to show that there was disparity in the salaries of employees of the appellant performing similar duties. Counsel consequently urged us to allow the appeal, find that there was no underpayment, and set aside the impugned judgment.

19. For the respondents, Mr. Onyony commenced his submissions by tackling the issue as to whether the claim by his clients was time-barred. He rejected the appellant's contention that the claim was barred

by statute and submitted that the trial court made a finding on this issue in a ruling dated 15th May, 2018 and the respondents had adhered to the orders of that ruling. Counsel pointed out that since the said ruling was not challenged either by way of review or appeal, the trial court was indeed correct in stating in the judgment that it was functus officio on the issue.

20. The next issue addressed by counsel was whether the reports of PwC and the Bwondara Committee were binding on the appellant and whether the failure to implement them was discriminatory against the respondents and subjected them to unfair labour practices. According to Mr. Onyony, the appellant's submissions on this issue were at variance with its own reports and evidence. Counsel buttressed this argument by stating that the Bwondara Committee found that there were salary disparities contrary to the appellant's contention that there was no discrimination on salaries. Counsel also submitted that the Bwondara Committee's report was complimentary to PwC's Report and not a stand-alone report. According to Mr Onyony, the PwC Report, which was approved by the Board, yielded the Bwondara Committee Report and therefore, the latter cannot be considered in isolation but rather, in unison with the former. Counsel also submitted that the appellant's Board could not distance itself from implementing the two reports yet it sanctioned their preparation. Counsel opined that once the Board launched the Bwondara Committee, its report and recommendations were automatically binding on it.

21. On the question as to whether legitimate expectation accrued to the respondents, courtesy of the report of the Bwondara Committee, Mr. Onyony submitted that the resolution by the Board to implement the PwC Report gave rise to a legitimate expectation that all employees would be treated equally. Counsel maintained that the skewed implementation of the PwC Report yielded to the respondents' right to seek its proper implementation. Mr. Onyony pointed out that the Bwondara Committee report formed part of the appellant's policies and its findings were binding on the appellant. Counsel also added that the two reports being the appellant's policy documents became terms of the employment contract between the appellant and the respondents. Counsel referred this Court to the various aspects of salary discrepancies as noted in the Bwondara Committee Report and submitted that those disparities if considered on the face of the PwC Report, qualified as discrimination and unfair labour practices.

22. Mr. Onyony relied on the cases of *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd & Another* [2001] eKLR and *Patrick Pakiro Odeke T/A Airport Africana Restaurant v Kenya Airport Authority* [2013] eKLR in support of his submission that the reports formed part of a binding contract between the appellant and its employees, and therefore the appellant was bound to the terms of that contract. Counsel also relied on the case of *Justice Kalpana Rawal v Judicial Service Commission & 3 others* [2016] eKLR to submit that the commencement of the implementation of the PwC Report created a legitimate expectation that all employees of the appellant would have their salaries reviewed upwards.

23. Turning to the issue of discrimination, counsel submitted that where discrimination is alleged by an employee, Section 5(6) of the *Employment Act* places the burden of proving that there was no discrimination upon the employer. In support of this view, counsel relied on *G.M.V. v . Bank of Africa (K) Ltd* [2013] eKLR. Counsel pointed out that the pleadings and evidence tendered by the appellant did not discharge this burden and in the end failed to prove that there was no discrimination at its offices whereas the respondents' allegations were proved through the reports adduced in evidence. Counsel urged that the trial court did not err in finding that the appellant discriminated against and subjected the appellants to unfair labour practices; and that there was legitimate expectation that the respondents would benefit from the implementation of the PwC Report.

24. The third issue addressed by Mr. Onyony was whether the award on underpayment of the annual leave allowance was merited. Counsel commenced his submissions on this issue by stating that Section 28 of the *Employment Act* entitled all employees, the respondents included, to annual leave of 21 days and that leave allowance was a work-related benefit provided for under Clause 3.1.13 of the NSSF Human Resource Manual. Subsequently, counsel submitted, that the learned Judge exercised her discretion judiciously in making the award as the same was calculated based on actual salaries of the respondents and which salaries are the subject of this appeal; and that the underpayment of salaries automatically affected their leave allowances. To buttress this submission, counsel relied on the case of *Fancy Jeruto Cherop & Another v . Hotel Cathay Ltd* [2018] eKLR.

