



**Automobile Association (AA) of Kenya & 3 others v Kahora (Appeal E018 of 2023) [2024] KEELRC 2865 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2865 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
APPEAL E018 OF 2023  
DN NDERITU, J  
NOVEMBER 14, 2024**

**BETWEEN**

**AUTOMOBILE ASSOCIATION (AA) OF KENYA ..... 1<sup>ST</sup> APPELLANT  
GOVERNING COUNCIL, AA OF KENYA ..... 2<sup>ND</sup> APPELLANT  
JINARO K KIBET, PRESIDENT AA OF KENYA ..... 3<sup>RD</sup> APPELLANT  
ERASTUS K MWONGERA ..... 4<sup>TH</sup> APPELLANT**

**AND**

**DANIEL MWAURA KAHORA ..... RESPONDENT**

*(Being an appeal from the judgment and decree in Nakuru Chief Magistrate's Court ELRC Cause No. E035 of 2020 by Hon. Priscah Nyotah (SRM) delivered on 9<sup>th</sup> June, 2023)*

**JUDGMENT**

**I. Introduction**

1. The respondent herein (the claimant in the lower court) commenced Nakuru CM ELRC Cause No. E035 of 2020 by way of a memorandum of claim dated 11<sup>th</sup> November, 2020 filed in court on even date. Subsequently, an amended plaint dated 8<sup>th</sup> January, 2021 was filed on even date wherein the following reliefs were sought –
  - a. CDF monies due at Kshs176,350/- (not denied)
  - b. Notice pay being 1 month's salary of Kshs46,024/-
  - c. Unpaid salaries for months of April 2020 to September 2020 at Kshs276,144/-.
  - d. Compensation for wrongful termination being equivalent of 12 months' basic salary making it Kshs40,166 x 12=Kshs481,992/-.



- e. Unpaid leave days being  $40,166/26 \times 26=40,166/=$ .
  - f. