



**The German School Society & another v Ohany & another (Civil Appeal  
325 & 342 of 2018 (Consolidated)) [2023] KECA 894 (KLR) (24 July 2023) (Judgment)**

Neutral citation: [2023] KECA 894 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 325 & 342 OF 2018 (CONSOLIDATED)  
HM OKWENGU, HA OMONDI & JM MATIVO, JJA  
JULY 24, 2023**

**BETWEEN**

**THE GERMAN SCHOOL SOCIETY ..... APPELLANT**

**AND**

**HELGA OHANY ..... RESPONDENT**

**AS CONSOLIDATED WITH**

**CIVIL APPEAL 342 OF 2018**

**BETWEEN**

**HELGA OHANY ..... APPELLANT**

**AND**

**THE GERMAN SCHOOL SOCIETY ..... RESPONDENT**

*(Appeals from the judgment and decree of the Employment and Labour  
Relations Court at Nairobi (Wasilwa, J.) dated on 17th January,  
2017 and reviewed on 4th October, 2017) in ELRC No. 2197 of 2014)*

**JUDGMENT**

1. This judgment determines two consolidated appeals, namely, The German School Society v Helga Ohany, Civil Appeal No. No. 325 of 2018 and Helga Ohany v The German School Society Civil Appeal No. 342 of 2018. The common thread between the two appeals is that they both arise from the judgment and decree of the Employment and Labour Relations Court at Nairobi by (Wasilwa J.) delivered on 17<sup>th</sup> January, 2017 in ELC Cause No. 2197 of 2014 and reviewed on 4<sup>th</sup> October, 2017. The point of divergence is that whereas Civil Appeal No. 325 of 2018 seeks to set aside the entire



judgment and decree and have it substituted with an order of dismissal, Civil Appeal No. 342 of 2018 seeks orders that the refusal to award pension lost be substituted with an order awarding the respondent the pension lost and interest as set out in her undated statement of claim filed on 11<sup>th</sup> December, 2014; that the appeal be allowed and part of the reviewed judgment and decree awarding interest at 6% be set aside and substituted thereof by an order that interest at court rates be awarded from the date of the suit until payment in full. The other variance is that whereas the appellant in Civil Appeal No. 325 of 2018 prays for costs of the appeal and costs of the suit in the High Court, the appellant in Civil Appeal No. 342 of 2018 prays for costs of the appeal only.

2. For the sake of brevity, The German School Society, the appellant in Civil Appeal No. 325 of 2018 shall herein after be referred to as the appellant while Helga Ohany, the appellant in Civil Appeal No. 342 of 2018 shall herein after be referred to as the respondent (where the context so permits respectively).
3. As was held by the High Court in *Korean United Church of Kenya & 3 Others v Seng Ha Sang* [2014] eKLR, consolidation of suits is done for the purposes of achieving the overriding objective of expeditious and proportionate disposal of civil disputes. Consolidation saves costs, time and effort and makes the conduct of several actions more convenient by treating them as one action. The rationale behind consolidation of matters is to avoid conflicting judgments, save time and money by clubbing together matters involving common questions of fact and law.
4. The history of this litigation can be traced to a written contract of employment signed between the appellant and the respondent pursuant to which the respondent was employed by the appellant on an unlimited contract on 28<sup>th</sup> March, 1995, at a salary of Deutsche Mark (DM) 2,076.00 per month. The respondent rose to the position of chief accountant. On 11<sup>th</sup> July, 2014, her services were terminated on grounds of redundancy. She challenged the termination at the ELRC on grounds that:
  - (a) the termination was wrongful and unfair;
  - (b) her application to join the employer's pension scheme was turned down because the scheme was only available to employees paid in Kenya Shillings and not those paid in DM;
  - (c) even though the terms of her contract were altered several times giving her more responsibilities, after restructuring the administration department, she lost loyalty bonus and compensation for loss of purchasing power, which was discriminatory because other employees on Euro contracts still got their payments;
  - (d) she was denied the opportunity to discuss hostile work environment, challenges and difficulties at work contrary to her terms and conditions of employment;
  - (e) the changes made to her terms were to her detriment, occasioning her loss of income of Euro (€) 43,264.55 as back pay;
  - (f) without notice or justifiable cause, the appellant capriciously declared her redundant after advertising for a post merging her duties with Human Resources and failing to consider her for re-absorption in the organization contrary to the *Employment Act*.
5. The appellant filed a response to the claim and a notice of a preliminary objection on 11<sup>th</sup> March, 2015, stating that:
  - (a) the claim was time barred under section 90 of the *Employment Act* 2007 in as far as any cause of action was said to have accrued before the 10<sup>th</sup> December, 2011;
  - (b) the court lacked jurisdiction to entertain statute barred claims;



- (c) the respondent was issued with a warning letter dated 21<sup>st</sup> January, 2010, for poor performance and lack of efficiency in the discharge of her duties;
  - (d) the documents produced by the respondent could not be authenticated as they were not dated or signed and that the fee note produced as exhibit 41 was a legally privileged document between the respondent and its lawyers which ought to have been disregarded by the court in its decision;
  - (e) the respondent never applied to join the pension scheme, so, she was not denied an opportunity to join it as alleged. Further, it was voluntary for any employee to join and that the only application made by the respondent was via a letter dated 12<sup>th</sup> May, 2014, which could not be acted upon because it was not in the prescribed form, and therefore it amounted to a non-application;
  - (d) the respondent was above the 55 years cap and she ostensibly waived her right to join the scheme 2 years after employment in line with the rules;
  - (e) there is nothing to show that she was granted special permission by the trustees and the insurance company to join the scheme; and,
  - (f) as a trustee of the scheme, she was in a position to know all the regulations but did not join the scheme.
6. In her judgment dated 17<sup>th</sup> January, 2017, Wasilwa, J. found that that the respondent suffered unfair and wrongful redundancy coupled with being subjected to discriminatory practices by the appellant to her disadvantage and detriment. She awarded damages as follows:
- (a) For discrimination, an award equivalent to 12 months' salary i.e. 12 X Kshs. 177,144/= Kshs. 2,125,728/=;
  - (b) Unlawful redundancy 12 months' salary, i.e. 12 x Kshs. 177,144= Kshs. 2,125,728/=;
  - (c) Back pay – Kshs. 1,422,255/= all aggregating to Kshs. 5,673,711/= plus what was paid to her for redundancy. She also awarded costs and issuance of Certificate of Service.
7. Following a successful application for review by the respondent, in a ruling dated 4<sup>th</sup> October, 2017, the learned judge varied the above award as follows:
- a. Damages for discriminatory practice-12 x Kshs.495,445/= .....Kshs. 5,945,340/=.
  - b. Damages for unlawful redundancy-12 x Kshs. 495,445/=.....Kshs. 5,945,340/=.
  - c. Difference between pay earned between 2003 and September 2007..Kshs.4,975,360/= Total Kshs. 16,866,040
  - d. Interest shall be deemed to be 6%.
8. Aggrieved by the judgment, the appellant seeks to set it aside faulting the learned judge for: (i) holding that a claim for back pay was a continuing injury and therefore not time barred; (ii) failing to find that the respondent's claims as set out at paragraph 3 to 12 of the statement of claim were barred under Section 90 (1) of the *Employment Act*; (iii) failing to consider the appellant's defence and response with regard to the respondent's claim for pension benefits; (iv) misdirecting herself by holding that the existence of a pension scheme was never brought to the attention of the respondent yet it was



