



**Kenya Methodist University v Kaungania & another (Civil Appeal 61 of 2017) [2022] KECA 90 (KLR) (4 February 2022) (Judgment)**

Neutral citation: [2022] KECA 90 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 61 OF 2017  
AK MURGOR, P NYAMWEYA & JW LESSIT, JJA  
FEBRUARY 4, 2022**

**BETWEEN**

**KENYA METHODIST UNIVERSITY ..... APPELLANT**

**AND**

**MARY KAUNGANIA ..... 1<sup>ST</sup> RESPONDENT**

**KABERIA ISAAC KUBAI ..... 2<sup>ND</sup> RESPONDENT**

*(Appeal from the Judgment of the Employment and Labour Relations Court at Nyeri (Bryam Ongaya J.) delivered on 3rd June 2006 in Nyeri Employment and Labour Relations Court Cause No 4 of 2016 as consolidated with Nyeri Employment and Labour Relations Court Cause No 5 of 2016)*

**JUDGMENT**

1. The Kenya Methodist University, the Appellant herein is aggrieved by a judgment delivered by the Employment and Labour Relations Court (hereinafter “ELRC”) in which it allowed the consolidated claims by Mary Kaungania and Kaberia Isaac Kubai, the 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent herein respectively. The ELRC in this respect granted the 1<sup>st</sup> and 2<sup>nd</sup> Respondents various declaratory orders, namely that they were entitled to the enjoyments of rights and fundamental freedoms guaranteed under Article 41 (2) (a) and 47 (1) & (2) of the *Constitution*; that at all material times they were entitled to the full and unlimited enjoyment of the statutory rights secured under the *Employment Act*; and that the termination of their employment was unconstitutional, unlawful, contrary to the rules of natural justice, non-procedural, null and void and therefore of no effect.
2. The said Court granted the 1<sup>st</sup> Respondent a further declaratory order that the Respondent’s act of placing the said Respondent in the wrong Job Group and further ignoring her pleas to correct the same was unconstitutional, unlawful, contrary to the rules of natural justice, non-procedural, null and void and therefore of no effect. Arising from these orders, the ELRC compelled the Appellant to pay



salary arrears to the 1<sup>st</sup> Respondent from the year 2005 as a result of wrongful job placement as well as underpaid leave allowance; and to pay the 1<sup>st</sup> and 2<sup>nd</sup> Respondents gratuity, their unpaid leave days, their unpaid dues for the remainder of the contract period.

3. The Respondents were ordered to compute, file and serve the amounts due within seven days of the date of the judgment, for a mention for recording the quantum, and the Appellant was ordered to pay the Respondents the amounts due by 1<sup>st</sup> August 2016, failing which interest was payable thereon from the date of the judgment until payment in full. Lastly, the Appellant was ordered to pay the Respondents' costs of the suit in the ELRC with interest at Court rates.
4. The facts giving rise to the said orders and this appeal as set out in the pleadings filed by the parties in the ELRC, are that the 1<sup>st</sup> Respondent's claimed that she was employed by the Appellant as a chaplain by an appointment letter dated 23<sup>rd</sup> September 2004 for a contract on a three year basis. The said contract had been renewed severally and was to expire on 10<sup>th</sup> May 2016. However, that on 4<sup>th</sup> January 2016, the Respondent without reasonable cause or notice terminated her employment citing a letter from the Presiding Bishop of Methodist Church withdrawing her secondment and approval to work for the Respondent. The 1<sup>st</sup> Respondent also claimed that despite being in Job Group MU14B as per the Respondent's terms and conditions of service, she had been placed in Job Group MU12 and several attempts to have the Respondent rectify the same were in vain.
5. Similarly, the 2<sup>nd</sup> Respondent claimed that he was employed as a Lecturer and Head of Department by the Appellant in 2010 on a three-year contract that was renewed and was to expire in September 2016. He also received a letter dated 4<sup>th</sup> January 2016 from the Respondent which terminated his service, and that the Appellant based its decision on a letter from the Presiding Bishop, Methodist Church in Kenya, withdrawing his letter of secondment and approval for the 2<sup>nd</sup> Respondent's employment.
6. The Respondents asserted that during their employment they were answerable to the Appellant's Vice Chancellor and the University Board, and that this obligation was enforceable under the University Charter as well as relevant laws governing the Appellant. Therefore, that the Appellant cannot purport to be governed by the Methodist Church in Kenya, as the two were separate entities. The Respondents therefore claimed that their termination was unfair and unlawful.
7. The 1<sup>st</sup> Respondent accordingly sought the following relief in her statement of claim dated 11<sup>th</sup> January 2016 :
  - a. A Declaratory Order that the Claimant was and is still entitled to the enjoyments of rights and fundamental freedoms guaranteed under Articles 41 (2)(a) and 47(1) & (2) of the Constitution of Kenya 2010.
  - b. A Declaratory Order that all material times the Claimant was and is still entitled to the full and unlimited enjoyment of the statutory rights secured under the Employment Act Cap 226 Laws of Kenya.
  - c. A Declaratory Order that the termination of the Claimant's employment was unconstitutional, unlawful, contrary to the rules of Natural Justice, non-procedural, null and void and therefore of no effect.
  - d. A Declaratory Order that the Respondent's Act of placing the Claimant in the wrong job group and further ignoring the Claimant pleas to correct the same was unconstitutional, unlawful, contrary to the rules of Natural Justice, non-procedural null and void and therefore of no effect.



- e. An order to compel the Respondent to pay the Claimant salary owed to him from the year 2005 as a result of wrongful job placement as well as underpaid leave allowance.
  - f. An order to compel the Respondent to pay the Claimant gratuity as per the Respondent's Terms and Conditions of service.
  - g. An order to compel the Respondent to pay the Claimant underpaid leave days.
  - h. An order to compel the Respondent unpaid dues for the remainder of the contract period.
  - i. Costs of the Claim plus interest at court rates.
8. The reliefs sought by the 2<sup>nd</sup> Respondent in his statement of claim also dated 11<sup>th</sup> January 2016 were as follows:
- a. A Declaratory Order that the Claimant was and is still entitled to the enjoyments of rights and fundamental freedoms guaranteed under Articles 47(1) & (2) of the Constitution of Kenya 2010.
  - b. A Declaratory Order that all material times the Claimant was and is still entitled to the full and unlimited enjoyment of the statutory rights secured under the *Employment Act* Cap 226 Laws of Kenya.
  - c. A Declaratory Order that the termination of the Claimant's employment was unconstitutional, unlawful, contrary to the rules of Natural Justice, non-procedural, null and void and therefore of no effect.
  - d. An order to compel the Respondent to pay the Claimant gratuity as per the Respondent's Terms and Conditions of service.
  - e. An order to compel the Respondent to pay the Claimant underpaid leave days.
  - f. An order to compel the Respondent unpaid dues for the remainder of the contract period.
  - g. Costs of the Claim plus interest at court rates.
9. The Appellant on its part admitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were employed on contract as the university chaplain and as a lecturer in the Department of Theology and Religious Studies respectively, but stated that their appointments were based on secondment terms from the Methodist Church in Kenya. Therefore, that the secondment and approval of the Presiding Bishop of the Methodist Church in Kenya remained a condition requisite for the subsistence of the Respondents' contracts with the Appellant, as the Methodist Church in Kenya was their principal employer.
10. The Appellant contended that by a letter dated 4<sup>th</sup> August 2015, the 1<sup>st</sup> Respondent was recalled by the Presiding Bishop of the Methodist Church in Kenya with effect from 15<sup>th</sup> August 2015, and reassigned to the Methodist Church in Kenya (MCK) Kawangware Circuit-Limuru Church with effect from 1<sup>st</sup> September 2015. Likewise, that the 2<sup>nd</sup> Respondent was recalled from 1<sup>st</sup> August 2015 by a letter dated 30<sup>th</sup> July 2015, and reassigned to MCK Malindi Circuit- Kilifi Synod with effect from 1<sup>st</sup> August 2015. However, that despite the many written notices by the Presiding Bishop, the Respondents failed to heed to their principal employer's directives, with the consequences of their suspension from work and withdrawal of their the secondment and approval to work at Kenya Methodist University from 23<sup>rd</sup> December 2015.
11. According to the Appellant, owing to the aforementioned circumstances, the contracts between it and the Respondents became untenable. The Appellant therefore terminated the said contracts after



notifying the Respondents of the reasons stated hereinabove, and offered to pay them three (3) months' salary in lieu of notice as per the terms of the contract and the provisions of Section 36 of the Employment Act. The Appellant denied that it was in breach of any terms and conditions stipulated in the contract and/or the termination was unconstitutional, unlawful or non-procedural.

