



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, KIAGE & MURGOR, JJ.A)

CIVIL APPEAL NO. 152 OF 2015

BETWEEN

DAMASIOUS MUSYA MALINDA.....APPELLANT

AND

THE HON. ATTORNEY GENERAL.....RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL NO. 153 OF 2015

DANIEL N. MWANGI.....APPELLANT

AND

THE ATTORNEY GENERAL.....RESPONDENT

*(Being an Appeal from a judgment of the Industrial Court at Nairobi (Nduma Nderi, J.) delivered 19<sup>th</sup> May, 2015 & 4<sup>th</sup> February 2015)*

in

Industrial Cause No. 550 of 2013 formally

(Civil suit No. 1649 of 2001)

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JUDGMENT OF THE COURT

Central to this appeal is a Government retrenchment exercise that was undertaken sometime in 2000/2001, where the appellants, **Damasious Musya Malinda, (Damasious)**, who was retired as a Senior Building Inspector, and **Daniel N. Mwangi (Daniel)**, who was retired as a mechanic were among 25,783 civil servants who were subjected to early retirement.

The Retrenchment Programme, which was detailed in a Civil Service Circular dated 23<sup>rd</sup> June 2000 signed by Dr. Richard Leakey, then Permanent Secretary/Secretary to the Cabinet and Head of the Public Service (*the Leakey Circular*), set out a retirement package which retirees were to receive. It stated

in significant part that;

*“As part of the Retrenchment Programme, the Government has designed a Safety Net package that will help to cushion retrenches from possible economic vulnerability. In designing the package, the Government has taken into account the current economic situation in the country and its ability to finance the package. It has also been designed to comply with the existing service regulations and comprises statutory and non-statutory payments. The package is as indicated below:*

**(a) Non Pensionable Employees**

- Severance Pay of two and a half (2 ½) months current basic salary (at the time of retrenchment) for each year worked in the Civil Service.
- Payment of 2 months' salary in lieu of notice.
- A "Golden Handshake" of forty thousand shillings (Kshs 40,000).
- Compassionate gratuity for staff employed in the service prior to 1<sup>st</sup> April 1996 for male officers and 1<sup>st</sup> January 1977 for female officers.

**(b) Pensionable Employees**

- Payment of gratuity and pension benefits under the Pensions Act Cap 189 to all officers who have been confirmed in their permanent and Pensionable employment.
- Payment of additional pension under the pensions Act Cap 189.
- Payment of 2 months' salary in lieu of notice.
- A "Golden Handshake" of forty thousand shillings (Kshs. 40,000)."

The appellants were displeased with the manner in which the retrenchment exercise was conducted, and as a consequence brought proceedings by way of a plaint that was subsequently amended on plaint of 17<sup>th</sup> March 2010, against National Treasury, the Ministry for Local Government (now the Ministry of Planning and Devolution) and the Public Service Commission, all of which were represented by the Attorney General.

Though the further, further amended plaint was not included in the record of appeal, the judgment set out the following reliefs as prayed by the appellants;

- i) A declaration that the civil service reform programme II as a medium strategy (1998- 2002) is illegal unconstitutional and breach of the law, null and void.
- ii) General damages.
- iii) Exemplary/aggravated damages.
- iv) Payment of full benefits due to each of the plaintiffs amounting to Kshs. 1,575,588,510.
- v) Costs of the suit.
- vi) Any other further relief that this court may deem fit and just to grant in the peculiar circumstances of this case.

The suit was heard and determined by the High Court (Nambuye, J. as she then was), and in a judgment dated 27<sup>th</sup> June 2012, in which the court found that the Government was liable for having failed to adhere to the laid down Civil Service Reform Programme II guidelines when terminating the appellants' services. In so doing the court ordered various reliefs. Of pertinence it was ordered that;

*"2. An order be and is made that it is the finding of this court that the exercise did not conform to approved International standards and human rights standards governing termination of contract by reason of the plaintiffs being discriminated against by reason of the defendant not showing the criteria how the plaintiffs were identified for retrenchment.*

*4. In lieu of reinstatement, the defendant is ordered and directed to pay to the plaintiffs in monetary terms the equivalent of money which was to be spent on transport, training and sensitization funds.*

*6. the assessment of the amount payable in number 4 above will also include assessment of other under paid benefits payable under the approved retrenchment plan like the pensions, notice period and the would have been proper payment of Golden handshake.*

