



IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJ.A.)

CIVIL APPEAL NO. 20 OF 2014

BARCLAYS BANK (K) LIMITED.....APPELLANT

AND

WILLIAM MWANGI NGURUKI.....RESPONDENT

(Appeal against the Ruling/Order of the High Court of Kenya at Embu (H. Ong'udi J.) dated 18th December 2012 as well judgment by Commissioner of Assize (Omwitsa, J.) dated 4th April, 2001

in

H.C.C.C. No 51 of 1997)

JUDGMENT OF THE COURT

1. The respondent, William Mwangi Nguruki, was employed by Barclays Bank on a permanent and pensionable basis in 1974 and his station of duty was Embu Town. By a letter dated 2nd April, 1992, the Bank (appellant) terminated the services of the appellant on the ground that he was dishonest.
2. By a plaint dated 30th May, 1997, the respondent filed suit against the appellant seeking declaratory orders *inter alia* that the purported dismissal was null and void; damages for wrongful termination of services; an order that he be reinstated in the service of the appellant; that he be paid all his dues including salary arrears, leave allowance, fringe and terminal benefits including his lost pension rights as shall be determined by the court.
3. The appellant filed a defence denying *in seriatim* wrongful dismissal averring that the appellant's services were terminated pursuant to a collective bargaining agreement which the respondent was subject to.
4. The case between the parties was heard by G.A. Omwitsa, Commissioner of Assize, who in a judgment dated 4th April, 2001, made the following orders:

“As regards the prayer for damages the plaintiff did not specify what category of damages he had in mind. If special as would be expected in the case of this nature, the same were neither pleaded nor proved. I dismiss that claim. I order the defendant to pay to the plaintiff all his dues including his salary, leave allowances, fringe benefits and terminal benefits plus lost pension, if any, which were due at the time of his dismissal and which he would have been entitled to upon normal retirement. The plaintiff shall

have the costs of the suit. I enter judgment for the plaintiff against the defendant accordingly”.

5. Dissatisfied by the aforesaid judgment, the appellant filed a Notice of Appeal dated 10th April 2001. A decree dated 28th August, 2003, was extracted to enforce the judgment by the Commissioner of Assize. The decree states as follows:
 1. ***That the purported dismissal of the plaintiff was null and void.***
 2. ***That prayer (c) of the plaint is not granted.***
 3. ***That prayer (d) of the plaint be and is hereby dismissed.***
 4. ***That the Defendant do pay the Plaintiff all his dues including his salary, leave allowances, fringe benefits and terminal benefits plus lost pension, if any, which were due at the time of his dismissal and which he would have been entitled to upon normal retirement.***
 5. ***That the plaintiff shall have the costs and interest of the suit.***
6. The respondent faced a challenge in enforcing the judgment and decree by the Commissioner for reason that the judgment and decree do not have a specific sum of money decreed as due and owing from the appellant Bank. The appellant Bank contended that the judgment is unenforceable as a decree can not issue for unspecified sums of money.
7. The respondent moved the High Court (*Hon. W. Karanja J, as she then was*) seeking interpretation of the judgment by the Commissioner for Assize dated 4th April, 2001. By a ruling dated 6th December, 2010, W. Karanja, J., expressed herself as follows:

“I would like to state from the outset that the decree herein was drawn and extracted from the judgment of Hon. Omwtisa then Commissioner of Assize. I would not alter the decree nor would I have jurisdiction to vary it or calculate any figures because his order does not give any figures. ... The Commissioner of Assize specifically ordered that the dues including the salary, leave allowances, fringe and terminal benefits, if any, which were due at the time of dismissal be paid – this bit meant the dues already earned but unpaid as at the time of dismissal which would include his terminal benefits. That was in the present. The order nonetheless captured the pension (if any). The words, “if any” here refer only to the pension and not to the other benefits because if there were none that were due by the time of this dismissal, then payment of the same did not arise. I have perused the record herein and I have observed that indeed Judge Khaminwa had ordered for the computation of the pension. The same was done and the figures given. Other than for the monthly payment of Ksh. 8,823.40 which accrues monthly, the rest of the money should have been payable as the amount said to be due by the Commissioner of Assize in his judgment. My interpretation of that decree without computing the figures therefore is that all the money owing to the plaintiff/applicant as at the time of the decree was supposed to be paid instantly and the only money payable as it falls due is the Ksh. 8,823.40 which should be paid monthly”.