the respondent's evidence that she applied to join the pension scheme but was turned down and the respondent was subsequently ineligible having attained the age of 55 years; (v) erred when she found that the respondent had been discriminated against by being deliberately excluded from the pension scheme; (vi) erred in awarding the respondent maximum compensation on grounds of discrimination and a further compensation for unfair redundancy amounting to double compensation; and, (vi) erred in finding the redundancy was unlawful.

9. Aggrieved by the same judgment, the respondent appealed to this Court citing four grounds, namely, that; (a) the learned judge erred in law and fact equating damages for discriminatory practice to pension lost; (b) the learned judge erred in finding that to award pension lost would amount to a double payment; (c) the learned judge misdirected herself in awarding interest at 6% under the section 26 (2) of the *Civil Procedure Act*; and, (d) the learned judge erred in law in failing to clarify when the awarded interest would take effect. The respondent prayed that part of the reviewed judgment and the decree be substituted with a judgment awarding her the pension lost and interest as set out in the statement of claim.

She also prayed that the award of interest at 6% be set aside and be substituted by an order that interest at court rates be awarded from the date of the suit until payment in full, lastly, costs of the appeal be awarded to her.

10. In his submissions, the appellant essentially argued three issues. One, whether the respondent's claims set out at paragraphs 3 to 12 of the statement of claim were time barred. Two, whether the respondent's claim for pension benefits was merited considering the evidence on record and third, whether the termination of the respondent's employment was unlawful.
11. Regarding the first issue, the appellant argued that the respondent admitted that the opportunity to join the pension scheme accrued two years after her employment in 1995. Further, in 2014 when she sought to join the scheme, she was ineligible having attained the age of 55 years. The appellant also submitted that the respondent filed her suit in 2014, 17 years, after joining the scheme, so, her claim on this issue offends section 90 of the *Employment Act*.
12. Regarding the alleged underpayment and loss of benefits, the appellant submitted that it was not in dispute that the respondent's contract of employment was changed on various occasions during the lifespan of the contract, and, that the respondent signed for all the variations without questioning, so, her right to challenge the alterations lapsed in 2002. It argued that in 2002, the respondent felt that she was underpaid and raised the issue with the appellant who adjusted her salary effective July 2002, so, the right to challenge the alleged underpayment for the period between January and November, 1998 lapsed in 2001.
13. Further, the appellant argued that the respondent's complaint that the pay adjustment was reflected in Kenya Shillings and not Euros was rectified in 2003 and her salary was translated into Euros effective 1<sup>st</sup> July, 2002, and the balance occasioned by the exchange rate differences was duly paid. Consequently, the appellant argued that any injury ceased in 2003 and any claims for lost benefits accrued in 2003 when the respondent was reverted back to the Euro payment lapsed in 2006.
14. Additionally, the appellant submitted that in 2009 when German employees were regrouped under a new salary scale to the exclusion of the respondent, after the issue was raised, she was regrouped and her benefits backdated. It submitted that the respondent was notified that some benefits such as the loss of purchasing power would no longer be payable effective October 2009, and having failed to challenge the changes to benefits, her right to challenge the same lapsed in October, 2012.



15. Regarding the increment of November 2009, the appellant argued that it raised the salaries of other employees from 80% to 85% of the basic salary but the respondent's salary was not increased due to earlier revisions of her contract which meant that she was earning 83.9% compared to the other employees who earned 80%. In any event, the appellant argued that the respondent's claim for the increment would have accrued in November, 2009, so, it lapsed in November, 2012 because the limitation period under the law runs from when the loss is suffered and must be filed within 3 years. Further, this suit was filed in 2014 long after the causes of action had lapsed, so, the trial judge erred in holding that the respondent's claim was a continuing injury. The appellant cited *Attorney General & Another v Andrew Maina Gitinji & Another* (2016) eKLR, where this Court in explaining the mandatory nature of section 90 of the *Employment Act* held that the intention of Parliament must have been to protect both the employer and the employee from irredeemable prejudice if they have to meet claims and counter claims made long after the cause of action had arisen when memories have faded, documents lost, witnesses are dead or untraceable.
16. Regarding pension benefits, the appellant submitted that the Supreme Court in *Albert Chaurembo Mumba & 7 Others v Maurice Munyao & 148 Others* (2019) eKLR was unequivocal that pension disputes are not in the province of the courts whether it is the High Court or the ELRC. The appellant argued that even though the said decision was delivered after the impugned judgment, the appellant's counsel urged this Court to be guided by the said decision and set aside any award in relation to pension benefits.
17. The appellant submitted that at no point did the respondent allege that the pension scheme was not brought to her attention, so, the trial court erred in holding that the existence of the pension scheme was not brought to the attention of the respondent and as a result, she lost out on the pension contribution from the employer. Also, the respondent had the option of joining the pension scheme because joining the pension scheme was voluntary and any employee of the appellant was free to join subject to the applicable rules which the respondent was well aware of and in fact, in 2008, she was a trustee of the pension scheme and could have made an application under clause 3.4 of the Schedule to the Pension Deed which required her to get special permission from her fellow trustees but she did not do so. Further, her attempt to join the scheme in 2014 was done via a letter instead of the prescribed form. Lastly, having attained the age of 55 years, she was ineligible to join the scheme.
18. Regarding the review of the judgment, the appellant cited this court's holding in *Kenya Medical Research Institute v Samson Gwer & 8 Others* (2019) eKLR that to alter a claim at the judgment stage is impermissible because the other party is not afforded an opportunity to respond.
19. On the legality of the redundancy, the appellant submitted that the allegations that there were no consultations and that the respondent was forced to go on leave after the redundancy notice was issued were never substantiated because on 12<sup>th</sup> June, 2014, the respondent was invited to the appellant's board meeting and informed that due to ongoing restructuring, the position she held (Chief Account) was abolished, and that the respondent in her statement admitted asking for time to consult her advocate, and her advocate replied to the notice on 26<sup>th</sup> June, 2014, so, the parties were in consultations during the notice period before termination of the employment on 11<sup>th</sup> July, 2014.
20. Regarding the issue of being forced to proceed on leave during the notice period, the appellant argued that there is no legal provision prohibiting service of notice while an employee is on paid leave. It submitted that the trial court erroneously held that the respondent's leave was used as notice period and at no point did the respondent allege that she was not paid while she was on leave.



