



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MUSINGA, GATEMBU & MURGOR, JJ,A)**

**CIVIL APPEAL NO. 252 OF 2014**

**BETWEEN**

**PATRICK NYAKUNDI.....APPELLANT**

**AND**

**KENYA NATIONAL UNION OF TEACHERS**

**(KNUT HEADQUATERS).....1<sup>ST</sup> RESPONDENT**

**KENYA NATIONAL UNION OF TEACHERS**

**(KISII BRANCH).....2<sup>ND</sup> RESPONDENT**

*(Appeal from the Judgment and /Review of the Industrial Court of Kenya at Nairobi of Hon. Justice Nzioki Wa Makau, J.) dated 23<sup>rd</sup> June, 2014*

**in**

**Industrial Cause No. 1902 of 2011)**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

*Patrick Nyakundi, the appellant, was born on 15<sup>th</sup> July 1941. He trained as a teacher, and on 1<sup>st</sup> October 1978 was employed as an Executive Officer by the 2<sup>nd</sup> respondent, stationed at its branch at Kisii. In the course of his employment, the 2<sup>nd</sup> respondent was divided into two branches namely; Gucha and Kisii branches. As a consequence of the split, the 2<sup>nd</sup> respondent notified the appellant in a notice dated 6<sup>th</sup> January 1998, of its intention to declare the appellant redundant, which notice was to take effect on 31<sup>st</sup> January 1998. The appellant contended that the notification was in breach of the respondents' redundancy guidelines, as the notice was backdated, and he was only served in February 1998. Subsequently, the 2<sup>nd</sup> respondent cancelled the redundancy notice, and purported to commence a new contract of employment with the appellant, where the appellant's salary was reduced by 50%.*

*On 26<sup>th</sup> November 2001, the 2<sup>nd</sup> respondent served the appellant with a retirement notice that was to take effect on 31<sup>st</sup> December 2001. The appellant contended that the notice was invalid as he was entitled to*

receive a six months' notice from the 2<sup>nd</sup> respondent or six months salary in lieu thereof.

On account of the alleged unfair treatment, the appellant in Nairobi HCCC No 210 of 2006 commenced a suit against the respondents. By a consent recorded on 15<sup>th</sup> June 2006, the court ordered the consolidation of HCCC No 210 of 2006 and HCCC 209 of 2006. By a further consent, the court allowed the appellant to amend the Plaint on 26<sup>th</sup> June 2006. The appellant filed the amended memorandum of claim against the respondents on 24<sup>th</sup> July 2012 wherein he claimed a sum of Kshs.5,662,854.06 made up as follows:-

a)	Balance of unpaid salaries for January, February and March 1998	= 27,167.00
b)	Underpayment of salary	= 2,117,127.75
c)	Payments to leave of 1993, 1994, 1995 and 1996	= 285, 487.86
d)	Unpaid balances of headquarters gratuity	= 108,734.70
e)	Salary arrears	= 104,552.85
f)	Payment to compulsory retirement notice of 6 months	= 676,345.00
g)	Unpaid service gratuity	= 271,879.20
h)	Staff terminal benefits scheme	= 2,071,559.70
	<b>TOTAL</b>	= <b>5,662,854.06</b>

On its part, the 2<sup>nd</sup> respondent admitted having employed the appellant on 18<sup>th</sup> September 1978 prior to the split of Kisii branch, following which it duly notified the appellant of the impending redundancy on 6<sup>th</sup> January 1998. It was further contended that following negotiations, by agreement of the parties, the appellant was reemployed on 27<sup>th</sup> March 1998 on new terms and conditions.

The respondents denied that it owed the appellant the sums claimed as alleged terminal benefits, but stated that it had paid the appellant all his terminal sums due based on the number of years worked, which the appellant had rejected, and instead opted to file this suit.

The 2<sup>nd</sup> respondent contended that the appellant worked upto the time he attained the mandatory retirement age of 60 years and retired on 31<sup>st</sup> December 2001; that the appellant was notified of his impending retirement in January 2001, and subsequently proceeded on terminal leave until his retirement.

In his judgment dated 23<sup>rd</sup> June 2014, which reviewed an earlier judgment of the court dated 10<sup>th</sup> January 2014, the learned judge concluded that the appellant, having accepted the terms of engagement of the new employment contract, and having been paid his dues, was not entitled to make any further claims for under payment. Furthermore, save for the sum of Kshs. 93,294/35 being his gratuity entitlement, he was not entitled to any further payments from the respondents.

The appellant was dissatisfied with the decision of the Industrial Court and appealed to this Court on grounds that; the court failed to appreciate that the declaration of redundancy by the 2<sup>nd</sup> respondent was unlawful; that the appellant was not paid his leave for 1993, 1994, 1995, and 1996 of a sum of Kshs. 285,487/86; unpaid salary of Kshs. 27,167.00; unpaid balance of headquarters gratuity of Kshs. 108,734.70; salary arrears at Kshs 104,552.85 and dues from staff terminal benefits scheme of Kshs.2,071,559.70; that the agreement reducing the appellant's salary by 50% was procured by way of duress; that the 2<sup>nd</sup> respondent did not issue the appellant with a proper retirement notice; that the learned judge failed to take into account the appellant's submissions and documentary evidence.

Both the appellant and the respondent filed comprehensive written submissions which were summarized by oral submissions thus; **Mr. Osoro**, learned counsel for the appellant submitted that the declaration of a redundancy by the respondents was unlawful, as the 2<sup>nd</sup> respondent's financial crisis, was not established since the 2<sup>nd</sup> respondent's officials went on to subsequently increase their salaries. Furthermore, the declaration of redundancy did not conform to the requirements of the Labour Relations Act or to **section 40 of the Employment Act** and that following the expiry of the redundancy notice, the appellant was reappointed on half salary.

Counsel further submitted that, contrary to the learned judge's finding, all claims were specifically pleaded in the memorandum of claim.

As concerned the issue of limitation, counsel submitted that this did not arise, as, by the time of the appellant's retirement, the Employment Act of 2006 had not been enacted, and the previous Employment Act did not specify a limitation period for filing a claim.

On the question that the employee did not provide records to support his claim, counsel argued that it was the obligation of the employer to keep such records. Counsel cited **David Wanjau Muhoro vs Ol Pejeta Ranching Ltd, Nairobi Industrial Cause No. 1813 of 2013**, in support of this proposition. Counsel finally submitted that the appellant was entitled to the sums claimed on the basis that the benefits continued to accrue even after the so called redundancy.

In opposition, **Mr. Ameyo**, learned counsel for the respondents, submitted that it was not denied that the appellant had been declared redundant vide a letter dated 6<sup>th</sup> January 1998, and that subsequent to the redundancy, he was employed on new terms; counsel took the view that the trial court was right in finding that the amounts claimed for the three years from 6<sup>th</sup> January 1998 were an afterthought, and that the appellant was paid all his benefits upto that time. Counsel submitted that the trial court rightly found that the amounts claimed were no longer applicable as, the appellant had acquiesced to the new terms of employment.

On the issue of limitation, counsel asserted that under the Limitation of Actions Act, the period for filing the claim expired in 2004, and the appellant filed his suit in 2006, which was outside the specified period. See **Attorney General vs Andrew Maina Githinji, [2016] eKLR Waki, JA**.

Furthermore, it was argued, the trial court rightly dismissed the claims for payment of compensation and unpaid leave as they were not raised in the pleadings. With respect to unpaid salaries under the previous contract, counsel submitted that the appellant was not entitled to the amounts as the non-payment of these sums was not proved.

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

- i. *Whether the appellant was declared redundant;*
- ii. *Whether the appellant entered into a new contract of employment; and*
- iii. *Whether the appellant was entitled to the sums claimed in respect of his employment with the*

2<sup>nd</sup> respondent.

This Court in the case of ***Eveready Batteries (K) Limited Vs. Simon Kinyua***, Civil Appeal No. 281 of 2004, set out the duty of the first appellate court as follows:-

***“This being a first appeal, it is our duty to re-evaluate the evidence, analyze it and come to our own conclusions but in so doing we must give allowance to the fact that we have neither seen nor heard the witnesses – see Selle V. Associated Motor Boat Company [1968] E.A. 123 and Jivanji vs. Sanyo Electrical Company Ltd [2003] KLR 425.”***

Bearing these principles in mind, we shall first consider whether or not the appellant was declared redundant thereby bringing his employment contract to an end.

By a letter dated 6<sup>th</sup> January 1998, the 2<sup>nd</sup> respondent issued a three months’ notice to the appellant informing him of an impending redundancy. The letter also provided that;

***“...the Employees would be at liberty, if interested to re-apply for the employment at the time of expiry of the said notice, on new terms and conditions.”***

According to the 2<sup>nd</sup> respondent’s Chairman, Peter Rianga, after the appellant was notified of the impending redundancy, new terms of engagement were negotiated and agreed upon with the appellant on 27<sup>th</sup> March 1998. On the same day, the appellant appended his signature to a letter that revised his monthly salary from Kshs. 44,888/- to Kshs. 22,244/-.

The letter read thus:

*“ KENYA NATIONAL UNION OF TEACHERS KISII BRANCH P.O BOX 454*

*TEL: 21417,KISII*

*DATE: 27/3/98*

*PATRICK NYAKUNDI*

*....EMPLOYMENT*

*...That a notice terminating your service with KNUT was to end on 1<sup>st</sup> March....you are aware and in reference to our letter to you of 6<sup>th</sup> January, 1998, was due to ... difficulty that the Branch was experiencing.*

*..informing you that the Branch Executive Committee meeting on 25<sup>th</sup> March, 1998, ... you appeared before and thereby talked personally to you; you agreed on the new conditions as to what the branch would be able to pay you.*

*On behalf of the B.E.C. informing you that at the same time congratulating you for .....to continue working for the Union. Your total earnings (Inclusive of*

*allowances) 22,571 (Twenty Two Thousand, Five Hundred and Seventy one) and your incremental .....every January of the coming year.*

*...you the best of luck and co-operation in your duties, as they will be allocated to you.*

*...the offer please sign below*

Signed .....

Fred Ontere

Executive Secretary

KNUT-KISII

David Mokamba

Branch Chairman

...”

Having considered the evidence, learned judge concluded that;

**“...the Claimant accepted new terms of service as evidenced by the letter of 27<sup>th</sup> March 1998. The letter confirmed that the Claimant met the Branch Executive Committee at a meeting held on 25<sup>th</sup> March 1998 and agreed to the new terms which were Kshs.22,571/- per month. He signed the letter in acceptance.”**

It is not in dispute that on 6<sup>th</sup> January 1998, the 2<sup>nd</sup> respondent issued the appellant with a letter of redundancy which specified a notice period that was to expire on 31<sup>st</sup> March 1998. Prior to the expiry of the redundancy notice, the parties entered into negotiations, and the appellant subsequently signed a letter revising the terms of his employment on 27<sup>th</sup> March 1998, with the result that, the impending redundancy was averted, and did not take effect.

As such, the finding by learned judge that the redundancy letter was deemed to have been revoked when the appellant signed the employment letter dated 27<sup>th</sup> March 1998 specifying new terms of engagement, was correct.

As to whether the appellant entered into a new contract with the 2<sup>nd</sup> respondent, it is not in dispute that on 27<sup>th</sup> March 1998, the appellant negotiated and signed the letter that revised the terms of his employment with the 2<sup>nd</sup> respondent. The letter congratulated the appellant for agreeing to continuing to work with the Union, and for accepting a reduced salary of an amount of Kshs. 22,244/-. In effect, the letter was an acknowledgement by the appellant of his continued employment, with the 2<sup>nd</sup> respondent, and that his employment had not been terminated by way of a declaration of redundancy. Consequently, we find that the appellant did not enter into a new contract, but instead took up the option to continue in employment under the existing contract with the 2<sup>nd</sup> respondent, *albeit* under new terms.