12. The ELRC found that the Appellant could not unilaterally vary or introduce the issue of withdrawal of the secondment and that once the argument was concluded, the parties were bound to the three years' secondment and nothing was left for the Presiding Bishop to approve and he became functus officio. Therefore, that the termination of the Respondents was unlawful as it was an unreasonable administrative action and amounted to unfair labour practices. The court further held that since the Respondents did not contribute to their removal, they were entitled to their pay for the remainder of the term of their contracts as well as the pay for all outstanding leave days and gratuity. In addition, since the evidence on record was clear that the office of the Appellant's chaplain was established at a higher job group, the 1<sup>st</sup> Respondent was treated unfairly and discriminated against by being placed in a lower job group and was entitled to the prayers on underpayment.
13. After the ELRC rendered its decision, the Appellant lodged the appeal in this Court, and has raised four grounds in its Memorandum of Appeal dated 23<sup>rd</sup> May 2017. The grounds are on the findings by the trial Court on the nature of the Respondent's employment arising from their secondment from the Presiding Bishop of the Methodist Church, and which was a term of employment of the Respondents; the findings on the termination of the employment arising from the withdrawal of the secondment, and the inconclusive nature of the judgment.
14. The fact of the secondment of the Respondents by the Methodist Church in Kenya to the Appellant is not contested, nor is the termination of their employment by the Appellant. What is in dispute was the effect thereof on their contract of employment. The three main issues arising in this respect are firstly, who was the Respondents' employer during their secondment to Appellant. Secondly, what was the legal effect of the withdrawal of approval of the secondment by the Presiding Bishop of the Methodist Church of Kenya, if any on the contract of employment. Lastly what remedies, if any, the Respondents merited.
15. The appeal was canvassed during a hearing held on 19<sup>th</sup> July 2021 by Patrick Macharia, learned counsel for the Appellant, and Mr. Kabira Kioni, the learned counsel for the Respondents, who relied on written submissions dated 16<sup>th</sup> July 2021 and 23<sup>rd</sup> July 2021 respectively. Our mandate as the first appellate Court was stated in *Selle & Another vs Associated Motor Boat Co. Ltd. & others (1968) EA 123* as follows:

“.....An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally”

16. We shall therefore proceed to consider the issues in this appeal by re-evaluating the evidence adduced in the ELRC and arrive at our own conclusions of fact and law. In this regard we will only depart from



the findings by the said court if they are not based on the evidence on record, or where the court is shown to have acted on wrong principles of law, as held in *Jabane vs Olenja* [1986] KLR 661.

17. On the issue of the Respondents' employer during the period of secondment, the Appellant submitted that since the employment relationship between it and the Respondents was based on secondment, the Methodist Church in Kenya was the principal employer of the Respondents, while the Appellant was the host employer. Therefore, that the trial Court did not appreciate the nature of the relationship and committed an error in finding that the Respondents were employees of the Appellant, which was contrary to the evidence adduced during the trial. Reliance was placed on the decision in the case of *David Barasa vs British Peace Support Team & another* [2016] eKLR on the nature of employment by secondment, and for the proposition that the seconded employee is at liberty to conclude a valid contract of employment with the host employer, but that the principal employer who seconds the employee remains the employer at all material times. In addition, that it was a term of the contract that the Respondents' employment would be terminated if the subsisting secondment was withdrawn, bringing into play section 10 (5) of the *Employment Act*.
18. The Respondents' counsel on his part submitted that the employment relationship between the Appellant and the Respondents was governed by the letters of appointment signed between them and issued by Kenya Methodist University, therefore forming the basis of the employment contract. Further, that the same are done under the letterhead of Kenya Methodist University and signed by the Vice Chancellor of the said institution on behalf of the University Council. Though the letters indicated that the appointment was on secondment from the Methodist Church of Kenya, as per the said contracts the remuneration to the Respondents was paid by the Appellant and their appointment was said to be subject to the University Rules and regulations. Further, the Respondents were said to be fully accountable to the University norms and discipline. According to their counsel, this showed that there was mutuality of obligations between the Appellant and the Respondents and that the Respondents were fully under control of the Appellant.
19. It is notable that an employer is defined under the *Employment Act* to mean any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes their agent, foreman, manager or factor. On the other hand, an employee is defined to mean a person employed for wages or a salary. The relationship between an employer and employee is therefore essentially contractual. The legal significance of the identifying who as between the Appellant and Methodist Church of Kenya arises from the need to clarify the proper repository of the duties and obligations that arose from the contract of employment with the Respondents, including the terms of termination of the said employment, quite apart from the statutory obligations that also arise under the *Employment Act* in this regard.
20. In this respect, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents provided evidence of their letters of appointment by the Appellant dated 10<sup>th</sup> May 2013 and 24<sup>th</sup> March 2014 respectively, and which were signed by the Appellant's Vice Chancellor. The appointment was stated to be on secondment terms from the Methodist Church in Kenya for three years renewable and based on approval from the Presiding Bishop of the Methodist Church in Kenya and was subject to the Appellant's rules and regulations. The main duty of an employer is to pay the employee remuneration, and under the Respondents' letters of appointment, the Appellant contracted to pay them remuneration made up of basic salary and allowances, as well as to remit their pension contributions and employer's contributions to their retirement benefit scheme. In addition, the Appellant specified the duties of the Respondents.
21. The Appellant on the other hand did not bring any evidence of a contract entered into between the Respondents and the Methodist Church in Kenya, and instead relied on the letters by the Presiding