25. The fourth issue in the respondents' submissions was in regard to the order compelling the appellant to calculate cost of living adjustments payable. On this, Mr. Onyony submitted that the appellant had the opportunity at the trial court to seek directions on the applicable parameters for calculating the cost of living adjustments. Counsel faulted the appellant for failing to do so and urged us to dismiss this ground of appeal. In conclusion, Mr. Onyony urged us to dismiss the appeal; uphold the judgment of the trial court in its entirety; and, award the costs of the appeal to his clients.

F. Issues for Determination

26. Before we determine this appeal, it is important to point out that this being a first appeal, we are required to conduct an independent appraisal and analysis of the facts and arrive at our own independent conclusion. In doing so, we are at liberty to consider both issues of law and fact. This is the import of Rule 31 (1) (a) of the *Court of Appeal Rules*, 2022. However, in doing so, we need to take into consideration the fact that unlike the trial court, we did not have the advantage of seeing and hearing the witnesses testify so as to be in a position to gauge their demeanour. The stated law on the jurisdiction of this Court on a first appeal has been reiterated in several decisions and we only need to cite *Abok James Odera T/A A. J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR where it was stated that:

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2EA 212 wherein the Court of Appeal held inter alia that: -
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> "On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence""

27. Living up to our mandate as stated above, we have dutifully considered the record of appeal and the submissions of all the parties and identified the issues for our determination as follows:

    i. Whether the claim by the respondents was time-barred;

    ii. Whether the PwC and the Bwondara Committee reports were binding on the appellant;

    iii. The burden of proof in employment disputes where infringement of constitutional rights is alleged;

iv. Whether the respondents were subjected to discrimination and unfair labour practices by the appellant;

v. Whether the orders sought were merited; and

vi. The costs of the appeal.

G. Analysis andDetermination

i. Whether the claim by the respondents was time-barred;

28. In the further amended statement of defence, the appellant pleaded that the respondents' memorandum of claim was time- barred by virtue of Section 90 of the *Employment Act*. From the record of appeal, it is apparent that the trial court addressed this issue in a ruling delivered on 15th May, 2018. The said ruling is not the subject of this appeal. It is trite law that a court cannot sit on appeal on its own ruling or judgement once it has already determined an issue. The trial court in its judgment reiterated that it was functus officio and proceeded to point out that the cut-off date for the claims was 30th April, 2014. We agree with the learned Judge that unless her ruling of 15th May, 2018 was challenged by way of either review or appeal, she was functus officio. The effect of this view is that without challenging the said ruling, an appeal on this aspect of the trial could only be entertained on the question as to whether the trial Judge was right in holding that she was functus officio. That aspect of the judgment is not among the issues in the appeal before us. Based on our finding hereinabove, and since no appeal has been preferred against the ruling of 15th May, 2018, we proceed on the understanding that the cut-off date for the respondents' claims remains 30th April, 2014. Although the issue of the jurisdiction of a court can be raised anew on appeal or suo moto by the court, in this case, the issue of jurisdiction had been raised and dealt with by the trial court, presumably to the satisfaction of the appellant. Further, the question of jurisdiction in this matter was a factual one to be dealt with according to the circumstances of each claimant.

ii. Whether the recommendations of PwC and the Bwondara Committee were binding on the appellant;

29. At the centre of this appeal are the two reports by PwC and the Bwondara Committee. There is also the Board Paper prepared by the appellant's Human Resource Manager in November, 2014. PwC was engaged by the Board in 2009 and its report subsequently approved and implemented in 2011. It is this report that restructured the job grading system by condensing the previous job groups and introducing new salary scales or what is commonly referred to by the parties herein as notches. The dispute between the parties arose when during the implementation of the PwC Report, the respondents who fell between job groups 5 and 6 alleged that they were awarded a 10% salary increase contrary to their salaries being aligned to the new salary scales as recommended by the PwC Report. The appellant's explanation for this move is that the respondents' salaries were above the benchmark salaries as per the salary survey and the Board decided to award them a 10% salary increment so as to cushion them against inflation. It is the appellant's case that the action by the Board resulted in the respondents' salaries falling in-between notches. There were two salary increments made in 2012 and 2014 but the respondents remained aggrieved leading to the commissioning of the Bwondara Committee by the Board to address those grievances.

In its report launched in 2014, the Bwondara Committee recommended that the PwC Report should have been implemented to the letter; and that the way it was implemented led to salary disparities which negatively affected the respondents. In November 2014, the Human Resource Manager advised

the appellant's Managing Trustee that a fresh job evaluation would sort out the issues raised by the respondents. The Board agreed with the suggestion.