8. The Bank being dissatisfied with the Ruling and interpretation by Karanja, J., filed a Notice of Appeal dated 6th December, 2010. Despite the lodgment of the Notice of Appeal, the parties herein moved to the High Court before Ong’udi, J., seeking review of the interpretation given by Karanja, J. In the application for review, the appellant Bank argued that the Karanja, J., did not state in her ruling that the normal retirement time of the appellant is when he attains the age of 60 years which is April, 2012, and this is when the pension sums should be due and payable. The Bank submitted their Staff Pension Rules provided that 60 years was the retirement age. The Bank also submitted that Karanja, J., did not address the issue of interest which is not mentioned in her ruling.
9. By a ruling dated 15th February, 2012, Ong’udi, J., dismissed the application to review the ruling and interpretation given by Karanja, J., stating that a further interpretation of the judgment will amount to rehearing of the original application afresh and this is not the purpose of review and this would amount to sitting as an appeal court over Karanja’s ruling.

10. Despite the rulings given by the learned Judges in this matter, the Bank did not satisfy the decree extracted pursuant to the judgment by the Commissioner for Assize. Consequently, the respondent took out a notice to show cause and the Bank by way of a preliminary objection to the Notice to Show Cause submitted before Ong'udi, J., that the figures mentioned in the Notice to Show Cause were inaccurate and a misdirection and interest thereon had been compounded.
11. By a ruling dated 18th December, 2012, which is the subject of the instant appeal, Ong'udi, J., ordered that decree awarded costs to the plaintiff and that the deputy registrar and the registry have guidelines showing what interest rates are applicable; it was ordered that the judgment debtor (*respondent*) does present the required tabulation on pension due within 7 days or the deputy registrar to prepare a final decree based on the preliminary decree dated 28th August, 2003, and guidelines on interest. The learned Judge observed that the Bank had not appealed against the rulings by the learned Judges dated 6th December, 2010, and 15th February, 2010, and neither have they appealed against the judgment dated 4th April 2001 by the Commissioner of Assize Hon. G. A. Omwitsa.
12. Aggrieved by the Ruling dated 18th December, 2012, the Bank filed a Notice of Appeal dated 14th January, 2013, and has now moved to this Court citing nine grounds of appeal in its memorandum of appeal dated 19th May, 2014. The grounds are as follows:

(i) that the learned Commissioner of Assize erred in law by awarding pension as special damages yet the same had not been specifically pleaded and proved at trial;

(ii) that the Commissioner of assize erred in law by awarding judgment for lost pension whereas the respondent had not attained the age of 60 upon which he would be eligible to earn pension;

(iii) that the learned Judge erred in law in the ruling made on 6th December 2010 by interpreting that the word "if any" in the judgment made in 2001 referred to prospective pension that as at the time of judgment the respondent was not eligible to earn;

(iv) that the learned Judge erred in law by giving an interpretation to the judgment of the Commissioner of Assize effectively and materially altering the effective date of eligibility for pension without evidence;

(v) that the learned Judge erred in law by proclaiming that the judgment made on 4th April 2001 was a preliminary decree necessitating the making of a final decree whereas there was no indication in the judgment that it was preliminary in nature.

(vi) the learned Judge erred in law in the ruling made on 15th February 2012 by directing the registrar of the High Court to assess emoluments and append changes to a judgment of the High Court..

(vii) the learned Judge erred in law in the ruling made on 15th February 2012 by directing the registrar of the High Court to prepare a decree effectively amending the substantive terms of the judgment of the High Court without jurisdiction;

(viii) the learned Judge erred in law in the ruling made on 18th December, 2012, by holding that it was upon the parties to provide tabulation to enable the registrar of the court to draw a final decree to complete a judgment.

(ix) the resultant final decree issued by the High Court on 8th March, 2013, does not accord with the judgment made on 4th April, 2001 to wit:

(a) the calculation of dues adopted by the High Court leading up to the issue of Notice to Show Cause is unprocedural and substantively irregular

(b) the pension sum of Ksh. 8,823/- has been reckoned from a period before the filing of the suit in 1997 which is not supported by any finding or direction of the court in its judgment and or rulings.