21. On the selection criteria for those to be declared redundant, it argued that the respondent was the sole holder of the position of chief accountant as opposed to being part of a class of employees, so section 40 (1) (c) of the *Employment Act* was inapplicable. Further, that the award for damages for unlawful redundancy was unsustainable and should be set aside. It cited *Dalmas B. Ogoye v K.N.T.C. Ltd* [1996] eKLR in which this court held that where an employee was lawfully terminated, the only damages they are entitled to in law are the amounts they would have been entitled to in the contract of service and no more. The appellant argued that the respondent having been lawfully terminated and her terminal dues paid, she has no more claims against the appellant, and, that Further, the award of 12 months' compensation was excessive and unjustifiable. It cited the dictum in *Moi Teaching and Referral Hospital v James Kipkonga Kendagor* [2019] eKLR in which this Court held that a judge who awards the statutory maximum of 12 months' salary without justification has exceeded his powers.
22. Lastly, the appellant submitted that the award of interest is at the discretion of the Court and not a matter of right and cited *Beth Muthoni Njau & Another v City Finance Bank Ltd* [2018] eKLR which held that failure to award interest does not constitute an error of law that can be corrected by an application for review.
23. The respondent framed two issues in her submissions. One, whether the respondent's claims set out at paragraphs 3 to 12 of the statement of claim were time barred and second, whether the process leading to her termination was unlawful.
24. She submitted that alteration of terms of her contract of service in the years 1997 to 2004, 2007 and 2009 and the resultant underpayments and loss of benefits were a continuing injury within the meaning of section 90 of the *Employment Act*. She submitted that the High Court made the correct finding on back pay and underpayments and urged this Court to uphold the finding. She cited *Ol Pejeta Ranching Limited v David Wanjau Muboro* (2017) eKLR where this court held:

“The period in employment was a continuous period, with employment benefits vesting in the employee, and obligations on the part of the employer attaching over time. There are accrued benefits which cannot be isolated and subjected to a different date of accrual. At the date of termination, the Employee should be accorded all benefits arising under the contract of employment. The event that triggered this Claim happened on or about 26<sup>th</sup> January 2011, and the Claim to enforce the full range of benefits was filed on 11<sup>th</sup> August 2011, well within the period created under section 90 (of the *Employment Act* 2007)...”
25. On the legality of the redundancy process leading to her termination, she contended that no notice was issued to her communicating the appellant's intention to render her position redundant one month before the intended date of termination. She submitted that the letter dated 12<sup>th</sup> June, 2014, was not a notice of intention to declare redundancy but was a termination notice on account of redundancy contemplated under section 40(1) (f), since it required her to return any property of the school in her possession not later than 11<sup>th</sup> July 2014 the effective date of termination, so the learned judge did not err in finding that there was no consultation prior to the letter dated 12<sup>th</sup> June, 2014.
26. She cited *Cargill Kenya Limited v Mwaka & 3 Others* (2021) KECA 115 (KLR) in which this Court held that the employer is supposed to give two (2) distinct notices on account of redundancy, that the notice must be in writing and it is to be given after the conclusion of consultations on all issues arising from the redundancy. Also, the respondent argued that no criteria or reasons were given as to why she was singled out for redundancy, and that the termination process was unfair as she was the only one targeted. She argued that no evidence of restructuring of the Finance Department was tabled before the court, but, the appellant simply wanted to get rid of her without following due process.



27. In support of her appeal, she submitted that the award of interest after the review was proper and within the law and that the exercise of the discretion should have been in keeping with the practice note number 1 of 1982.
28. We have considered the records for the two appeals, 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 ELRC 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 this court's 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 this Court. The first appellate court has jurisdiction to reverse or affirm the findings of the trial court. 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 ELRC, we did not have the benefit of seeing the witnesses testify. (See *Kenya Ports Authority v Kuston (Kenya) Limited* (2009) 2EA 212).
29. Essentially, the appellant's appeal will turn on the following questions. Did the learned judge err in holding that the respondent's claims set out at paragraphs 3 to 12 of the statement of claim were not time barred. Was the existence of the pension scheme brought to the attention of the respondent? Did the appellant discriminate against the respondent by deliberately excluding her from the pension scheme? Was the award of 12 months' compensation to the respondent excessive in the circumstances and without any justification? Was the termination on account of redundancy unlawful?
30. First, we will address the question whether the respondent's claims set out at paragraphs 3 to 12 of the Statement of Claim were time barred. The appellant's contestation is that the respondent's claim for back pay accrued long after the prescribed 3 years limit under section 90 of the *Employment Act*. On her part, the respondent argues that the said claims relate to a continuing state of affairs, so, it constitutes a continuing claim which was not resolved during the pendency of the respondent's employment contract and several amendments thereto and that the claim crystalized upon her unlawful termination, so, her suit was instituted within the time set out in section 90 of the *Employment Act*, 2007.
31. The trial judge agreed with the respondent's counsel that her claim crystalized upon termination of her contract since the respondent would not have moved the court from time to time during the pendency of her employment because her hopes were that the appellant would make good what she was entitled to upon the contract coming to an end. The learned judge held that the claim was filed within time since the contract ceased on 11<sup>th</sup> July, 2014, and the claim was filed on 11<sup>th</sup> December, 2014. The learned judge held that the claims for back pay, underpayments, and loss of purchasing power were not time barred and cited Industrial Cause No. 849 of 2011, *Justus Atulo Asbioya v Akshar Team security Ltd* (UR) which held:
- “The period in employment was a continuous period, with employment benefits vesting in the employee, and obligations on the part of the employer attaching over time. There are accrued benefits which cannot be isolated and subjected to a different date of accrual. At the date of termination, the Employee should be accorded all benefits arising under the contract of employment. The event that triggered this Claim happened on or about 26th January



2011, and the Claim to enforce the full range of benefits was filed on 11th August 2011, well within the period created under section 90 (of the *Employment Act* 2007).”

32. Central to the issue at hand is section 90 of the *Employment Act* which provides:

90. Notwithstanding the provisions of section 4 (1) of the *Limitation of Actions Act*, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained of or in the case of continuing injury or damage within twelve months next after the cessation thereof.

33. Undeniably, the above provision in peremptory terms bars civil actions or proceedings based or arising out of the *Employment Act* unless the same is commenced within three years next after the act, neglect or default complained of. However, where there is a continuing injury or damage, the action must be brought within twelve months after the cessation thereof. The statutes of limitations are enacted as a matter of public policy to fix a limit within which an action must be brought, or the obligation is presumed to have been paid, and is intended to run against those who are neglectful of their rights, and who fail to use reasonable and proper diligence in the enforcement thereof. The underlying purpose of statutes of limitation is to prevent the unexpected enforcement of stale claims concerning which persons interested have been thrown off their guard by want of prosecution.