*12. Exemplary and aggravated damages are payable because the defendant did not tender evidence to show that they complied fully with the guidelines laid down for the identification of the would be retrenches. They therefore acted in a highhanded, oppressive and an unfair manner towards its own citizens.*

*16. Under any other relief that the court may deem fit to grant, the plaintiffs who had attained the age of 50 years and above to have their retrenchment converted into normal voluntary retirement and their benefits to be adjusted accordingly.*

17. Also under any other relief that the court may deem fit to grant the plaintiffs who had not yet attained the age of 50 years to have their retrenchment to be converted into normal employment termination of employment and their dues entitlement to be adjusted accordingly”.

Thereafter, the question of quantum was referred to the Employment and Labour Relations Court (Nduma Nderi, J.) for determination where the court made the following awards to the appellants;

“1. Four (4) months’ salary in lieu of notice to all claimants.

2. Four (4) months’ salary being exemplary damages to all claimants.

3. Conversion from probationary to permanent status to all claimants who had served 2 years but had erroneously not been given confirmation letters and payment of lumpsum pension and monthly pension with effect from the date of retrenchment for life and 5 years to the dependents upon death.

4. (1) above is payable with interest at court rates from date of retrenchment till payment in full.

5. (2) above is payable with interest at court rates from the date of this assessment till payment in full and

6. (3) above is payable with interest at court rates from the date of attaining 2 years till payment of the full lumpsum and arrears of monthly payment.

7. The specific amounts payable to each claimant be computed and filed with the Court within sixty (60) days from the date by the Respondent.”

The appellants were displeased with the judgment and filed an appeal to this Court on grounds when summarized; that the learned judge wholly misapprehended and misconceived the scope of the jurisdiction vested in the Industrial Court by the judgment of Nambuye J. in seeking to address unnecessary matters; in failing to order compensation in monetary terms for transport, training and sensitization funds; in failing to assess the quantum in accordance with paragraphs 4,6,12,16 and 17 of Nambuye, J’s judgment; in failing to assess Damasius’ pension on the basis that he had not yet attained the age of 50 years by converting his retrenchment into normal termination of employment and adjusting his pension accordingly; in failing to award enhanced golden handshake, and exemplary/aggravated damages; in failing to consider the appellants’ submissions on the assessment of the quantum due to them; in failing to award severance pay of 15 days for each year of service as provided by the Employment Act; in failing to compute their salary, medical and house allowances; and in failing to award additional pension. For Daniel, he also claimed a sum of Kshs 14,308.64 in respect of unpaid leave.

Damasius who was acting in person, filed written submissions on 5<sup>th</sup> April 2018, which he relied on in their entirety. He submitted that in accordance with Nambuye, J’s judgment, he was entitled to an unpaid balance on the pension lump sum, which amount ought to have been calculated on the basis of an anticipated salary of Kshs 50,000, expected to be paid upon retirement at 55 years and not on his basic salary of Kshs. 8,500 which is what he was paid by the time of early retirement. He therefore claimed a lump sum pension of Kshs. 5,204,102.04 inclusive of interest. He also claimed unpaid additional pension of Kshs 153,036 together with interest, and unpaid waiting time for payment of pension of an amount of Kshs. 363,400. It was submitted further that, he was entitled to Kshs. 308,890 for unpaid severance pay being his half monthly salary for a period of 23 years, and that under the Civil Service Code of Regulations he was entitled to be paid six months’ salary in lieu of notice, but was only paid 2 months. He claimed Kshs. 34,000, for the remaining 4 months together with interest for 18 years totaling Kshs. 107,440.

Damasius further submitted that in terms of the Leakey circular, he was entitled to a sum of Kshs. 5,000,000 as payment for transport and sensitization training. Also claimed was a sum of Kshs. 10,000 together with interest for the transportation of his personal effects to his rural home, which when computed with interest for 18 years, totaled Kshs. 31,600 under this head.

Another complaint was that the learned judge failed to appreciate that he was entitled to an increase in the Golden Handshake from Kshs 40,000 to Kshs. 240,000; that when the difference is computed together with interest for 18 years, he was entitled to be paid Kshs. 632,000 inclusive of interest.