(c) the Notice to Show Cause has been drawn up unilaterally by receipt of representation by one party which is not allowed at law;

(d) the sum of Ksh. 21 million sought under the Notice to Show Cause has employed the use of a court interest rate of 14% that was not applicable either at the time the plaintiff was retired in 1992 or prevailing at the time of judgment in 2001.

(e) the calculation transplanted by the High Court applies compound interest in arriving at the sum of Ksh. 21 million set out in the Notice to Show Cause as opposed to simple interest as per practice.

(f) the judgment made in April, 2001, never stated that the payment would commence from a period before the date of filing suit as it is sought to be done in this case.

13. At the hearing of this appeal, learned counsel Mr. Echessa Werimo appeared for the appellant while learned counsel Mr. Evans Gaturu appeared for the respondent.

14. Counsel for the appellant elaborated on the grounds of appeal. He submitted that the Commissioner of Assize erred by making an award relating to pension when the same had not been pleaded; that the whole controversy between the parties stems from the pleading and prayer in the plaint as awarded by the Commissioner for Assize where it was ordered that the appellant shall pay the respondent *“all his dues including his salary, leave allowances, fringe benefits and terminal benefits plus lost pension, if any, which were due at the time of his dismissal and which he would have been entitled to upon normal retirement.”* That in the entire proceedings before the Commissioner of Assize, no evidence was led to prove the pension amount due to the respondent; that the issue of pension was never proved. Counsel submitted that in law, a judgment relating to a sum of money as due must be certain, specific and determinate; that the Commissioner of Assize erred in delivering a judgment that was indeterminate; that the judgment by the Commissioner could not give rise to a decree; that a decree involving a sum of money must specify the amount due; that the judgment and decree by the Commissioner of Assize is ambiguous to the extent that the phrase *“if any which he would have been entitled to upon normal retirement”* is not determinative of the quantum due to the respondent. That the respondent’s claim relates to the amount of pension due to him; that under the **Retirement Benefits Act**, disputes relating to pension are to be heard and determined in the first instance by a Tribunal established under the **Act**; that the Commissioner of Assize and the learned Judges of the High Court did not have jurisdiction to hear and determine issues relating to pension. Counsel submitted that if pension sums were due to the respondent, then the same was not due and payable since the respondent had not attained the retirement age of 60 years; that the normal retirement age for the respondent is April, 2012, when he attained the age of 60 years; that the learned Judges erred by calculating the monthly pension due to the respondent to run from 1992 when he was dismissed from service; that the monthly pension due to the respondent should be calculated from April, 2012, when he attained the age of 60 years; that Karanja, J., erred in her interpretation that the pension due to the respondent was to be calculated as at the date of the judgment by the Commissioner for Assize; that the Notice to Show Cause indicated that sum of Ksh. 21 million was due and owing to the respondent; that there is no account as to how the said sum of Ksh. 21 million was arrived at; that the learned Judge erred in law by directing the Deputy Registrar to calculate and compute the pension sum due and owing to the appellant; that this was legally inappropriate as it was tantamount amount to the Deputy Registrar hearing a matter in which he has no jurisdiction; that a Judge cannot delegate the judicial function to hear and determine a dispute to the deputy registrar. It was submitted that in arriving at the sum of Ksh. 21 million in the Notice to Show Cause, the amount indicated as due and owing attracted a compounded rate of interest at 14% per annum which is wrong in law; that the Commissioner of Assize awarded interest at court rates; that the practice is that interest at

- court rates is calculated as simple not compounded interest; that the respondent filed his suit in 1997 and interest could not be calculated from 1992 when his employment with the appellant Bank was terminated; that in any event, the court rate of interest was not 14% as at 1992.
15. Counsel for the appellant conceded that the lump sum pension amount payable to the respondent is Ksh. 421,475/= while the monthly pension payable is Ksh. 8,823.40/=. The dispute is when these amounts become due and payable to the respondent and whether these amounts attract simple or compounded interest and from which date. For the appellant it was submitted that the lump sum and monthly pension amounts accrued and became due and payable to the respondent in April, 2012, when he attained the age of 60 years; counsel for the appellant submitted that pension sums are not payable until the employee attains the retirement age which in this case is 60 years; that although the respondent was dismissed in 1992, no pension sum was due and payable to him until April, 2012, when he attained 60 years. In so far as rate of interest is concerned, counsel for the appellant submitted that interest at court rate is simple interest and the respondent is only entitled to interest at court rates if any pension sum remains unpaid with effect from April, 2012; that the learned Judges erred in law in approving a decree to issue when interest was calculated at a compounded rate and the pension sum due and payable was calculated from 1992 instead of 2012.
 16. Counsel for the respondent opposed the appeal. He submitted that the grounds of appeal as urged by the appellant challenge the judgment by the Commissioner for Assize when no appeal had been filed against the judgment; that the Commissioner delivered his judgment on 4th April 2001 and the appellant filed a Notice of Appeal against the said judgment on 10th April, 2001; that after the Notice of Appeal was filed, the appellant took no action to file the record of appeal and it is irregular for the appellant to assert that the instant appeal is an appeal against the judgment of the Commissioner for Assize; that the learned Judges properly stated that no appeal had been filed against the judgment of the Commissioner of Assize. The respondent further submitted that the appellant is attempting to use the instant appeal to challenge the Ruling delivered by Karanja, J., on 6th December, 2010. It is the respondent's submission that although the appellant filed a Notice of Appeal on 10th December, 2010, intending to challenge the Ruling, no appeal was filed and it is improper for the appellant to use the instant appeal to prosecute an appeal that has never been filed against the ruling delivered on 6th December, 2010. Counsel submitted that even though Notices of Appeal were filed, the appeals were never pursued within the timelines that the Court had given the appellant to appeal and no appeal was filed. Relating to the ground that the learned Judge erred in delegating judicial function to the Deputy Registrar to calculate and compute the pension amount, it was submitted that the learned Judge did not err because a court decree is always extracted and calculated by the Deputy Registrar; that the Bank was given an opportunity to tabulate the pension amount due to the respondent but failed to provide tabulation and the learned Judge correctly gave directions that the Deputy Registrar is to calculate the pension amount due.
 17. Counsel for the respondent also conceded that the lump sum pension amount payable to the respondent is Ksh. 421,475/= while the monthly pension payable is Ksh. 8,823.40/=; that these sums became due and payable in 1992 when the respondent was dismissed by the appellant; that from 1992, interest was due and payable on these amounts and since payment has never been made, the outstanding sums attract a compounded interest at 14% per annum and the total due was Ksh. 21 million as indicated in the Notice to Show Cause.
 18. Counsel for the respondent submitted that the appellant stated that the pension dispute between the parties ought to have been heard and determined by the Tribunal established under the **Retirement Benefits Act**. Counsel submitted that the **Retirement Benefits Act** came into operation in 1997 well after the respondent had been dismissed by the appellant in 1992; that the **Act** was not retroactive in its application and no application was made by the appellant to transfer the respondent's suit to be heard and determined by the Tribunal. Counsel submitted that it is the practice that judgment and decretal sum is due and payable immediately when judgment is delivered; that the Commissioner of Assize delivered his judgment in April, 2001, and the appellant became obligated from this date to satisfy the decree and pay all monies due and owing under the said judgment. Counsel reiterated that no appeal has been filed against the judgment by the Commissioner of Assize and the ruling by Karanja, J.; that because no appeal has been filed, all the other grounds of appeal as raised by the appellant has not been proved.
 19. We have considered the rival submissions by counsel and examined the record of appeal. As this

is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. (See Selle -vs- Associated Motor Boat Co. [1968] EA 123; Jabane – vs- Olenja, [1986] KLR 661, 664; Ephantus Mwangi -vs- Duncan MwangiWambugu (1982-88) 1 KAR 278 and Mwanasokoni vs. Kenya Bus Services (1982-88) 1 KAR 870).

20. It is our considered view that the following issues arise for determination:

- a. ***Is the present appeal an appeal against the judgment by the Commissioner of Assize dated 4th April 2001? Is the instant appeal an appeal against the Ruling by Hon. Lady Justice WanjiruKaranja dated 6th December, 2010?***
- b. ***What is the pension amount or judgment or decretal sum in the judgment by Commissioner of Assize?***
- c. ***From which date is the pension, judgment or decretal amount due and payable? Is it from 1992, 1997, 2001 or 2012?***
- d. ***What interest rate is payable on the decretal amount found to be due and payable? Is the rate of interest to be calculated on simple or compounded basis? From which date is interest due and payable?***

21. The record of appeal shows that the appellant filed a Notice of Appeal on 10th April, 2001, intending to challenge the judgment by the Commissioner for Assize; the record reveals that after the Notice of Appeal was filed, the appellant took no action to pursue or prosecute the intended appeal. Likewise, the appellant filed a Notice of Appeal on 10th December, 2010, intending to challenge the Ruling delivered by Karanja, J., on 6th December, 2010. Although the appellant filed Notices of Appeal intending to challenge the judgment by the Commissioner of Assize and the Ruling by Hon. Justice W. Karanja, no appeals were filed and the appellant cannot use the present appeal to challenge the judgment by the Commissioner of Assize and the Ruling by Hon. Lady Justice W. Karanja. We hold that the judgment dated 4th April, 2001, delivered the Omwitsa, C.A., stands as it has never been appealed against. Likewise, the Ruling by Karanja, J., stands as no appeal has been lodged against the same. We are comforted in our finding on this issue upon our perusal of the Certificate of Delay dated 14th April, 2014 issued to the appellant by the Deputy Registrar. The court fees were paid for on 14th April, 2014, and certified copies of the proceedings and Ruling/Order were duly collected on 14th April, 2014. The Certificate of Delay indicates that the period of delay is from 15th January, 2013 to 14th April, 2014; the date of 15th January, 2013, is after the judgment by the Commissioner for Assize and the Ruling by Karanja, J. It follows that all along, the appellant was clear in its mind that no appeal had been lodged against the judgment by the Commissioner for Assize. It follows and we find that the decree extracted pursuant to the judgment by the Commissioner for Assize is valid and enforceable. It is our considered view that the Ong'udi, J., did not err when she stated that the appellant had not appealed against the Rulings of 6th December, 2010 and 15th February, 2012.

22. The next issue for our consideration is what is the pension amount or judgment or decretal sum in the judgment by Commissioner of Assize? As correctly observed by the Karanja, J., the judgment by the Commissioner of Assize does not indicate the specific amount or figure as the pension sum or judgment amount or decretal amount due and payable by the appellant to the respondent. The parties in this case were directed to tabulate the pension amount payable that would be used to determine the judgment or decretal sum due. At the hearing of this appeal, both counsel admitted and conceded that the lump sum pension amount payable to the respondent is Ksh. 421,475/= while the monthly pension payable is Ksh. 8,823.40/=. We adopt these figures and find that the pension amount and the judgment sum or decretal amount payable to the respondent pursuant to the judgment by the Commissioner of Assize is a lump sum pension amount of Ksh. 421,475/= and a monthly pension of Ksh. 8,823.40/=. On this issue, we are satisfied that the Final Decree dated 8th March, 2013, as at paragraph 5 thereof states that the amount the respondent would have been entitled to upon normal retirement is Ksh. 421,475/= lump sum and Ksh. 8,823.40 per