34. The respondent’s argument is that the claims in question constitute a continuing injury within the meaning of section 90 of the *Employment Act*. Specifically, she argued that the claim for back pay, underpayments and loss of purchasing power are a continuing claim that was not resolved during the pendency of her contract and the several amendments/alterations/additions made to the said contract, and, it was upon the unlawful termination of her contract that the claim crystalized, so, the institution of the suit for the recovery of the amounts claimed was within time as set out in section 90 of the Act. The respondent contended that every unequal pay received reset the date of the accrual of action. After considering the respective parties’ arguments, the learned judge held that the respondent could not move to court from time to time during the pendency of her employment because her hope was that the appellant would make good what she was entitled to under the contract and that all the benefits not paid as continuing injury were to be claimed within 12 months after cessation of the contract. It was the learned judges finding that the contract ceased on 11<sup>th</sup> July, 2014, and this claim was filed on 11<sup>th</sup> December, 2014, within the time allowed, hence, it was not time barred.

35. There is no contest that a claim premised on a continuing injury must be filed with 12 months after cessation of the injury as provided by section 90. This position was upheld by this Court in *G4S Security Services (K) Limited v Joseph Kamau & 468 Others* [2018] eKLR. The contestation before this Court is whether the claims in question fall within the ambit of “a continuing injury” as contemplated by section 90. The essential question for determination before the High Court was the maintainability of the complaint due to the limitation period prescribed by the above section. Central to this question is the meaning of the phrase “a continuing injury” and whether the respondent’s claims fell within the said definition. Before the High Court and this Court, the parties did not attempt to define what constitutes “a continuing injury.” From the record, we note that the respondent’s counsel only cited the definition of “back pay” in the *Black’s Law Dictionary 9<sup>th</sup> Edition* at page 159 which defines it as “the wage or salary that an employee should have received but did not because of an employer’s unlawful action as setting or paying the wages or salary” to support her claim that back pay was a continuing state of affairs.



36. Locally, there appears to be a paucity of court decisions defining the phrase “a continuing injury.” The *Employment Act* does not define the said phrase. We are alive to the dictate in Article 259 of *the Constitution* which requires courts to advance the development of the law. We shall attempt to judicially define what constitutes “a continuing injury.”

37. The principles underlying continuing wrongs and recurring/ successive wrongs have been applied to service law disputes. “A continuing wrong” refers to a single wrongful act which causes a continuing injury. “Recurring/successive wrongs” are those which occur periodically, each wrong giving rise to a distinct and separate cause of action. The Supreme Court of India in *Balakrishna S.P. Waghmare v Shree Dhyaneswar Maharaj Sansthan* AIR 1959 SC 798 explained the concept of continuing wrong (in the context of the Indian Limitation Act) as follows:

“It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues, then the act constitutes a continuing wrong. In this connection, it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury.”

38. Also relevant is *M. R. Gupta v Union of India*, (1995) (5) SCC 628, in which the appellant approached the High Court in 1989 with a grievance in regard to his initial pay fixation with effect from 1.8.1978. The claim was rejected as it was raised after 11 years. The Supreme Court of India applied the principles of “continuing wrong” and “recurring wrongs” and reversed the decision. It held:

“The appellant's grievance that his pay fixation was not in accordance with the rules, was the assertion of a continuing wrong against him which gave rise to a recurring cause of action each time he was paid a salary which was not computed in accordance with the rules. So long as the appellant is in service, a fresh cause of action arises every month when he is paid his monthly salary on the basis of a wrong computation made contrary to rules. It is no doubt true that if the appellant's claim is found correct on merits, he would be entitled to be paid according to the properly fixed pay scale in the future and the question of limitation would arise for recovery of the arrears for the past period. In other words, the appellant's claim, if any, for recovery of arrears calculated on the basis of difference in the pay which has become time barred would not be recoverable, but he would be entitled to proper fixation of his pay in accordance with rules and to cessation of a continuing wrong if on merits his claim is justified. Similarly, any other consequential relief claimed by him, such as, promotion etc., would also be subject to the defence of laches etc. to disentitle him to those reliefs. The pay fixation can be made only on the basis of the situation existing on 1.8.1978 without taking into account any other consequential relief which may be barred by his laches and the bar of limitation. It is to this limited extent of proper pay fixation, the application cannot be treated as time barred.....

In the case of pension the cause of action actually continues from month to month. That, however, cannot be a ground to overlook delay in filing the petition..... If petition is filed beyond a reasonable period say three years normally the Court would reject the same or restrict the relief which could be granted to a reasonable period of about three years.”



39. Also, the Supreme Court of India in *M. Siddiq v Suresh Das* (2020) 1 SCC 1 observed:

343. “... A continuing wrong arises where there is an obligation imposed by law, agreement or otherwise to continue to act or to desist from acting in a particular manner. The breach of such an obligation extends beyond a single completed act or omission. The breach is of a continuing nature, giving rise to a legal injury which assumes the nature of a continuing wrong. For a continuing wrong to arise, there must in the first place be a wrong which is actionable because in the absence of a wrong, there can be no continuing wrong. It is when there is a wrong that a further line of enquiry of whether there is a continuing wrong would arise. Without a wrong there cannot be a continuing wrong. A wrong postulates a breach of an obligation imposed on an individual, whether positive or negative, to act or desist from acting in a particular manner. The obligation on one individual finds a corresponding reflection of a right which inheres in another. A continuing wrong postulates a breach of a continuing duty or a breach of an obligation which is of a continuing nature. [...]

Hence, in evaluating whether there is a continuing wrong within the meaning of Section 23, the mere fact that the effect of the injury caused has continued, is not sufficient to constitute it as a continuing wrong. For instance, when the wrong is complete as a result of the act or omission which is complained of, no continuing wrong arises even though the effect or damage that is sustained may endure in the future. What makes a wrong, a wrong of a continuing nature is the breach of a duty which has not ceased but which continues to subsist. The breach of such a duty creates a continuing wrong and hence a defence to a plea of limitation.”

40. The employment relationship is the legal link between employers and employees. It exists when a person performs work or services under certain conditions in return for remuneration. It is through the employment relationship, however defined, that reciprocal rights and obligations are created between the employee and the employer. It has been, and continues to be, the main vehicle through which workers gain access to the rights and benefits associated with employment in the areas of labour law. The existence of an employment relationship is the condition that determines the application of the labour law provisions. It is the key point of reference for determining the nature and extent of employers' rights and obligations towards their workers.
41. Normally, a belated service related claim will be rejected on the ground of delay and laches or limitation. One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. Borrowing from the excerpts reproduced above and considering that the respondent continued to work under the same circumstances, we find and hold that the breach complained of was of a continuing nature, capable of giving rise to a legal injury which assumes the nature of a continuing wrong. It follows that the appellant's argument that the claims were time barred fails. On the contrary, the said claims fall within the ambit of a continuing wrongs contemplated under section 90.
42. Next, we will address the appellant's argument that the High Court lacked jurisdiction to determine the respondent's eligibility to the pension scheme. In support of this argument, the appellant relied



on the Supreme Court decision in *Albert Chaurembo Mumba & 7 Others v Maurice Munyao & 148 Others* (2019) eKLR which held that pension disputes are not within the province of the courts whether in the High Court or the ELRC. Acknowledging that the said decision was delivered after the trial court's judgment, she urged this Court to follow the said decision and set aside any award relating to pension benefits.