In seeking to discredit the revised letter of 27<sup>th</sup> March 1998, the appellant claimed that he was coerced into signing the revised letter, which he claimed to have signed under duress.

In the Uganda case of **Behange vs School Outfitters (U) Ltd 2000 1 EA 20**, it was stated thus,

**“One of the basic principles in the law of contract is that the parties have the freedom to fix the terms of their own bargain. The courts do not concern themselves with the question whether “adequate” value has been given or whether the agreement is harsh or one sided. The fact that one person pays “too much” or “too little” for a thing may be evidence of fraud or a mistake or it may induce the court to imply or to hold that the contract has been frustrated. But it does not of itself affect the validity of the contract. Thus in the absence of fraud, duress, undue influence, mistake or representation the courts will enforce a promise so long as some value for it has been given.”**

The available material does not support the assertion that the appellant was coerced into signing the employment letter, and without any proof to support this contention, we find that the appellant's employment contract with the 2<sup>nd</sup> respondent was voluntarily revised of his own free will, and in so doing, he willingly acceded to a reduction of this remuneration.

Having voluntarily agreed to continue in employment under new terms, we find that the impending redundancy was overtaken and did not take effect.

Having so found, it is at this juncture that we consider it necessary to consider the respondents' submissions that the appellant's claim following his redundancy in 1998 was time barred for the reason that it was not instituted within the six year period specified by **section 4 (1)** of the **Limitation of Actions Act**, that being the applicable law at the time. It was argued that since the appellant was declared redundant in 1998, and the period for filing the claim expired in 2004, then the claim for unlawful redundancy and retirement was time barred as it was filed in 2006.

In addressing the issue of limitation, we observe that it was not specifically pleaded in the respondents' defence as required by **Order 2 rule 4** of the **Civil Procedure Rules**, but was raised in the respondents' submissions before both the trial court and this Court. The trial court did not address the issue of limitation in its judgment.

It is trite that statutory limitation must be specifically pleaded by a party to a suit in a defence or in a reply to a counterclaim. **Order 2 rule 4** stipulates;

**"4.(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of Limitation or any fact showing illegality –**

**(a) which he alleges makes any claim or defence of the opposite party not maintainable;**

**(b) which, if not specifically pleaded, might take the opposite party by surprise; or**

**(c) which raised issues of fact not arising out of the preceding pleading**

**(2) . . .**

**(3) . . ."**

This Court quoting **Halbury's Laws of England, fourth edition, volume 36** at paragraph 48 page 38 headed; **"Matters which must be specifically pleaded"** in the case of **Achola & Another vs Hongo & Another LLR No. 4007 [CAK]** stated thus;

**"The defendant must in his defence plead specifically any matter which he alleges makes the action not maintainable or which, if not specifically pleaded might take, the plaintiff by surprise or which raises issue of fact not arising out of the statement of claim. Examples of such matters are performance, release, any relevant statute of limitation, fraud or any act showing illegality."**  
(Emphasis supplied)

More recently in the case of **Abdullahi Ibrahim Ahmed (Suing as The Personal Representative of The Estate Of Anisa Sheikh Hassan (Deceased)) vs Lem Lem Teklue Muzolo [2013] eKLR** this Court observed that;

**"The issue of limitation was never before the learned judge. Indeed, the respondent never participated in the suit. She neither entered appearance nor filed a defence pleading despite being served. The issue of statutory limitation was brought up by the learned Judge suo moto during formal proof, interlocutory judgment having long been entered. In terms of Order 2 Rule 4 (1) the issue of limitation must be specifically pleaded before a court can act on it."**

In our view, the respondents' submissions on limitation on the basis of the letter of redundancy were an afterthought. We say this because, at all times, their defence turned on the contention that the appellant was not at any time declared redundant, and that he had remained in continuous employment until 2001. Had their case centered on the averted redundancy, which it was not, they would have specifically pleaded limitation at the outset.

But this notwithstanding, as seen above, we have found that the appellant was not declared redundant in 1998, but remained in continuous employment until his retirement on 31<sup>st</sup> December 2001. It was after he retired that a cause of action was considered to have arisen. Therefore from 31<sup>st</sup> December 2001 to 2006 is a period of five years, which was within the limitation period specified under **section 4 (1) (a)**. As such the suit was not time barred.

This being the positions, we can now address the appellant's various heads of claims and, we will begin with the claim for salary underpayment from 1998 to 2001. As established above, the appellant voluntarily agreed to the payment of a lesser salary. In so doing, he is estopped from claiming the difference between the previous salary, and the agreed reduced salary. On this basis, the claim for underpayment of salary fails.

With respect to the claims arising in the course of his employment, we have already found that the appellant's employment was not terminated, but that he continued to be engaged under the existing contract, *albeit* at a reduced salary. As such, his employment being one of continued engagement entitled him to such unpaid sums as he would have been eligible to receive by virtue of the employment contract.

Beginning with the claim for unpaid annual leave for 1993, 1994, 1995 and 1996, it would appear that sometime prior to a letter dated 30<sup>th</sup> January 2001, the appellant wrote to the 1<sup>st</sup> respondent claiming outstanding leave for the aforementioned years. In response the 1<sup>st</sup> respondent replied;

*"I am in receipt of your application for terminal leave pending your retirement at the end of the year.*

*We, however cannot understand why you did not take leave for the years 1993, 1994, 1995, and 1996. While we are investigating this matter, we can only grant you leave for the years 1997 and 2000. Proceed for the same w.e.f Thursday 1/2/2001 and resume duty on 5<sup>th</sup> June 2001."*

Since the 1<sup>st</sup> respondent has not proffered any evidence to show that the appellant took leave for the years in question or that the same was forfeited, it can only be concluded that the appellant's leave remained outstanding, and due to him in respect of the years, 1993, 1994, 1995 and 1996. He is therefore entitled to be paid Kshs. 285,487.86

With regard to the unpaid salary arrears for the months of January, February and March 1998, there is evidence to show that on 17<sup>th</sup> January 2001, the appellant wrote to the 1<sup>st</sup> respondent requesting for payment of his salary for those months. The 1<sup>st</sup> respondent has not proved that these amounts were paid. As a consequence, we find that the amount of Kshs.27,167.00 claimed by the appellant is payable.

Another claim was in respect of salary increments where it was claimed that in accordance with the respondents' Circular No. KNUT/TERMS/69/1/98 dated 14<sup>th</sup> January 1998, he was entitled to salary increments effective 1<sup>st</sup> July 1997, and allowances, including commuter allowances, daily and travelling allowances amongst other benefits, effective 1<sup>st</sup> January 1998, which increments and allowance he claimed were not effected by the respondents.

As the respondents have not controverted or provided any material to show that such increment and allowances were paid in terms of the circular, we find that the appellant was entitled to the sum of Kshs. 104,445.85 as claimed.

The provision for notice of 6 months prior to compulsory retirement, is stipulated in a circular dated 8<sup>th</sup> January 1998, where the Secretary General of 2<sup>nd</sup> respondent directed that;

***“... once an employee has reached the age of 60 years, he has to be retired by the Union. Notice of compulsory retirement must be given to such an employee at least 6 months before the commencement of the retirement.”***

The 1<sup>st</sup> respondent issued the appellant with a letter dated 26<sup>th</sup> November 2001, notifying him that he would be proceeding on compulsory retirement on 31<sup>st</sup> December 2001, thereby providing him with merely one month's notice of his retirement. This was contrary to the specific requirements of the concerned circular. Having been provided with only one month's notice, we take the view that the appellant is entitled to five months' salary, of an amount of Kshs.112,855/-, in lieu of the balance of notice period that was not provided.

Also claimed were sums in respect of unpaid balances of Headquarters and Service Gratuity. We have examined the record to establish the basis upon which Headquarters gratuity were payable. We were unable to find any material to support an award in respect of this claim. As such, the claim fails.

On the unpaid service gratuity claimed for the period 1999 to 2001 of a sum of Kshs.271,879.20, by a letter dated 5<sup>th</sup> February 2002 addressed to the 2<sup>nd</sup> respondent, the 1<sup>st</sup> respondent confirmed owing the appellant service gratuity for this period. In a letter dated 15<sup>th</sup> February 2002, addressed to the National Treasurer of the 2<sup>nd</sup> respondent, the appellant computed the claim as follows;

***“1999 January to December 27,920 x 21% = 5,863.20 x12= 70,358.40 2000 January to December 28,920 x 21% = 6,046.95 x 12 = 72,563.40 2001 January to December 29,745 x 21% = 6,246.45 x 12 = 74,957.40 TOTAL = 217,879.20”***

On 28<sup>th</sup> November 2003, the 1<sup>st</sup> respondent wrote to the District Labour Officer, Kisii, advising that the appellant's cheque for Kshs.93,294.35 was ready for collection. The letter did not provide any computation showing how the sum was arrived at.

Considering that the 1<sup>st</sup> respondent did not controvert the appellant's computation in any way, and given that no computation was provided in respect of the sum of Kshs. 93,294.35, we find that it had no basis. We therefore consider the appellant's computation of Kshs. 217,879.20 as the sum of unpaid service gratuity owed by the 1<sup>st</sup> respondent to the appellant.

Concerning unpaid staff terminal benefits, paragraph 4 (2) of the respondents' Staff Terminal Benefits Scheme stipulated the categories of the respondents' employees eligible to benefit from the scheme as;-

***(a) Elected national and Branch Officials in full time employment at the head Office and Branch Offices respectively;***

***(b) Elected National and Branch Officials, not in full-time employment, but who draw monthly remunerations from the union;***

***(c) Executive Officers on permanent employment or contract of not less than twelve months, on employment at Head Office or Branch Offices.***

***(d) Other staff....”***

The Scheme further provided that the lump-sum payable to the respondents' staff was based on;

***“(a) the Total Monthly Emoluments in the last month of service.***

***(b) the total number of months of service.”***

It was also provided that the elected national and branch full-time officials, as well as Executive Officers in permanent or contract employment would be entitled to basic salary, House Allowance, Medical Allowance, Commuter Allowance, and Entertainment Allowance, provided that the months of service shall be the months of service which the staff concerned has been in continuous, uninterrupted employment of the union, at branch, national or both prior to the date on which the lump sum payment is due, including months on terminal leave, and subject to a period limited to 15 years or 180 months for staff of Head Office, and National Executive Council members or five years to 60 months for staff of branches and Branch Executive Council members.

In the instant case, the appellant was an Executive Officer with the Kisii Branch, who had been in continuous and uninterrupted employment with the 1<sup>st</sup> respondent, for a period exceeding 5 years. He was therefore entitled to staff terminal benefits as specified in the Scheme.

Therefore, the appellant’s Total Monthly Emolument in the last month of service was Kshs 26,959/-. Total Months of service from 1975 to 2001 was 22 years. Since the period is limited to 5 years at branch level, the computation of Kshs.26,959 x 60 months divided by 10 means the amount due would be Kshs. 161,754/-.

The result of the foregoing is that, the appeal partially succeeds. The appellant is entitled to items a, c, e, f, g, and h of the memorandum of Claim, subject to the reductions specified herein. For the avoidance of doubt, we order that the 1<sup>st</sup> respondent pay the appellant a total sum of Kshs. 985,626.91 made up as of the following;

- 1) Unpaid Salary for January, February and March 1998-Kshs.27,167/-;
- 2) Unpaid leave for the years, 1993, 1994, 1995 and 1996-Kshs.285,487.86;
- 3) Salary arrears January – March 1998 Kshs. 104,552.85;
- 4) Unpaid Service gratuity- Kshs. 271,879.20;
- 5) Five (5) months salary in lieu of retirement notice – Kshs. 134,795/-; and
- 6) Unpaid Staff terminal benefits- Kshs. 161,745/-.

As the appeal has partially succeeded, we order each party to bear their own costs both in the Industrial Court and in this Court.

***It is so ordered.***

***Dated and delivered at Nairobi this 10<sup>th</sup> day of November, 2017.***

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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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**