Bishop of the Methodist Church in Kenya approving the Respondents secondment for the position that the Church was the Respondents' employer.

22. In addition, while employment involves doing work for which one has been hired and is being paid by an employer, secondment is defined in Oxford Dictionary as the act of transferring a worker temporarily to another employment or position, and therefore under another employer. In effect, the employee does not undertake any work for the original employer during the period of secondment. Therefore, in a situation where a person is employed on secondment, the substantive and principal employer in our view is the person or entity that has assigned the employee specific duties which are remunerated by a salary or wages during that period of employment. The person or entity that seconds such a person is the nominal employer whose powers and duties are reinstated once the secondment ends and are residual during the period of secondment.
23. This position was also recognised by this Court in *Kenya Education Staff Institute vs Kenya Union of Post-Primary Teachers (Kuppet) & 2 others [2020] eKLR* as follows  

“I find no basis for disturbing the trial court’s finding that the grievants were employees of the appellant, they had been absorbed as such, assigned and diligently discharged duties within the appellant’s establishment until they were erroneously released to T.S.C in contravention of the procedure set out in sub-clause 7(5) &6 of legal Notice No. 565 of 1988 on the procedure the appellant was obligated to employ and follow when relieving any employee of either the status of secondment or employment with his/her employment with them. The appellant was also obligated to follow the prerequisites set out in the Act if they had arrived at the conclusion that they no longer needed the grievants’ services.
24. In the present appeal, the position of the Appellant as the principal employer was reinforced by the fact that it actually entered into contracts of employment with the Respondents, which is the fact that distinguished the secondment in this appeal, and as observed in *Mary Ratemo & 9 others v Kenya Police Staff SACCO Ltd & Another, Nairobi Industrial Cause No. 255 of 2011* and *Rev. John Mungania vs Kenya Methodist University & anor: Nairobi Industrial Cause no. 133 of 2013*. The Trial judge therefore did not err in finding that the parties were bound to the three years’ secondment and upon giving the approval for the Respondents’ secondment the Presiding Bishop of the Methodist Church in Kenya became *functus officio* as he was a residual employer.
25. On the second issue of the effect of withdrawal of the approval of secondment before expiry of the Respondents’ contracts, counsel for the Appellant submitted that the secondment by the Presiding Bishop of the Methodist Church of Kenya was amenable to withdrawal before the expiry of the three-year contract period arising from the secondment nature of the Respondents’ employment with the Appellant. Reference was made to the case of *Mary Nyangasi Ratemo & 9 others v Kenya Police Staff Sacco Limited (supra)* that the ordinary meaning of secondment as a temporary transfer has the connotation that the employee is subject to recall by his employer, and the Respondents having received the recall letters and indeed the letters for change of work station the Presiding Bishop effectively recalled them from their employment with the Appellant to work elsewhere.
26. They further invited the Court to consider that good faith and fair labour practices were observed in withdrawing the secondment of the Respondents before the lapse of the three-year period contract, despite the fact that the Respondent committed acts warranting summary dismissal as espoused by Section 44 (4) (a) and (e) of the *Employment Act* by failing to report to work and failing to obey lawful command of their Employer. The Appellant submitted in this respect that the Respondents were issued with warning letters and suspension letters before termination of their contracts of employment.



27. The Respondents' submissions were that by the time the Methodist Church of Kenya issued the secondment letter they were well aware that there was a contract between the Appellant and the Respondents for a term specified, which could not be withdrawn or altered as this would amount to breach of the contract. Reference was made to the case of Rev. John Mugania versus Kenya Methodist University & Prof. Mutuma Mugambi, Cause No.133 of 2013 where the court held that during the secondment, the person proceeding on secondment must conclude a valid contract of employment with such other employer. The Respondents maintained that the trial Court having found that the Respondents were employees of the Appellant, and that the secondment was not amenable to withdrawal before the expiry of the term specified in the contract, the Court correctly observed the said termination of Employment was unfair and unreasonable on account of being contrary to the provisions of sections 43, 45 and 46 of the *Employment Act, 2007*.
28. We have perused the contract of employment between the Appellant and Respondents, and note that the 1<sup>st</sup> Respondent's letter of appointment dated 10<sup>th</sup> May 2013 contained the following terms with regard to her secondment and approval by the Presiding Bishop of the Methodist Church in Kenya, in clause 2 and 5 thereof;
- 2.0 Nature of Appointment Your appointment will be on secondment terms from the Methodist Church in Kenya for three years renewable and based on approval from the Presiding Bishop, Methodist Church in Kenya. The appointment is subject to the University rules and regulations now in force and which may be amended from time to time. During this period of secondment, you are fully accountable to the University norms and discipline....
5. 0 Termination of Appointment Either party may terminate this appointment by giving the required period of notice. In your case you are required to give three months' notice or payment of equivalent salary in lieu of notice. After expiry of the renewed secondment, further approvals will be sought from the Presiding Bishop, Methodist Church in Kenya.
29. The 2<sup>nd</sup> Respondent's revised letter of appointment dated 24<sup>th</sup> March 2014 contained similar terms in clause 1 and 14 thereof as follows:
1. 0Terms of Employment Your appointment will be on secondment terms from the Methodist Church in Kenya for three years. The appointment is subject to the University rules and regulations now in force and which may be amended from time to time. During this period of secondment, you are fully accountable to the University norms and discipline.
14. 0 Termination of Employment Either party may terminate this appointment by giving the required period of notice. In your case you will be required to give three months' notice period.
30. A plain reading of the terms of the contract and the letters of approval by the Presiding Bishop of the Methodist Church of Kenya reveal three aspects of the secondment and or approval by the Presiding Bishop. First, that the approval was a condition precedent for the Respondents' employment with the Appellant, and was therefore required before entering the said employment or renewal of the existing contract. Second, in addition to the fact of secondment, the approval given by Presiding Bishop also covered the term of the secondment, which was three years. Third, termination of the three-year contract was either upon expiry of the term or by either party to the contract, that is the Appellant or Respondents, giving three months' notice or payment in lieu of notice. There was thus no role or requirement of notice by, or withdrawal of approval by the Presiding Bishop, and such notice or withdrawal of approval did not have any legal consequence of effect on the Respondents' contracts.



31. Therefore, by relying on the said withdrawal of approval by the Presiding Bishop, to terminate the Respondents' contract, the Appellant was in breach of its employment contract with the Respondents in two respects, namely by prematurely terminating the contract before the expiry of its term as illustrated from the terms of the said contracts, and by unfairly terminating the said contracts. The Court explained what an unfair termination is in *Janet Nyandiko versus Kenya Commercial Bank Limited(2017) eKLR* as follows : -

“Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.”

32. The ELRC therefore did not err in its findings in this respect on the introduction of the notice of withdrawal and the unlawful and unfair termination of the Respondents' contracts.

33. The last issue before us is that of the remedies merited by the Respondents. Since the termination of their contract was unlawful and unfair, it is our view that they were entitled not only to the pay for the period of the remainder of their contract but also to compensation and the three months' pay in lieu of notice as per the terms of the contract, arising from the provisions of section 50 of the *Employment Act*. The said section obliges Courts to apply the factors in section 49 of the Act in determining a complaint or suit involving wrongful dismissal or unfair termination of the employment of an employee.

34. Section 49(1) provides as follows as regards payments to be made to an employee by an employer in the event of unjustified termination:

- (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.