- month.
23. The next issue for determination is the rate of interest to be charged on any outstanding sum due and owing in relation to the lump sum of Ksh. 421,475/= and the monthly pension sum of Ksh. 8,823.40. The judgment by the Commissioner of Assize clearly stated that the respondent was entitled to interest at court rates. The respondent in his plaint prayed for interest at court rates. Interest at court rates is calculated on a simple interest and not on compounded basis. It is our finding that any interest due to the respondent must be calculated on a simple interest and not on compounded basis. The rate of interest applicable is the court rate prevailing on 4th April 2001 as adjusted from time to time until payment in full. We find that in the instant case, it is erroneous to compound interest on any amount due and payable to the respondent. (See ***Hon. Daniel Toroitich Arap Moi CGH – v- Mwangi Stephen Muriithi & Another, Court of Appeal at Nairobi, Civil Appeal No. 240 of 2011***)”.
 24. The final issue for our consideration is to determine from which date is the interest on the judgment or decretal sum due and payable? There are four different years to be considered in answer to this question. The four years are 1992, 1997, 2001 or 2012. The judgment or decretal sum in this case represents the pension due and owing to the respondent from the appellant.
 25. The respondent calculated the interest due on the decretal sum to run from April, 1992; the argument is that April, 1992, is the month in which the Bank terminated the services of the respondent and it is from this month and year that any amount due and owing should be payable and interest calculated from this date. In the alternative, the respondent submitted that the plaint in this matter was filed in June, 1997, and this is the month and year that the decretal sum should be due and payable and interest levied from this date; in a further alternative, the respondent submitted that the judgment by the Commissioner of Assize was delivered in April, 2001, and any amount due and payable as well as interest thereon should be from the date of judgment that is April, 2001.
 26. The appellant on his part contends that the lump sum of Ksh. 421,475/= and the monthly pension sum of Ksh. 8,823.40 were not due and payable until April, 2012, when the respondent attained the age of retirement which is 60 years. That in 1992 when the respondent’s services were terminated, his pension was not due and payable because he had not attained the retirement age. Likewise, the appellant argued that in 1997 and 2001, the respondent had not attained the retirement age and neither the lump sum nor the monthly pension was due and payable. In the alternative, the appellant submitted that the respondent filed the plaint in 1997 and any monies due and payable can only be from 1997 or the date of judgment by the Commissioner for Assize which is April, 2001. That the judgment by the Commissioner of Assize does not state that the decretal sum is to be calculated from the date of filing suit. That a judgment sum is effective and payable from date of judgment and not any other earlier date. Without prejudice to the foregoing submissions, it is the appellant’s case that the lump sum of Ksh. 421,475/= and the monthly pension sum of Ksh. 8,823.40 are not due and payable because these are special damages that were neither pleaded nor proved before the Commissioner for Assize.
 27. We have considered the rival submissions by counsel to determine as from which date or year is the interest on the lump sum of Ksh. 421,475/= and the monthly pension sum of Ksh. 8,823.40 payable. The month or year in which interest is to be calculated is also the month or year that the lump sums and monthly pension become due and payable by the appellant to the respondent. In order to ascertain the month or year, we ask ourselves two questions: first, when is pension due and payable to an employee? Second, which month and year would the respondent have been entitled to pension upon normal retirement?
 28. In the case of ***Highway Furniture Mart Limited – v- The Permanent Secretary & Another, EALR (2006) 2 EA 94***, it was stated that interest antecedent to filing suit is only claimable where there is an agreement stipulating the contractual rate of interest or where there is no stipulation but interest is allowed by mercantile usage which must be pleaded and proved or where there is a statutory right to interest or when an agreement to pay interest can be implied from the course of dealing between the parties. We have examined the pleadings filed in this matter; the respondent in his plaint prayed for interest at court rates; the plaint does not contain a plea for interest at any other rate neither is there a plea that a different contractual rate of interest is applicable between the parties. Guided by the dicta in ***Highway Furniture Mart Limited – v- The Permanent Secretary & Another, EALR (2006) 2 EA 94***, we find that the respondent is not entitled to interest