Finally, Damasius submitted that the learned judge wrongly awarded 4 months’ salary equivalent for exemplary and aggravated damages instead of Kshs. 24,000,000 inclusive of interest as claimed. He also faulted the court for not awarding him costs of the suit of Kshs. 570,000.

In his submissions, Daniel also acting in person, claimed unpaid additional pension of Kshs. 139,568 exclusive of interest; unpaid severance allowance being his half monthly salary for a period of 22 years of Kshs. 92,098 inclusive of interest; four (4) months’ salary in lieu of notice of Kshs 7,930 per month and, Kshs. 35,526, inclusive of interest instead of six (6) months as specified by the Civil Service Code of Regulations.

On the claim for annual leave, it was submitted that he was entitled to Kshs. 14,308.64 inclusive of interest being 1  $\frac{3}{4}$  days of full pay in respect of each completed month of service subject to completion of two or more consecutive months leave.

It was further submitted that in terms of the Leakey circular dated 23<sup>rd</sup> June 2000 he was entitled to transport, training and sensitization of a sum of Kshs. 725,760 for 72 lessons over a 5 month period at the rate of Kshs. 9,000 per lesson together with interest, and compensation for the transportation of his personal effects to his rural home in Laikipia of Kshs 490,200.

Like Damasius, he also claimed underpayment of the Golden handshake of Kshs. 200,000 and finally, submitted that he was entitled to receive exemplary and aggravated damages of Kshs. 20,625,353 inclusive of interest and costs of the suit of Kshs. 1,768,000 for the stress and loss he had suffered on account of having been retired early.

Learned counsel for the respondent, **Mr. K. Motende**, appearing with Ms. C. Oyugi filed written submissions. Submitting orally, counsel opposed the appeal and stated that the appellants had filed an application for review which was dismissed; that the appeal was incompetent as the Notice of Appeal and the Record of Appeal were filed out of time, and leave was not sought to extend time to file the appeal; that as a consequence, they lost the right to appeal. Counsel went on to submit that the demand for reimbursement of training allowance was unknown in the civil service, as was the demand for refund for the transportation of their personal effects to their rural homes.

Having regard to the record and submissions of the parties as well as the law, we are of the view that the issues for determination are;

1. *Whether the appellants were entitled to be awarded;*
  - i) *Enhanced pension and additional pension entitlement;*
  - ii) *Severance pay entitlement;*
  - iii) *balance retirement notice period of 4 months;*
  - iv) *Transportation of personal effects on retirement;*
  - v) *Sensitization training allowance;*
  - vi) *Enhanced Golden handshake from Kshs.40,000 to Kshs. 240,000; and*
  - vii) *Exemplary and Aggravated damages.*
2. *Whether Daniel is entitled to outstanding annual leave.*
3. *Interest and Cost of the Suit.*

This is a first appeal and it is our duty to reevaluate the evidence and come to our own conclusions on the facts, but remaining cognisant of the fact that we have not seen or heard the witnesses. See ***Mwanasokoni vs Kenya Bus Limited [1985] KLR 931.***

As a preliminary issue the respondent's assert that the appeal is incompetent as the Notice of appeal was filed and served out of time. In this regard we would draw their attention to the proviso to **rule 84** of the ***Court of Appeal Rules*** which provides that

***"...an application to strike out a notice of appeal or an appeal shall not be brought after thirty days from the date of service of the notice of appeal or record of appeal and the case may be."***

In the circumstances, having sat on their right until the appeal was fixed for hearing and without filing the requisite application to strike it out, the respondent lost the moment, and they have only themselves to blame for the lack of vigilance on their part. Accordingly, we decline to strike out the appeal.

Now, turning to the appeal, at the outset it is important to point out that the parties agreed that Nduma Nderi, J's judgment should be in respect of the following issues that arose out of Nambuye, J's, judgment;

***"i) That the assessment of remedial/Quantum; was based on paragraphs 4, 6, 12, 16, and 17 of the Judgment of Nambuye, J at p 44 and 45 thereof.***

***(ii) Claimants to call two witnesses to lead evidence on money that ought to have been paid to each claimant in respect of the budget allocation for the Training and transport of the claimants with a view to have the court apportion a share to each of the claimants.***

***(iii) Evidence to be lead on the amount of Quantum that ought to have been paid, it being common cause that all claimants were paid Kshs 40,000 each as Golden Handshake.***

***Evidence led on the claim for aggravated damage based on the unlawful and unfair treatment of the claimants by the Respondent***

***(v) The parties to file list/matrix of the claimants indicating the particulars of employment of each claimant and the exit package already paid to them."***

As such, and in adherence to the parties' agreement, we will limit our determination to the agreed matters that were before the learned judge.

Beginning with unpaid pension payments, the learned judge found that most of the claimants were paid the lumpsum pension and continued to receive monthly pension for life and thereafter 5 years payment for their dependents after their demise.

Damasius' claim was that he was entitled to an enhanced lump sum pension of Kshs. 1,478,438 based on an anticipated salary of Kshs. 50,000, which he would have received, had he retired at age 55 years, and not subjected to early retirement. His other pension related claim was that he was not paid additional pension.

For his part, Daniel's pension claim was limited to non-payment of additional pension.

Regarding Damasius' claim for enhanced pension, **regulation 15** of the **Pensions General Regulations** specifies the rules applicable to qualifying and pensionable service and provides that;

***“(1) Subject to the provisions of these Regulations, qualifying service shall be the inclusive period between the date on which an officer begins to draw salary in respect of public service and the date of his leaving the public service, without deduction of any period during which he has been absent on leave.***

***(2) No period which is not qualifying service by virtue of subregulation (1) shall be taken into account as pensionable service.***

***(3) No period during which the officer was not in public service shall be taken into account as qualifying service or as pensionable service.”***

In other words, the provisions make it clear that only the period between the date on which an officer begins to draw salary in respect of public service and the date of his leaving the public service will be considered as pensionable service, or will be considered as the period to which pension will accrue. Any period outside of that will not attract a pension. Therefore, once Damasius left the public service on 1<sup>st</sup> October 2000, the period following his retirement cannot qualify as a pensionable service period capable of attracting a pension. He was therefore not eligible for pension from the date he left the service upto age 55 years when he anticipated that he would have retired. This claim therefore lacks merits and is hereby dismissed.

Regarding the claim for additional pension, both Damasius and Daniel insist that they did not receive a payment under this head following their retirement. We have reviewed Nduma Nderi, J's judgment and it would appear that this issue was not addressed. In the circumstances, we think it necessary to interrogate it.

The Leakey circular specified that, all officers confirmed in Permanent and Pensionable employment were not only entitled to receive gratuity and pensions benefits under the Pensions Act 189, but were also to receive

*“...Payment of additional pension...”*

According to **Shem Nyakato (DW1)**;

*“To earn a pension one must have worked for 10 years in category*

*(i) and (iv). When they are retrenched the 10 years qualification is waived. They earn permanent in spite of not being 50 and not worked for 10 years. They also get additional pension upon retrenchment or when offices are abolished.”*

The witness further added that;

*“The additional pension is reflected in lumpsum and monthly pension. There is a formula used I need the file to show you how the additional pension is worked out.”*

The evidence shows that Damasius retired under permanent and pensionable terms on 10<sup>th</sup> December 1980, and that on 16<sup>th</sup> July 2000, he received Kshs. 302,812.50 as pension and gratuity. He also was to receive a monthly pension of Kshs. 3,785.15 effective 1<sup>st</sup> October 2000. He concedes that he received a lumpsum pension amount of Kshs. 286,875, which, if deducted from Kshs 302,812.50 would give rise to an excess pension payment of Kshs. 15,937.50.

In Daniel's case, there is evidence to show that he was confirmed on permanent and pensionable terms effective 31<sup>st</sup> October 1984. A letter dated 29<sup>th</sup> December 2000 shows that he was to be paid a lumpsum pension gratuity of Kshs. 295,392.50 and a monthly pension of Kshs. 3,692.40 with effect from 1<sup>st</sup> October 2000. He received a cheque for Kshs. 293,172.10. A difference of Kshs. 2,220.40

**Regulation 24** of the **Pension Regulations** deals with additional pension following abolition and reorganization of office. It provides that an officer who is retired because of abolition of office or reorganization is eligible to receive a pension or gratuity, at his or her option, even though he or she may not have completed the necessary ten years qualifying service. The regulation goes on to stipulate that the retiree;

***“...is also liable to an additional pension at the rate of one-sixtieth of his pensionable emoluments for each completed period of three years pensionable emoluments, and together with the remainder of his pension to the pension for which he/she would have been eligible if he would have continued until age 55 years to hold the office held by him at the date of his retirement having***

*received all increments for which he would have been eligible at that date.”*

The Leakey circular clearly directed that the appellants would receive a lumpsum pension and an additional pension. The appellants have conceded that they received the lumpsum pension due to them, together with varied amounts in excess of the lumpsum pension. But there is nothing to show that they were paid the additional pension as directed. Or that it was reflected together with the lumpsum pension. They are therefore entitled to the additional pension as computed under **regulation 24**, less any excess amounts paid, as well as any applicable statutory and tax deductions.