30. The respondents maintain that the reports of PwC and the Bwondara Committee are binding on the Board and they ought to have been implemented to the letter. They further argue that since the reports were binding on the appellant, they formed part and parcel of the appellant's policy documents and therefore acquired the binding nature of a contract between the appellant as an employer and the respondents as employees. The respondents also contend that the reports created a legitimate expectation as they expected to reap the full benefits of the reports like other employees. The appellant on the other hand is of the view that the two reports were mere recommendations to the Board and were not binding; and that they could only form part of the appellant's policies once approved and adopted. It is the appellant's case that since the report of the Bwondara Committee was not approved, it did not become a policy document.

31. To properly appreciate the operations, scope, powers, discretions and limitations of the appellant's Board, we must recall the statutory law establishing and governing the operations of the appellant. The principal law governing the operations of the appellant at the time material to this appeal was the *National Social Security Fund Act*, Cap. 258 which was later repealed by the *National Social Security Fund Act* No. 45 of 2013 ("the NSSF Act"). The key objective of the NSSF Act is to provide for contributions to and the payment of benefits out of the National Social Security Fund ("the Fund"). Section 3 of the NSSF Act which establishes the Fund provides that the Fund shall be operated and managed by the National Social Security Fund Board of Trustees established under Section 4. At the time the respondents instituted their claim in 2017 the NSSF Act, 2013 had come into force on 10th January, 2014. The relevant provisions of Section 10 of that Act empower the Board of the appellant as follows:

> " 10. The powers and responsibilities of the Board
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> (1) The Board shall exercise all the powers necessary for the proper performance of its responsibilities under this Act.
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> (2) Without prejudice to the generality of subsection (1), the Board may—
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> (a) ...;
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> (b) ...;
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> c. lay down such policies and guidelines as may be necessary for the proper operations and management of all the contributions and funds collected by the Fund and for any other matter concerning the Fund;
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> d. ...;
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> e. approve contracts, undertakings, hiring of senior staff and other activities entered into by the Management or otherwise undertaken in the name of the Fund whose value requires Board approval;
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> f. ...;
>
> g. ...;

h. out of its own funds and together with funds it may require its employees and officers to contribute, establish and make contributions to pension, superannuation, provident or medical social security scheme for the benefit of its employees or officers and, grant pensions, gratuities or retirement allowances to its officers or employees from the funds established;

i. ...;

j. exercise such other powers as may be conferred upon the Board by this Act or any other written law.

3. The Board shall be responsible for—

(a) ...

(b) enforcement of good corporate governance practices within the Board and senior management;

(c) formulation of strategy and policies of the Fund in accordance with this Act and best practices of good corporate governance;

(d) effective leadership of the Fund and guidance of the Management in their day to day management of the Fund;

(e) ...;

(f) the effective administration and implementation of this Act; and

(g) doing all other things as are necessary to give effect to the provisions of this Act.

(4) In the performance of its responsibilities under this Act, the Board shall be accountable to the members of the Fund."

32. The foregoing provisions bestowed upon the Board a range of powers, obligations and responsibilities. It is also important to note that the appellant herein is a statutory body operating and funded by Kenyan employers and employees within both the public and private sector and its core mandate is to ensure that pension funds are prudently managed. The appellant being a statutory body is also subjected to the constitutional edicts on governance and public finance as well as the laws governing the management of public finances. As such, the appellant is expected to entrench good corporate governance, accountability, effectiveness and efficiency not forgetting ensuring value for money. The PwC Report, the Bwondara Committee Report and the Board Paper were sanctioned and the recommendations considered independently during different Board sittings as can be gleaned from the evidence on record. The engaged agents also came up with different conclusions and recommendations. The PwC Report was adopted and implemented whereas the Bwondara Committee Report and the Board Paper were not adopted for implementation.

33. The Concise Oxford English Dictionary defines the word

> " recommend" as;
>
> "(i) put forward with approval as being suitable for a purpose or role
>
> (ii) Advise as a course of action".