43. We are acutely aware that Article 163 (7) of *the Constitution* provides that Supreme Court decisions are binding on all courts in Kenya except the Supreme Court itself. The said article is an edict addressed to all the courts in Kenya telling them that they are bound by Supreme Court decisions. However, the facts in the said decision are totally different from the facts in this case. The dispute in *Albert Chaurembo Mumba & 7 Others v Maurice Munyao & 148 Others* (*supra*) involved members of a pension scheme and therefore the matter was governed by the *Retirement Benefits Act*. The said Act defines a member to mean a member of a retirement benefits scheme and includes a person entitled to or receiving a benefit under a retirement benefits scheme. The Act defines a "scheme" to mean a retirement benefits scheme. In the instant case, the respondent was not yet a member of the Pension Scheme. Her complaint was that she was denied the opportunity to join the scheme. Accordingly, the said decision is distinguishable from the facts of this case.
44. In any event, a case is only an authority for what it decides. The following excerpt explicates this point.

"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found.

...a case is only an authority for what it actually decides.." (*Orissa v Sudhansu Sekhar Misra* MANU/SC/0047/1967).
45. The ratio of any decision must be understood in the background of the facts of the particular case. A case is only an authority for what it actually decides, and not what logically follows from it. A little difference in facts or additional facts may make a lot of difference in the precedential value of a decision. Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect. In deciding cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another. To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Accordingly, we agree with the learned judge that the jurisdiction of the ELRC is drawn from Article 162(2)(b) of *the Constitution* and therefore the ELRC had the requisite jurisdiction.
46. It's also important to mention that there is evidence that the respondent failed to join the pension scheme at least two years after she was employed and by the time she expressed the desire to join, she had attained the age of 55 years rendering her ineligible. All these facts distinguish this case from the facts in the cited Supreme Court decision.
47. Next, we will address the question whether the learned judge erred by holding that the existence of the pension scheme was not brought to the attention of the respondent. The appellant contended that the respondent admitted in her oral evidence that she did not at any point in time apply to join the pension scheme save for a request made in 2014 by which time she was ineligible to join having surpassed the 55 year age limit. During cross examination, the respondent admitted that the period to join the pension scheme lapsed in 1997. In addition, upon cross-examination, the respondent admitted



that she applied to join the pension scheme vide a letter dated 12<sup>th</sup> May, 2014; that she was beyond the age of 55 years; and, that there was no provision in the pension scheme providing that the scheme was only for Kenyans. Further, an employee who failed to join the scheme as soon as possible could not join the scheme without the permission of the trustees and the insurance company as provided by clause 3 of the trust deed and rules. Also, that the respondent in her capacity as a trustee of the scheme was aware that joining the scheme was voluntary and subject to the provisions of the trust deed. It was also brought to the attention of the respondent that prior to the letter dated 12<sup>th</sup> May, 2014, at no point had she requested to join the pension scheme.

48. Our reading of the above evidence is that all along the respondent was aware of the existence of the pension scheme, but she never took any steps to join the scheme. As was held by this Court in *Gitabi & Another v Maboko Distributors Ltd & Another* (2005) 1 EALR page 65 a court of law has to decide a case before it on the evidence before it and on the law. We find that the trial court's finding that the existence of a pension scheme was never brought to the respondent's attention was not supported by the evidence. In fact, as can be gleaned from the respondent's letter dated 12<sup>th</sup> May, 2014, the respondent's grievance was that she was unlawfully denied membership to the pension scheme and at no point did she allege that the existence of the pension scheme was never brought to her attention.

49. Closely related to the above issue is the respondent's allegation of discrimination which were premised on the argument that she was denied joining the pension scheme because she was a foreigner. We have already found that there was no basis for the learned judge's finding that the existence of the pension scheme was never brought to her attention. The upshot of the said finding is that the learned judge's conclusion that the respondent was entitled to damages for discriminatory practices also collapses because it was not supported by evidence. It follows that there was no basis at all for awarding damages for discrimination.

50. We now address the legality or otherwise of the termination of the respondent's employment on grounds of redundancy. An employer is generally allowed to terminate employment where there is a redundancy. Redundancy is defined in the [Employment Act](#) and the [Labour Relations Act](#), 2007 as:

The loss of employment, occupation, job or career by involuntarily means through no fault of the employee involving termination of employment at the initiative of the employer, where the services of an employee are superfluous, and the practices commonly known as abolition of office, job or occupation and loss of employment.

51. In addition, the [Employment Act](#) provides that an employer may fairly terminate an employee's employment solely based on the operational requirements of the employer. The High Court in *Jane I Khalachi v Oxford University Press E. A. Ltd*, Cause No.924 of 2010 held that;

“employers have the prerogative to determine the structures of their businesses and therefore make positions redundant. Positions and not employees, become redundant. When the position becomes redundant, the employee can be re-deployed, which means the employee is given another job, or the employee is retrenched, meaning the employee loses the job altogether.... Although not expressly defined under the [Employment Act](#) 2007, ‘reorganization’ is contemplated by section 45 [2] as a fair termination reason.”



52. Further the High Court in *Agnes Ongadi v Kenya Electricity Transmission Company Limited* [2016] eKLR held that:

“...A redundancy, a restructuring or reorganization commenced with the sole purpose of laying off specific employees is a sham. Such is not justified and cannot be sanctioned by the court...”

53. In this regard, it is an employer’s prerogative to elect to make its employees redundant if there is a justifiable business reason for doing so. The *Employment Act* does not list specific instances of redundancy and therefore an employer should ensure that the reason is based on operational business requirements. Section 40(1) of *Employment Act* provides for termination on account of redundancy as follows:

1. “An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—
  - a) Where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy.
  - b) Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
  - c) The employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
  - d) Where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
  - e) The employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;
  - f) The employer has paid an employee declared redundant not less than one month’s notice or one month’s wages in lieu of notice; and
  - g) The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days’ pay for each completed year of service.

54. In *Thomas De La Rue (K) Ltd v David Opondo Omutelema* [2013] eKLR, this Court stated:

“It is quite clear to us that sections 40 (a) and 40 (b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where



the employee is not a member of the union, the notification must be in writing and to the employee and the local labour officer. Section 40 (b) does not stipulate the notice period as is the case in 40 (a), but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice.”

55. Also, this Court in *Cargill Kenya Limited v Mwaka & 3 Others* [2021] KECA 115 (KLR) addressed redundancy as follows:

“It is thus our finding that the above interpretative factors discount a construction that a notice of termination is required by subsection (1) (f), or within the timelines held by the learned judge of the trial court. While such a notice may eventually require to be given in a termination on account of redundancy, it is definitely not one of the conditions to be met under section 40 subsection 1(f) of the *Employment Act* before the redundancy. In our view, the learned judge in the trial court appears to have conflated the payment in lieu of notice under section 40 subsection (1)(f), with the final declaration of termination by redundancy, and erred in finding that there is a requirement to issue a notice of termination before the redundancy under section 40(1)(f) of the *Employment Act*.”

The trial judge also held that the termination was unlawful for reasons that the Appellant used the notices of intended redundancy as notices of termination under section 40(1)(f). This finding was in error for two reasons. Firstly, as we have found, no notice of termination is required to be given before redundancy under section 40(1)(f) of the *Employment Act*. Secondly, an examination of the letters issued by the appellant lead us to a conclusion that they indeed were notices of intended redundancy required by section 40(1) (a) of the *Employment Act*.”

56. A notice to the employee/trade union/labour officer opens up the door for a consultative process with the key stakeholders. The Court of Appeal in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others* (2014) eKLR held:

- a) Consultation is implicit in the *Employment Act* under the principle of fair play;
- b) Consultation gives an opportunity for other avenues to be considered to avert or to minimize the adverse effects of terminations;
- c) Consultations are meant for the parties to put their heads together and is imperative under Kenyan law;
- d) Consultations have to be a reality not a charade;
- e) Opportunity must be given for the stakeholders to consider;
- f) Stakeholders must have and keep an open mind to listen to suggestions, consider them properly and then only then decide what is to be done; and
- g) Consultation must not be cosmetic.

57. In essence, consultation is an essential part of the redundancy process and ensures that there is substantive fairness. The employer should ensure that it carries out the process as fair as possible and that all mitigating factors are taken into consideration. A reading of the record shows that the respondent was served with a redundancy notice and asked to proceed for a one month’s leave. The



trial court found that the redundancy was unfair and irregular for failure to give adequate notice and thereby not giving consultation a chance.

58. We note from the record that in a meeting held on 12<sup>th</sup> June, 2014, the respondent was informed that due to the ongoing restructuring, the position of chief accountant was being abolished. According to the appellant, the purpose of the notice period when a redundancy is declared is to ensure that parties are engaged appropriately and to allow the employer to implement the requirements set out under section 40 of the [Employment Act](#), 2007. Further, the appellant contended that the fact that the respondent was on paid leave did not prevent the parties from undertaking consultations and in fact, the parties were engaged during the notice period before the termination letter dated on 11<sup>th</sup> July, 2014. The respondent on the other hand argued that no notice was issued by the appellant and that the appellant communicated its intention to render her position redundant one month before the intended date of termination and that the letter dated 12<sup>th</sup> June 2014 was not a notice of intention to declare redundancy but was a termination notice on account of redundancy contemplated under Section 40(1) (f).
59. We have examined the appellant’s notice dated 12<sup>th</sup> June, 2014. The subject and reference of the said letter was stated to be a notice of the intention to terminate contract of employment on account of redundancy. The tone of the letter communicated the date and effect of the redundancy. It was to take effect one month later. The threshold required to be met under section 40(1)(a) & (b) of the [Employment Act](#) in this regard is notification of “the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy.” These requirements are all present in the said letter.
60. However, on the question whether the notice gave consultations and dialogue a chance, we find that while the requirement for consultation is not expressly provided for in section 40 of the [Employment Act](#), this requirement is implied, as the main reason and rationale for giving the notices in section 40(1) (a) and (b) to the unions and employees of an impending redundancy where applicable. In this respect we wholly adopt the reasoning of this Court in [Kenya Airways limited v Aviation & Allied Workers Union Kenya & 3 Others](#) (*supra*) that:
- “49...Section 40(1) of our [Employment Act](#) does not expressly state the purpose of the notice. Although it also does not expressly provide for consultation between the employer and the employees or their trade unions before the final decision on redundancy is made, on my part I find the requirement of consultation provided for in our law and implicit in the [Employment Act](#) itself.
50. By dint of article 2(6) of [the Constitution](#), the treaties and conventions ratified by Kenya are now part of the law of Kenya. The Kenya Constitution, 2010 was promulgated on 27<sup>th</sup> August, 2010. Before then Kenya was a dualist state, which, like other dualist states, domesticated the treaties or conventions it ratified by legislation. By virtue of the provisions of this Article, however, the treaties or conventions which Kenya had ratified before that date, whether domesticated or not, automatically became part of the law of Kenya. The process of ratification of the treaties Kenya has entered and those it enters into after the enactment and entry into force of the Ratification of Treaties Act, 2012 is now through legislation.
51. Kenya is a State party to the International Labour Organization (ILO), which it joined in 1964 and is bound by the ILO conventions. Article 13 of Recommendation No. 166 of the ILO Convention No. 158-[Termination of](#)



*Employment Convention, 1982* requires consultation between the employers on the one hand and the employees or their representatives on the other before termination of employment under redundancy. It reads:

“1. When the employer contemplates terminations for reasons of an economic technological, structural or similar nature, the employer shall:

- a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;
- b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.”

61. Having regard to the legislative intention of the provisions of section 40 of the *Employment Act*, the International Law and decided cases, we find that consultation on an intended redundancy between the employer and employee is implied by section 40(1)(a) and (b) of the *Employment Act*. Moreover, consultation is also now specifically required by Article 47 of *the Constitution* and the *Fair Administrative Action Act*. Article 47 and section 4(3) of the *Fair Administrative Action Act* provide that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give notice to the person affected by the decision. (See. *Cargill Kenya Limited v Mwaka & 3 Others*, para 35 - 37).

62. The scope of the consultations in a redundancy process was explained in *Kenya Airways limited and Aviation & Allied Workers Union Kenya & 3 Others* (supra):

“ 52. The purpose of the notice under section 40(1) (a) and (b) of the *Employment Act*, as is also provided for in the said ILO Convention No. 158- *Termination of Employment Convention, 1982*, is to give the parties an opportunity to consider “measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.” The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable. This means that if parties put their heads together, chances are that they could avert or at least minimize the terminations resulting from the employer’s proposed redundancy. If redundancy is inevitable, measures should be taken to ensure that as little hardship as possible is caused to the affected employees.”

63. In addition, termination of employment through redundancy is also subject to the substantive justification envisaged by sections 43 and 45 of the *Employment Act*, 2007 which provides for proof of reason for termination and for unfair termination respectively. In order for termination to be fair in the eyes of the law it has to be both substantively and procedurally fair. The employer needs to have a valid and fair reason for termination. Apart from a valid reason of termination, the employer must follow



fair procedures for termination in accordance with the Employment Act. In any form of termination the employer is required to prove the reasons for the termination otherwise it will be termed as unfair. It is apparent from the records of these appeals that there was no evidence on record or presented to the trial judge regarding any consultations undertaken in the manner stated hereinabove. We therefore find no fault in the finding by the trial judge that the termination was unfair for want of the consultations envisaged under section 40 of the Employment Act.

64. Next, we will address the question whether the award for unfair termination was excessive. The appellant submitted that the award was in the circumstances of the case excessive and that the learned trial judge did not justify the maximum award of 12 months' compensation. The Respondent on the other hand urged the Court to uphold the findings of the Superior Court. However, in the event that the Court finds the Superior Court erred in failing to give reasons for maximum compensation then the court is urged to consider the same award due to unjustified and unfair procedure in terminating the respondent's employment on account of redundancy. The Respondent also urged the Court to consider the treatment the respondent was subjected to during her entire employment period.
65. Section 50 of the Employment Act obliges courts to apply the factors in section 49 of the Act in determining a complaint or suit involving wrongful dismissal or unfair termination. Section 49(1) provides as follows:
- a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;
  - b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or
  - c. the equivalent of a number of months' wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.
66. The compensation applicable in the circumstances of the present appeal is the one prescribed in section 49(1) (c). The factors that the courts are required to take into account in determining the quantum in this regard are set out in section 49(4) as follows:
- a) the wishes of the employee;
  - b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
  - c) the practicability of recommending reinstatement or re-engagement
  - d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
  - e) the employee's length of service with the employer;



- f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
- g) the opportunities available to the employee for securing comparable or suitable employment with another employer;
- h) the value of any severance payable by law;
- i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;
- j) any expenses reasonably incurred by the employee as a consequence of the termination;
- k) any conduct of the employee which to any extent caused or contributed to the termination;
- l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and
- m) any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee.

67. In determining the award, the approach is that the court has discretion, to be exercised judicially upon a consideration of all facts, and in essence, it is a matter of fairness to both parties. A redundancy by its very nature adversely affects employees without any fault or wrongdoing on their part. The employees therefore need to be cushioned from these adverse effects. Ordinarily, the employee will receive the wages which the employee would have earned had the employee been given the period of notice to which he was entitled or the equivalent of a number of months wages or salary not exceeding 12 months based on the gross monthly wage or salary of the employee at the time of dismissal.
68. The respondent does not dispute that she was paid one- month's salary in lieu of notice, severance pay at the rate of 15 days per every year worked and accrued leave days. However, it is our view that the compensation of 12 months' salary for unfair termination in the circumstances of this case was excessive, taking into account the relevant factors provided in paragraphs (a), (e), (f), (g), (h) and (m) of section 49(4) hereinabove. However, taking to account circumstances of this case and the above provisions, it is our view that 6 months gross pay would suffice. This will translate to 6 X Kshs. 495,445 =Kshs. 2,972,670/=.
69. Next, we will address the claim for back pay in respect of which the learned judge awarded Kshs. 4,975,360/= in her ruling following an application for review filed by the respondent. Back pay can be defined as the difference between the amounts of pay a worker is owed versus what they actually received. Essentially, back pay is the term for wages that are owed to an employee for work done in the past, yet, for whatever reason, the employer withheld these wages from the employee's paycheck. Payment of back pay depends upon the facts and circumstances of each case. It would, however, not be correct to contend that it is automatic. It should not be granted mechanically. The workman is required to plead and prima facie prove the claim.



70. The respondent's claim for back pay was pleaded at paragraphs 10 and 11 of the statement of claim as follows:

10. The claimant states that further changes were made to her terms and conditions of employment to her disadvantage and detriment in August 2008 and despite complaints the respondent refused, neglected and ignored to pay her the payments guaranteed in the additional agreement of 16<sup>th</sup> November 2004 that were to apply until the end of her contract. The claimant claims lost income in the sum of € 43,264.55 as back pay lawfully due and owing by the respondent to her. See the annexed documents marked HO 20, 21,22, 22(a), 22(b), 23 and 24.

10. The claimant states that in November 2009, she discovered that unknown to her and with the knowledge of the respondent, she was being underpaid as per the TVOED salary scale and her name was missing from the list of employees of the respondent entitled to such payments pursuant to a decision made in the Annual General Meeting of the respondent. Despite demand made by the claimant the respondent ignored, neglected and refused to make good the demand and continued to under pay her.

71. A reading of the above paragraphs and indeed the entire Statement of Claim shows that no particulars were specifically pleaded to suggest how the said sum of Kshs. 4,975,360/= was arrived nor does it show the exact period it covers. The only particulars, albeit very scanty are contained in the respondent's evidence during the trial. At page 673 she is recorded testifying that:

“During the employment period, I was under paid. My benefits used to be in the contract. When I was first employed, I was on scale BAT. This changed in 2008, but in 2004, all my benefits had been put in my salary and I came 2 scales higher. The scales are at page 61. I was to be on scale IV b but when benefits were put in my salary, I came to scale 111.”

72. In her witness statement, the respondent stated:

“After several months of discussions about my salary grouping and that I felt underpaid for my work as an accountant and final presentation of a list from Price Water House, stating that even an accountant with no more than 3 years of experience was earning more in Kenya than I did, (mine was 24 years by the time) my salary was adjusted from 01<sup>st</sup> July 2002 but now it was not fixed in EURO but in Kenya Shillings, out of which Kshs 15,000 monthly was retained and only paid to me in arrears if the final accounts for the term (4 months) was retained and only paid to me in arrears if the final accounts for term (4 months) was ready in time, that means 8 working days after end of the term.

I protested about the salary being fixed in Kshs and not in € as per my contract and as from March 2003 the salary was translated into € as per 01<sup>st</sup> July 2002 and the balance resulting from exchange rate differences was paid but there was no loyalty bonus and no compensation for loss of purchasing power anymore for me, the other employees on euro contracts still got these payments.”

73. This omission to plead the claim with specificity raises pertinent questions as to whether the said award was anchored on the statement of claim and if it was not pleaded, whether it could be sustained. The other pertinent question is whether the said question could be cured by the oral evidence tendered



in court. To our mind, no amount of evidence can be looked into, upon a plea which was never put forward in the pleadings. A question which did not arise from the pleadings and which was not the subject matter of an issue, cannot be decided by the court. A court cannot make out a case not pleaded. The court should confine its decision to the questions raised in pleadings. Nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint. No party should be permitted to travel beyond its pleadings. All necessary and material facts should be pleaded by the party in support of the case set up by him.

74. Closely tied to the issue at hand is the question whether, following an application for review, the court could in its ruling review its earlier award of Kshs. 1,322,255/- under this head and validly substitute it with an award of Kshs. 4,975,360/on the record= citing an error. First, the particulars of the claim were not specifically pleaded. Second, the evidence tendered did not contain the particulars. However, following an application for review dated 1<sup>st</sup> February 2017, the learned judge reviewed the award to Kshs. 4,975,360/= being what the respondent allegedly lost between the period 2003 and 22<sup>nd</sup> September 2007. Notably, the said period was not specifically pleaded in the statement of claim nor does it appear in her oral evidence or her Witness Statement. At prayer (d) of the statement of claim, the respondent prayed for back pay in the sum of € 43,264.55 from 2008 onwards. This prayer does not flow from the pleadings. And even if it does, the prayer is totally imprecise. The use of the word “onwards” is vague and imprecise. It does not state with certainty the period it covers. Computation of the said amount and the period covered is essentially a matter of evidence. Such an imprecise award could not properly be granted pursuant to a review application as happened in this case. It cannot be treated as an error on the face of the record. It could only be allowed after the party claiming discharges the burden of prove and after affording the opposite party the opportunity to challenge the evidence.
75. In addition, even if the said claim was properly placed and it was not the respondent’s evidence in support of the back pay was manifestly wanting. Her testimony was that during her contract, she was underpaid. She did not provide details of the alleged underpayment. She stated:
- “...my contract changed materially in 2004. I accepted it and signed it (page 61). The respondent changed it again in 2008. BAT Scale was discontinued. It became TVOED. Age groups were taken out. (page 79). I wrote to the board on this. I actually missed out on a job group.... I was losing income. In total I was losing € 55.056. (page 81).
- The total underpayments were 43264.55 if my contract had ended on 31.7.2015. I would have worked up to 2015...”
76. At paragraph 183 of the judgment, the learned judge stated that the appellant did not address the above issue. She described the defence as a mere denial. To our mind, a mere denial, if unsubstantiated by clear and convincing evidence, is a self-serving assertion that deserves no weight in law. However, the record shows that the appellant’s case was that it rectified and translated the respondent’s salary into Euros effective 1<sup>st</sup> July, 2002 and the balance resulting from exchange rate differences were paid. The appellant stated that in 2009 when German employees were regrouped under a new salary scale to the exclusion of the respondent, after the issue was raised, the respondent was regrouped and benefits were backdated. The respondent acknowledged the above payments in her evidence. The appellant also stated that the respondent was notified that some benefits such as the loss of purchasing power would no longer be payable effective October 2009. She did not challenge these changes. In fact in her evidence, she said she signed the contract(s) after some changes were introduced signifying her acceptance of the changes. Lastly, the appellant stated that the respondent’s salary was not increased due to earlier revisions of her contract which meant that she was earning 83.9% compared to the other employees who earned 80%.



77. In a nutshell, the foregoing is the defence the trial judge described as a mere denial. We do not think the defence was a mere denial. The general principle is set out in the judgment of Astbury, J., in *Weinberger v Inglis* [1916-17] All E.R. Rep. 843, when he said:
- “As a general rule, the court never orders a defendant to give particulars of facts and matters which the plaintiff has to prove in order to Succeed, and this is especially the case where a defendant has confined himself to putting the plaintiff to the proof of allegations in the statement of claim, the onus of establishing which lies upon him.”
78. It should be recalled that back pay wages are ordinarily to be granted, keeping in view the principles of grant of damages in mind. The claim must be proved to the required standard. It cannot be claimed as a matter of right. The burden of proof lies on the party claiming relief. Ordinarily, an employee or workman whose services are terminated and who is desirous of getting back wages is required to either plead she was employed on lesser wages. Once the employee shows that, the onus lies on the employer to specifically plead and prove that the employee was gainfully employed and was getting the same or substantially similar emoluments. The court will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner. The reasons for exercising discretion must be cogent and convincing and must appear on the face of the record.
79. As alluded to above, in her evidence, the respondent stated that her contract was changed materially in 2004 and that she accepted it and signed it. She did not challenge the changes in her Statement of Claim. The court cannot re-write a contract signed willingly by parties. She also testified that the contract was changed again in 2008 and the BAT Scale was discontinued and it became TVOED. She complained that age groups were taken out and she wrote to the board on the issue. She claimed that she actually missed out on a job group, that she was losing income of € 55.056 which translated to € 43264.55 if her contract had ended on 31.7.2015. She claimed she could have worked up to 2015. It is on the basis of this evidence that the court allowed the award for back pay.
80. However, the said award was premised on an assumption that the respondent could have worked up to 2015. The award in our view was premised on speculation and conjecture thereby ignoring the vicissitudes of life. It is our finding that the award for back pay was premised on speculation and conjecture.
81. We now address the respondent’s appeal in which she sought to partially to vary the judgement of the trial court. She inter alia faulted the learned judge for: equating damages for discriminatory practice to pension lost; finding that to award pension lost would amount to a double payment; misdirecting herself in awarding interest at 6% under the *Civil Procedure Act* Section 26(2) and in failing to clarify when the awarded interest would take effect.
82. Having held that the respondent failed to prove discrimination against her for not being able to join the pension scheme, we find and hold that the grounds in the cross appeal related to the issue of discrimination and the damages payable thereto fails.
83. Regarding the interest payable, the trial judge in the ruling delivered on 4<sup>th</sup> October, 2017, held that where the decree is silent on the interest payable it shall be deemed to be at 6%. The appellant submitted that the learned judge’s decision not to award interest was in line with the law and could not be changed through an application for review as it would amount to the judge sitting on appeal against her own decision and make a substantive finding that was not made in the initial judgment. The Respondent in her submissions submitted that the award of interest upon review was proper and within the law.



84. We note that the respondent in her submissions was categorical that the award of interest upon review was proper and within the law. Accordingly, we find that having so stated, the respondent constructively abandoned her ground of appeal on the question of interests. We therefore see no need to address this ground.
85. In conclusion, arising from our determination of the issues discussed herein above, we find and hold that both appeals partially succeed to the extent stated herein above. Accordingly, we set aside the judgment and decree of the trial court and substitute it with the following orders:
- a) The award for damages for discriminatory practice in the sum of Kshs. 5,945,340/= is hereby set aside.
  - b) The damages for unlawful redundancy awarded in the sum of Kshs. 5,945,340/= are hereby reduced and substituted with an award of Kshs. 2,972,670/=.
  - c) The award of Kshs.4,975,360/= for the back pay, that is the difference between pay earned between 2003 and September 2007 is hereby set aside.
  - d) The award at paragraph (b) above shall attract interest at the rate of 6% from the date of the judgment of the High Court.
  - e) Each party shall bear its own costs of these consolidated appeals.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JULY, 2023.**

**HANNAH OKWENGU**

.....

**JUDGE OF APPEAL**

**H. A. OMONDI**

.....

**JUDGE OF APPEAL**

**J. MATIVO**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