Additional pension for Damasius would therefore be computed as follows;

Lumpsum pension x 7 = Additional pension 60

286,875 x 7 = Kshs. 33,468.75

In effect, the additional pension due to the Damasius is Kshs. 33,468.95 which sum is subject to statutory deductions and tax, and the deduction of the amount of Kshs. 15,937 already paid to him.

For Daniel, additional pension would be computed as follows;

Lumpsum pension x 7 = Additional pension 60

295,392.50 x 7 = Kshs. 34,462.50

Therefore, Daniel was entitled to be paid an additional pension of Kshs. 34,462.50, subject to statutory and tax deductions.

Next, we turn to consider the question of severance pay to the appellants who were permanent and pensionable employees. The appellants have complained that following the abolition of their offices, they were entitled to severance pay, which sums were not paid to them after they retired. An analysis of Nduma Nderi, J’s judgment discloses that the court did not, once again, address this issue, yet, an evaluation of the proceedings before both Nambuye and Nduma Nderi, JJ shows that the appellants had sought to be paid a severance allowance.

It is uncontroverted that the appellants were retired following the abolition of their offices. According to the Leakey circular and letters from the Office of the President, Directorate of Personnel Management, the appellants were informed of their retirement following the “reorganization/abolition of office”. Damasius’ letter read in part;

*“Following the approval of the Public Service Commission that you be retired on re-organization/abolition of office, your safety net benefits have been computed upto and including 30<sup>th</sup> September 2000 and amount to Kshs. 55,860.”*

Daniel received a similar letter.

It is instructive that the Leakey circular specified that severance pay at the rate of two and a half (2 ½) months current basic salary for each year worked in the Civil Service (at the time of retrenchment) would be paid to non- pensionable retirees. But the circular was silent on severance pay to permanent and pensionable retirees. It merely made reference to a Safety Net Benefits, comprising 2 months’ salary in lieu of notice and a golden handshake of Kshs 40,000. Damasius received Kshs. 57,000, and Daniel Kshs. 55,860 comprising 2 months’ salary in lieu of notice and the golden handshake. Severance pay was not included in this amount.

**Section 16 A** of the repealed Employment Act, Cap 226, provided that;

***(1) A contract of service shall not be terminated on account of redundancy unless the following conditions have been complied with:***

***(a)...***

***(b)...***

***(f) an employee declared redundant shall be entitled to severance pay at the rate of not less than 15 days pay for each completed year of service as severance pay.***

***(2) “redundancy” has the meaning assigned to it in Section 2 of the Trade Disputes Act”.***

The Trade Disputes Act (repealed) defines “**redundancy**” as follows;

***“...the loss of employment, occupation, job, career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the service of an employee are superfluous and the practice commonly known as abolition of office, job or occupation and loss of employment due to Kenyanisation of a business. (emphasis ours)”***

These provisions essentially stipulated that, any employee whose employment was terminated through no fault of his/her own, or whose office was abolished was considered to have been declared redundant and would as a consequence be entitled to severance pay in the manner set out by the Act. As this Court aptly pointed out in the case of *Telkom Kenya Limited vs John O.Ochanda [2013] eKLR*:

***“An employer ... is obliged to pay all the normal terminal benefits and severance pay at a given rate for each year the employee has already served. The formula is statutory and the rate cannot be tied to pension. Pension is a benefit to be enjoyed in retirement and is usually managed by Trustees separate from the Employer.”***

Similarly, being a statutory obligation, severance pay was not part of the Safety Net Benefits, but specific provision ought to have been made in respect of it. Such provision should have provided a formula for arriving at the allowance payable, in a manner similar to that spelt out for non-pensionable retirees in the Leakey circular. Since no formula for severance pay was specified, or payment made which demonstrated that the appellants had received a severance pay, we are satisfied that the appellants did not receive such allowance from the respondent following the abolition of their offices, and we find that they are entitled to be paid fifteen days for each completed year of service as specified by the Act. Damasius and Daniel should therefore be paid Kshs. 97,750 and Kshs. 92,098 respectively under this head.

On the period of notice of retirement, the court found that this amount together with interest is payable to the appellants, and there being no cross appeal in respect of this item, we will uphold the learned judge’s conclusions in this regard.

Turning to the appellants’ claim for the sensitization training allowance and transport, the appellants’ assertion was that they were denied sensitization training in the period preceding their retirement, and therefore they should be paid a sum equivalent to that benefit. They rely on the Leakey circular which specified that;

***“The DPM, in collaboration with Ministries/Departments, will undertake a campaign to sensitize and inform Civil Servants about the objectives, procedures and processes of the retrenchment programme. In order to assist in this exercise, a Sensitization manual has been developed by the DPM and has been circulated to all Ministries /Departments for use.”***

Their case is that Nambuye, J’s judgment ordered that they be paid “...in monetary terms the equivalent of the money which was to be spent on transport, training and sensitization...”. Under this head, Damasius claimed a sum of Kshs 5,000,000, while in Daniel’s case the claim is for Kshs. 725,760 for 72 lessons over a 5 month period at the rate of Kshs. 9,000 per lesson inclusive of interest.

In addressing this issue, Nduma Nderi, J concluded that the appellants had failed to show on a balance of probabilities that there was any outstanding amount due to them.

On its part, the respondent has not denied that sensitization training of some of the retirees took place. It was explained that the sensitization training was a one day programme, whose objective was to prepare the retirees to exit from the civil service. No individual participant amount was specified. It was further stated that the amount payable to each individual varied depending on the distance they were required to travel to attend the training, and whether or not they would require to be accommodated at the training venue. Other amounts included lunch for the participants who attended the training.

We have been through the record and find that the appellants have not produced anything to show what transportation and accommodation costs were to be met in their respective circumstances. They did not attend the training, and so were not entitled to lunch which was specific to participants, and as the amount per participant for a one day training was not quantified, it was not possible to ascertain the amounts payable. The appellants have merely thrown lumpsum figures at the court that are unexplained and have no basis. Without anything upon which we can rely to arrive at an amount payable to the appellants, like the learned judge, we find that the claim is unfounded, and is accordingly dismissed.

On the claim for transportation costs of their personal effects to their rural homes, **Rose Muasya (DW1)**, the Deputy Board Secretary in the Permanent Public Service Remuneration Review Board, formerly, the Directorate of Personnel Management testified before Nambuye, J that, transport was not a benefit under retirement scheme, but was catered for under **section K clause 7 and 9 the Civil Service Code of Regulations** which specifies that an officer will be provided with transport provided that, it is claimed within 2 months upon cessation of services. The appellants have not demonstrated that they submitted their claims for transport within the stipulated period, which claim the respondent neglected to pay. In the circumstances, we find that it lacks merit and is accordingly dismissed.

Turning to the claim for enhanced Golden handshake. The appellants claim that they were paid a Golden Handshake of Kshs. 40,000, which ought to have been enhanced to Kshs. 240,000.

We have reviewed the Staff Retirement Package in the Leakey circular, and the Circular on Implementation of the Voluntary Early Retirement Scheme (VERS) in the Civil Service in force between 2004 and 2007 and signed by Amb. Francis Muthaura Permanent Secretary/Secretary to the Cabinet and Head of the Public dated 9<sup>th</sup> June 2005 (*the Muthaura circular*). The Leakey Circular, implemented in 2000, provided that non pensionable and pensionable employees would receive “A “Golden Handshake” of forty thousand shillings (KShs. 40,000),” while the Muthaura circular initially provided for a Golden handshake of Kshs 80,000 which was later reviewed upwards to Kshs. 120,000. In claiming that the Golden handshake was enhanced, the appellants appear to be referring to the later Muthaura circular.

However, when the two circulars are compared, it is clear that they refer to two separate schemes, one implemented between 2001 and 2002, and the other between 2004 and 2007. By the time of implementation of the Muthaura circular, the appellants had already retired, and were therefore not part of the later scheme, or entitled to benefit from its terms. Any review thereunder would not have been applicable to them. In the circumstances, as did the learned judge, we find that the claim that the Golden Handshake under the Leakey circular was reviewed upwards has not been demonstrated. In the circumstances, this ground of appeal is dismissed.

Among Daniel's complaints, was a claim for unpaid leave; that he was entitled to Kshs. 14,308.64 inclusive of interest, being 1 ¾ days of full pay in respect of each completed month of service subject to completion of two or more consecutive months leave. In order to ascertain this claim, Daniel would have had to specify the period of unpaid leave claimed. As no period was indicated, such amount is incapable of being ascertained, and as a consequence we find that the claim is unmerited.

Finally, we now turn to the claims for exemplary and aggravated damages of Kshs. 24,000,000 each. The appellants' grievance regarding this claim is that, Nambuye, J's judgment stated that;

***“Exemplary and aggravated damages are payable because the defendant did not tender evidence to show that they complied fully with the guidelines laid down in the identification of the would be retrenches. They therefore acted in a high handed oppressive and an unfair manner towards its own citizens.”***

And in considering what amounts were payable to the appellants, Nduma Nderi, J observed that, “ ... the claimants have not tendered any evidence to enable the court to quantify the award.” This notwithstanding, the court awarded four (4) months' salary for the finding that the respondent had acted in a highhanded, oppressive and unfair manner.

In the case of John vs MG Limited [1997] QB 586, the court stated thus;

***“Aggravated damages will be ordered against a defendant who acts out of improper motive e.g. where it is attracted by malice; insistence on a flurry defence of justification or failure to apologize”.***

And in the case of in Obongo & Another vs Municipal Council of Kisumu [1971] EA 91 this Court explained the circumstances in which aggravated damages would be applicable when it stated thus;

***“It might also be argued that aggravated damages would have been more appropriate than exemplary. The distinction is not always easy to see and it is to some extent an unreal one. It is well established that when damages are at large and the court is making general award, it may take into account factors such as malice or arrogance on the part the defendant and this is regarded as increasing the injury suffered by the plaintiff, as for example, by causing him humiliation or distress. Damages enhanced on account of such aggravation are regarded as still being essentially compensatory in nature.”***

And in the case of Kemfro Africa Limited t/a Meru Express Services, Gathogo Kanini vs A.M.M Lubia & Another (1982-88) 1 KAR 777, this Court enunciated the guidelines on the review of an award made by a trial court thus;

***“...the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that; short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage.”***

The appellants' position is that the learned judge awarded exemplary/aggravated damages that were equivalent to the period of notice, but that the notice period was different from exemplary/aggravated damages. It is apparent that the appellants have misunderstood that exemplary/aggravated damages awarded by the learned judge was separate from the award for the notice period. We would point out that the appellants have not stated or specified why they found the learned judge's award of four months' salary to be unsatisfactory.

It is trite that in considering an award for damages such as this, an appellate court should not interfere with such an award unless it can be shown that, in assessing the damages the learned judge took into account an irrelevant factor, or left out a relevant one, or that, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. We do not consider that in awarding four months' salary as exemplary/aggravated damages, that the learned judge did not take into account the circumstances of the case. Neither do we think that he awarded an amount that was too low or too high. For this reason, we find no basis upon which to interfere with that decision. We also cannot fault the learned judge for the award of interest and costs. In sum, we find that the appeal succeeds in part, and we make the following orders;

1. The respondent to pay Damasius unpaid additional pension of Kshs. 33,468.75 together with interest at court rates from the date of retrenchment until payment in full, which sum is subject to statutory and applicable tax deductions, and the deduction of the amount of Kshs. 15,937.50 already paid to him;
2. The respondent to pay Daniel unpaid additional pension of Kshs. 34,462.50 together with interest at court rates from the date of retrenchment until payment in full, subject to statutory and applicable tax deductions;
3. The respondent shall pay Damasius and Daniel severance pay of Kshs. 97,750 and Kshs. 92,098 respectively together with interest at court rates from the date of retrenchment until payment in full; and

4. As the appellants have partially succeeded, they shall be entitled to a half of the costs.

***It is so ordered.***

***Dated and delivered at Nairobi this 9<sup>th</sup> day of November, 2018.***

**ASIKE- MAKHANDIA**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original*

**DEPUTY REGISTRAR**