34. In *Thomson v Canada (Deputy Minister of Agriculture)* [1992] 1 SCR 385, the Canadian Supreme Court stated as follows:

> " The simple term "recommendations" should be given its ordinary meaning. "Recommendations" ordinarily means the offering of advice and should not be taken to mean a binding decision....
>
> There is nothing in either the section or the Act as a whole which indicates that the word "recommendations" should have anything other than its usual meaning. The Committee's recommendation constitutes a report put forward as something worthy of acceptance. It serves to ensure the accuracy of the information on which the Deputy Minister makes the decision, and it gives the Deputy Minister a second opinion to consider. It is no more than that."

35. We agree that ordinarily "recommendations" do not have a binding effect on the person or body to whom they are made. They cannot be elevated to the level of a "directive" or "directions" which are certainly binding on the recipients. With respect to this case, there is no doubt that even though these reports were generated at the behest of the Board, the Board retained the power to decide whether the recommendations, findings or reports would be implemented or not. Although the Board had authorized and commissioned the bodies that came up with the recommendations, the Board was not bound by those reports and was at liberty to reject them. Our view in this respect is supported by the decision of the Supreme Court in *Council of Governors & 47 others v Attorney General & 3 others (Interested Parties); Katiba Institute & 2 others (Amicus Curiae)* [2020] eKLR where it was stated:

> " In our considered opinion, the term "recommendation" is the operational yardstick in this entire debate. In this regard, we agree with those who have submitted that this term should first and foremost, be accorded its literal and natural meaning. Towards this end, generally speaking, a recommendation is a suggestion or proposal, for a certain cause of action. Such proposal does not ordinarily bind the person to whom, or entity to which, it is addressed. It is for the recipient of a recommendation, to determine what import he should attach to it. However, the categories of recommendations are never closed. Recommendations may differ, in their meaning,nature and effect, depending on the context in which they are deployed." [Emphasis ours]

36. Having elucidated the place of recommendations in relation to the recipients, we have no doubt that the same could only form part of the appellant's policies upon adoption by its Board. In this case, there were three independent reports and recommendations which were separately considered by the Board. It is a point of concurrence between both parties that the Board considered the three reports. The Board, however, approved and adopted the PwC Report while the report of the Bwondara Committee and the Board Paper were not adopted. Consequently, unlike the PwC Report which was adopted, the report of the Bwondara Committee and the Board Paper did not form part of the appellant's policy documents. In assigning the Bwondara Committee and the Human Resource Manager the task of looking into the complaints of the respondents about the alleged disparities between their salaries and

those of other employees, the Board simply wanted to receive an opinion on what the problem could have been and the best solution, if any. At the end of it all, and as communicated to the CAJ, the Board opted to conduct an organization review so as to address the employee complaints through another job evaluation.

37. The respondents have argued that the Bwondara Committee Report cannot stand alone and that the same is intertwined with the PwC Report. This argument cannot hold for at least two reasons; first, PwC and the Bwondara Committee were sanctioned through different Board meetings to address two different issues; and second, the process of acquiring legitimization through adoption by the Board was distinct and independent of the other. Each report was therefore required to undergo its own independent adoption process. The report of the Bwondara Committee was subjected to this process and unfortunately, it fell through the cracks. The report of the Bwondara Committee did not therefore acquire the status of a binding contract between the appellant and the respondents. The same fate befell the Board Paper prepared by the Human Resource Manager. Actually, in respect to the Board Paper, the Human Resource Manager herself had recommended that the most appropriate solution was to carry out a job evaluation.

iii. The burden of proof in employment disputes where infringement of rights is alleged;

38. In order to adequately address our minds to the issue as to whether the appellant discriminated against the respondents and subjected them to unfair labour practices, we are obliged to first determine the question of the burden of proof in employment disputes. On this issue, Mr. Masese for the appellant submitted that whereas Section 5(6) of the *Employment Act* places the burden of proof on the employer (the appellant herein), the employees (the respondents herein) were still under obligation to discharge the initial burden of proof before the same could be shifted to the employer. In support of this argument, counsel referred to Sections 108 and 109 of the *Evidence Act* and the Supreme Court pronouncement in *Raila Odinga & others v . IEBC & others*, Petition No. 5 of 2013. For the respondents, Mr. Onyony submitted that Section 5(6) of the *Employment Act*, squarely places the burden of proof on the employer where an employee alleges a constitutional breach in the course of employment.