35. In this regard, both the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' contracts of employment were terminated by a letter dated 4<sup>th</sup> January 2016. The 1<sup>st</sup> Respondent's contract was to expire in May 2016, and therefore had an outstanding term of 4 months at the date of termination, while that of the 2<sup>nd</sup> Respondent was to expire in September 2016 and had a term of 8 months outstanding. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents were therefore entitled to 4 months' pay and 8 months' pay respectively for the unexpired term of their contracts, in addition to the 3 month's pay in lieu of notice pursuant to section 49 of the *Employment Act*.

36. We however have two areas of concern with the remedies granted by the ELRC. First, the 1<sup>st</sup> Respondent accepted and signed a contract for a particular job group, and having affirmed the said contract by continuing to perform her duties under the contract duties and accepting the pay for the said Job Group, she could not raise the issue of her promotion at the time of termination of the contract. Secondly, the evidence presented by the 1<sup>st</sup> Respondent of positions at Job Group MU



14B was of Professors and Financial Controllers, and no evidence was provided that Chaplains were included within this job group.

37. Second it is trite special damages must be specifically pleaded and proved. The Respondent in this respect submitted that they computed, filed and serve the Appellants with their quantum of pay as ordered by the trial Court. The Appellants were given a chance to respond and filed an Affidavit in Opposition to the said computation, but later opted to file this appeal before the trial Court was given a chance to render itself on the same. The trial Court in this regard ought not to have awarded damages which it had no means of ascertaining.
38. In addition, it is notable that no evidence was brought as regards the leave days or allowances due to the Respondents, and there was no provision for payment of gratuity in the Respondents' letters of appointment. It was specifically stated in the 1<sup>st</sup> Respondents letter of appointment dated 10<sup>th</sup> May 2013 that she was not entitled to gratuity, and the Appellant's witness explained during the trial that this was because the Appellant was remitting the Respondents' pension contributions to the Methodist's Retirement Scheme a result of the Respondent, a factor which was not taken into account by the trial Judge. The trial Court therefore erred in granting special damages of salary arrears to the 1<sup>st</sup> Respondent, and leave pay and allowances and gratuity to both Respondents which were not specifically pleaded or proved.
39. The Appellant's appeal therefore only partially succeeds on the issue of the damages and remedies awarded to the Respondents to the extent of the following orders:
  1. We set aside order 1 of the judgment by the Employment and Labour Relations Court at Nyeri (Bryam Ongaya J.) delivered on 3rd June 2006 in Nyeri Employment and Labour Relations Court Cause No 4 of 2016 as consolidated with Nyeri Employment and Labour Relations Court Cause No 5 of 2016, and substitute it with an order that judgment is entered in favour of the 1<sup>st</sup> Claimant's against the Respondent therein in terms of prayers a, b, c and d in the 1<sup>st</sup> Claimant's statement of claim dated 11<sup>th</sup> January 2016.
  2. We set aside order 2 of the judgment by the Employment and Labour Relations Court at Nyeri (Bryam Ongaya J.) delivered on 3rd June 2006 in Nyeri Employment and Labour Relations Court Cause No 4 of 2016 as consolidated with Nyeri Employment and Labour Relations Court Cause No 5 of 2016, and substitute it with an order that judgment is entered in favour of the 2<sup>nd</sup> Claimant's against the Respondent therein in terms of prayers a, b, and c in the 2<sup>nd</sup> Claimant's statement of claim dated 11<sup>th</sup> January 2016.
  3. We set aside orders 3 and 4 of the judgment by the Employment and Labour Relations Court at Nyeri (Bryam Ongaya J.) delivered on 3rd June 2006 in Nyeri Employment and Labour Relations Court Cause No 4 of 2016 as consolidated with Nyeri Employment and Labour Relations Court Cause No 5 of 2016 in their entirety.
  4. We award the 1<sup>st</sup> Claimant 4 months' gross salary at the scale and rate applicable at the date of termination of employment, being the salary for the unexpired term of her contract of employment, and months' pay in lieu of notice.
  5. We award the 2<sup>nd</sup> Claimant 8 months' gross salary at the scale and rate applicable at the date of termination of employment, being the salary for the unexpired term of his contract of employment, and 3 months' pay in lieu of notice.



4. The Appellant herein shall pay the Respondents' costs of this appeal and of the suits in in Nyeri Employment and Labour Relations Court Cause No 4 of 2016 as consolidated with Nyeri Employment and Labour Relations Court Cause No 5 of 2016.

40. Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF FEBRUARY 2022.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

I Certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