- on any sum as from 1992 when he was dismissed as there was no claim for interest antecedent to the filing of suit.
29. The other issue for our consideration is whether the respondent is entitled to interest from June, 1997, being the date that the suit was filed or from April, 2001, when judgment was delivered by Commissioner for Assize. Generally, an employee is entitled to pension when he/she attains the retirement age. The rules governing employer-employee pension scheme are the rules that determine when the pension sums are due and payable. Although the employer through the trustees of the scheme is responsible for administering the pension scheme, a duty of good faith arises. In ***Imperial Group Pension Trust Ltd. –v– Imperial Tobacco Ltd., [1991] 1 WLR 589***, it was stated that the employer is not entitled in administering the pension fund solely to further the financial interests of the company but has to take the interests of the employees into account sufficiently not to undermine the trust and confidence of employees in its employ.
30. Before attaining the retirement age, an employee is not entitled to a monthly pension; the monthly pension becomes due and payable when the employee attains the retirement age. Unless expressed to the contrary by the pension scheme rules, the lump sum pension that has accrued for the benefit of an employee is due and payable either when the employee's contract of employment is terminated or the employee attains the retirement age whichever is earlier. The monthly pension accrues monthly and is due and payable in each and every month subsequent to attainment of the retirement age. It would be preposterous to hold in the instant case that the respondent being an employee whose services were terminated in 1992 at the age of 40 years is entitled to a monthly pension from the employer from the date of termination of his services in 1992. Unless the contrary is expressly stated in the contractual instrument governing employer-employee pension scheme, an employee whose services are terminated before retirement age is not entitled to a monthly pension. It is not the law that whenever an employee's services are terminated before he/she attains the age of retirement; such employee automatically becomes entitled to a monthly pension with effect from the date of termination of services. Likewise, there is no general principle that an employee whose services are terminated is entitled to a monthly pension. In the instant case, the respondent shall receive a monthly pension of Ksh.8, 823/= because the appellant Bank as the employer has conceded to this payment.
31. The appellant faulted the learned Judges for directing the Deputy Registrar to calculate the pension amount due to the respondent. It is our considered view that the learned Judge did not err in directing the Deputy Registrar to calculate and compute the pension amount due and payable to the respondent. (See ***Highway Furniture Mart Limited – v- The Permanent Secretary & Another, EALR (2006) 2 EA 94***. In the Highway Furniture Mart case, the Court of Appeal did not find fault in the learned Judge directing the Deputy Registrar to compute the applicable interest rate on the decretal sum.
32. Guided by our re-evaluation of the evidence on record, it is our considered view that the lump sum of Ksh. 421,475/= was determined as due and payable from the date of judgment by the Commissioner of Assize on 4th April, 2001 until payment in full. The said sum shall attract simple interest at the prevailing court rates for each year that the sum remains due and payable. This is in accord with the ruling by Karanja, J., when she stated that no court of law will award damages to a party with the intention that the same would be paid in future.
33. On the other hand, the monthly pension of Ksh, 8,823.40 is not due and payable until April, 2012, when the respondent attained the retirement age of 60 years.
34. We have considered the other grounds of appeal and find they have no merit. No appeal was filed against the judgment by the Commissioner of Assize; the said judgment stands and we cannot sit on "an appeal" which has never been filed. We find the ground of appeal urging that there was no plea for special damages has no merit as no appeal has been lodged against the judgment by the Commissioner for Assize. The appellant cannot use the instant appeal to argue three different appeals *to wit*: the first being an appeal against the judgment by the Commissioner for Assize dated 4th April, 2001, the second being appeal against the Ruling by the Karanja, J., dated 6th December, 2010, and the third being appeal against the Ruling by Ong'udi, J., delivered on 18th December, 2012. The appellant ought to have lodged separate appeals for each and every ruling/judgment that he was dissatisfied with. Unless there is an order for consolidation, three appeals arising from three different decisions cannot be lumped together into one appeal. The appellant urged this Court to find that the High Court had no jurisdiction to hear a dispute relating

to pension when there was a Tribunal established under the **Retirement Benefits Act**. We have considered this submission. The respondent was dismissed from the employment in 1992 and the instant suit was filed in June 1997. The **Retirement Benefits Act (Cap 197, Laws of Kenya)** and the Tribunal established there under became into operational on 20th November, 1997, after the dispute between the parties had arisen. The **Tribunal Rules** were enacted in 2000. The **Retirement Benefits Act** is not retroactive in its operation and we find that the appellant's ground of appeal has no merit.

35. The totality of our consideration of the grounds of appeal and submissions by counsel is that we make the following orders:

- i. ***The Final Decree dated 8th March 2013 is correct as at paragraph 5 thereof it states that the amount the respondent would have been entitled to upon normal retirement is Ksh. 421,475/= lump sum and Ksh. 8,823.40 per month.***
- ii. ***The lump sum of Ksh. 421,475/= was due and payable by the appellant to the respondent from the date of judgment namely 4th April 2001; this sum shall attract simple interest at court rates prevailing with effect from April 2001 and at such adjusted court interest rate until payment in full.***
- iii. ***The respondent is entitled to a monthly pension of Ksh. 8,823.40 with effect from April 2012 when he attained the retirement age of 60 years. This sum to attract simple interest at the prevailing court rates in each and every month that the monthly pension remains unpaid.***
- iv. ***This appeal is partially successful on the issue of the applicable interest rate and the effective date for payment of the lump-sum and monthly pension. The appeal being partially successful, we order that each party shall bear its/his own costs in the appeal. Except as expressly stated and ordered here above, the other grounds of appeal have no merit and are hereby dismissed.***

Dated and delivered at Nyeri this 1st day of October, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

J. OTIENO- ODEK

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