39. We agree with Mr. Onyony for the respondents that Section 5(6) of the *Employment Act* places the burden of proof on the employer (the appellant herein) to disprove the existence of any discrimination at its premises against employees. In the same breath, we equally agree with Mr. Masese for the appellant that the provisions of Section 5(6) of the *Employment Act* notwithstanding, there is an initial burden of proof that the employees ought to discharge before an employer is called upon to adduce evidence dispelling such allegation. In our view, the operationalization of Section 5(6) of the *Employment Act* must conform to the provisions of Sections 108 and 109 of the *Evidence Act*. That would mean that an employee must in the first instance prove that he or she has been the victim of discrimination at the hands of the employer before the employer is called upon to provide evidence that there was no such discrimination. Further, our legal system being adversarial in nature, a party who requires a court to make a finding in his or her favour ought to establish a case upon which such a finding can be arrived at, even without the evidence of the adverse party. Faced with the same question in *Samson Gwer & 5 others v . Kenya Medical Research Institute & 3 others* [2020] eKLR, the Supreme Court held that:

> " [47] It is a timeless rule of the common law tradition, Kenya's juristic heritage, and one of fair and pragmatic conception, that the party making an averment in validation of a claim, is always the one to establish the plain veracity of the claim. In civil claims, the standard of proof is the "balance of probability". Balance of probability is a concept deeply linked to the perceptible fact-

scenario: so there has to be evidence, on the basis of which the Court can determine that it was more probable than not, that the respondent bore responsibility, in whole or in part.

[48] ...

[49] Section 108 of the *Evidence Act* provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and Section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

[50] This Court in *Raila Odinga & Others v Independent Electoral & Boundaries Commission & Others*, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

"...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...."

[51] In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.

[52] ...

[53] In spite of the commonplace that proof of "indirect discrimination" is difficult, the petitioners ought to have provided sufficient evidence before the Court, to enable it to make a determination. The 1st respondent, by a more positive scheme, went ahead to counter the bare allegations. The petitioners failed, in this regard, to discharge their initial burden of proof."

40. We fully associate with and adopt the reasoning of the Supreme Court as to the proper approach and application of Section 5(6) of the *Employment Act* in relation to the burden of proof in situations where discrimination is alleged in an employment relationship. It is this approach that we will adopt in addressing the next issue.

iv. Whether the respondents were subjected to discrimination and unfair labour practices by the appellant;

41. We have already given the PwC Report a clean bill of health as we have found that it was adopted by the Board therefore forming part of the appellant's policy documents. As already stated, recommendations could only become binding once adopted by the Board. It is during the Board meetings that a decision is made to adopt the recommendations contained in a report either wholly or partially; and while doing so, the Board also prescribe the manner of the implementation of such recommendations, including the provision of the necessary funds.

42. As far as the Board Paper is concerned, both parties agree that the Board resolved to conduct a fresh job evaluation and grading exercise in a bid to cure the salary disparities occasioned by the implementation

of the PwC Report in 2011. Unfortunately, for the PwC Report which forms the basis of the dispute herein, there is no evidence as to how the NSSF Board resolved to implement it. Snippets from exhibits that were produced at the trial, and which form part of the record, point to the fact that the PwC recommendations were implemented in full but the outcome of the implementation was not as expected. For instance, at pages 239 and 240 of the record, the Human Resource Manager after observing that there were disparities in percentages awarded during conversion of salaries in November, 2011 concluded in her Board Paper that:

> "It is noted that this was a creation of the PwC grid which is inconsistent with salary administration best practice where one or two different percentages are applied."

43. The respondents challenged the manner in which the recommendations were implemented. However, we must point out at this juncture that in our jurisdiction, the courts' power to interfere with internal affairs of a body corporate are limited for the basic reason that such body corporates are legal persons that are operated using their constitutive documents, in this case, being the NSSF Act, as well as other relevant legal instruments. The PwC Report being a Board resolution meant to regulate the internal affairs of the appellant, the courts could only interfere if it was proved that it was ultra vires, fraudulent, unconstitutional or breached the express provisions of the mother law or any other statutory provisions. The procedural aspect of adopting these resolutions has not been called into question. Instead, it is the content and the implementation of the resolutions that gave rise to the dispute herein. Indeed, Part 7.3.3 of the PwC Report provided an implementation formula as follows:

> "7.3.3 Implementation
>
> We recommend that every year the entire structure be adjusted upwards in relation to Cost of Living Adjustments (COLA).
>
> When assimilating staff into the proposed salary structure, we recommend: Step 1 - Those whose current pay lies below the recommended scale minimum should have their salaries adjusted to be placed in their new grade at the entry level;Step 2 - Those individuals whose current pay lies within the recommended salary scale should have their salaries adjusted to the next step within the grade; andStep 3 - Those whose current pay lies above the recommended scale maximum should have their salaries frozen to allow the structure to catch up.
>
> In terms of implementation for cost control purposes, the Fund may consider as a first phase, assimilating everybody into the structure by adopting the recommendation in Bullet one above.
>
> It is recommended that the Fund implement the structures based on the recommended assimilation point outlined above, to make implementation more affordable and easy to justify to current and future stakeholders of the Fund." [Emphasis ours]

44. We have elsewhere in this judgment addressed the meaning of the word "recommend". We wish not to repeat that analysis here but to restate that, a recommendation in its literal term connotes an advice and not a directive. The recipient retains the liberty to choose whether and how to implement it. As per the last paragraph of Part 7.3.3 of the PwC Report, implementation was left to the discretion of the Board. However, the same cannot be said of the second last paragraph of Part 7.3.3 of the PwC Report. Even so, the use of the word "may consider" in that paragraph still left unfettered the Board's discretion to consider other suitable alternatives.

45. In this case, the respondents alleged that the appellant discriminated against them and thus subjected them to unfair labour practices. As we have already stated earlier in this judgment, the onus was on the respondents to discharge the overriding obligation by laying a basis before the trial court establishing that their treatment at the hands of the appellant was discriminatory. It is only upon transcending this threshold that the burden would then shift to the appellant to prove the contrary.

46. According to the respondents, their case on discrimination was hinged on the fact that when the appellant was implementing the PwC Report, other staff had their salaries moved to the next notch under the same job group while in their case, all they were accorded was a 10% salary increase. As a result, they argued that their salaries were left to hang in- between different notches contrary to PwC recommendations. It was their case that such selective application of the PwC Report was discriminatory against them and subjected them to unfair labour practices. They further contended that the move by the appellant disadvantaged them in the subsequent salary increases. On the other hand, the appellant explained that during the implementation, the respondents were not supposed to receive any increment because their salaries were found to be above the benchmark salaries as revealed in the salary survey. It is the appellant's case that the Board however opted to award the respondents a 10% salary increment to cover inflation since the staff had not been cushioned against inflation for over five years.

47. In the record, there is a letter by one Alex Kazongo, the NSSF Managing Trustee dated 11th October, 2011 and referenced SF/EST/1/25 Vol.V(99) where in the last paragraph he states as follows:

> "Individual letters will be issued to all employees affected by these changes. Transfers will be effected after handover of current responsibilities under the supervision of respective Departmental and Regional Managers. Transfers to departments at the Headquarters will be effected before branch network."

48. The Bwondara Committee Report at part 5.4 (page 266 of the record of appeal) concludes that the disparities in percentages awarded in the 2011 salary conversions was a creation of the PwC Report which is inconsistent with salary administration and best practices. It is therefore apparent that the disparities were as a result of the implementation of the PwC Report. However, the main question would be whether the same was intentionally skewed with an intention to disadvantage the respondents. From the record, the respondents did not adduce evidence to show how other employees in similar positions benefited from the implementation and if indeed there was a differential treatment of similar situations by the appellant. Even from the evidence adduced, we note that the respondents despite having their salaries fall between notches still received salaries within their respective job groups or grades and which were indeed beyond the benchmark.

49. As we have already stated in this judgment, the appellant had the discretion to decide on how to implement the recommendations contained in the PwC Report. It was therefore incumbent upon the respondents to adduce evidence at the trial to establish how other employees who fell in the same scenario as them were treated differently. This was not an uphill task as the paragraph quoted above from the letter dated 11th October, 2011 and referenced SF/EST/1/25 Vol. V (99) reveals that all the affected employees were issued with letters. In *Gichuru v. Package Insurance Brokers* Ltd [2021] KESC 12 [KLR], the Supreme Court when discussing the issue of discrimination at the work place observed that:

> "(51) From the above definitions, it is clear that discrimination can be said to have occurred where a person is treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds like race,

sex disability etc or due to unfair practice and without any objective and reasonable justification." [Emphasis ours]

50. In *Transport & General Workers Union & Another v Bayete Security Holding* [1998] ZALC 147, the South African Labour Court when dealing with the concept of discrimination at the work place noted as follows:

> "It is so that to pay one employee more than another for doing the same work may have amounted to an unfair labour practice under the 1956 Act (see SA Chemical Workers Union v Sentachem Ltd [1988] 9 ILJ 410(IC)), and would also be so under the new Act if it is done for an arbitrary reason. However, the mere fact that an employer pays one employee more than another does not in itself amount to discrimination: see Du Toit et al The *Labour Relations Act* of 1995 2 ed, 436. Discrimination takes place when two similarly circumstanced individuals are treated differently. Pay differentials are justified by the fact that employees have different levels of responsibility, expertise, experience, skills, and the like." (Emphasis ours)

51. The fact that employees on other levels and scales may have received greater increases percentagewise cannot be equated to discrimination considering that PwC had in the implementation matrix, which is already reproduced elsewhere in this judgment, appreciated that there were employees whose "current pay lies below the recommended scale minimum", others "whose current pay lies within the recommended salary scale" and a third category "whose current pay lies above the recommended scale maximum." The respondents did not disclose in which category they fell so that it could be said that they were treated differently from those who fell into that category. Indeed, at no point in the entire trial did the respondents point to any section in the PwC Report as the one that was not implemented hence leading to their being discriminated against. A party who moves a court or tribunal for orders is under a duty to lay a basis for the grant of the orders sought. It is not sufficient to allege discriminatory treatment by the employer without clearly stating why the action of the employer amounts to discrimination.

52. Indeed, PwC at Part 7.3.2.1.7 of its report appreciated that the implementation of some of its recommendations needed the goodwill of external stakeholders. Hence the statement that:

> "7.3.2.1.7Comparisons with Guidelines
>
> The proposed structure maximum has exceeded the proposed maximum as stipulated in the Guideline by Kshs 121,400. NSSF will therefore need to engage the Ministry of Labour and Human Resource Development for a revision in their structure maximum."

53. It is therefore our view that without evidence of differential treatment on the part of the appellant, the respondents' claims of discrimination and unfair labour practices were unfounded. At least, the respondents ought to have established the comparators or alternatively disproved the explanations tendered by the appellant as to why it implemented the 10% salary increment instead of moving the respondents' salaries to the next notch. Alternatively, evidence ought to have been adduced to impute malice or ill motive specifically targeted at the respondents by the appellant. Consequently, we also find that the claims of discrimination and unfair labour practices in respect to the subsequent salary increases in 2012 and 2014 were similarly not proved.

v. Whether the orders sought were merited;

54. From our findings above, we find that the learned Judge did not properly appreciate all the available evidence in a circumspective manner. Had she properly assessed the available evidence no other conclusion would have sufficed other than that which we arrive at herein; that the respondents did not discharge the initial burden of proof and their case was bound to fail. In the circumstances, we find that the judgment of the trial court and the subsequent orders cannot hold.

vi. Who should bear the cost of this appeal?

55. The next issue is who should bear the costs of this appeal. Under Rule 33 of the Court of Appeal Rules, 2022 this Court is empowered to make orders as to costs. In S*upermarine Handling Services Ltd v Kenya Revenue Authority* [2010] eKLR, this Court stated that:

> " Costs of any action, cause or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. See Section 27 (1) of the *Civil Procedure Act*... Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute "good reason" within the meaning of the rule."

56. The Supreme Court in *Jasbir Singh Rai & 3 others v . Tarlochan Singh Rai & 4 others* [2014] eKLR stated as follows with regard to award of costs:

> " Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases."

57. In the trial court, each party was ordered to bear their own costs. We do not wish to interfere with that exercise of discretion. With regard to costs incidental to this appeal, this Court has authority to make its own orders as to costs. We have considered the actions of the parties during the trial and hearing of this appeal. We have also considered the issues raised and canvassed in this appeal and the outcome. Additionally, we take cognizance that the appellant and some of the respondents might still be in an employer-employee relationship while other respondents are former employees of the appellant. In the circumstances, it is our view that these are sufficient reasons to make us depart from the norm that costs follow the event by ordering the parties to bear their own costs of the appeal.

58. The final orders of this Court are as follows:

    i. The appeal is hereby allowed and the entire judgment dated 24th August 2020 issued in Nakuru ELRC Cause No. 212 of 2017 is set aside in its entirety and substituted with an order dismissing the respondents' further amended Memorandum of Claim dated 21st June 2019; and

    ii. The parties to bear their own costs.

59. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 30TH DAY OF JUNE, 2023.

F. SICHALE

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

.....

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR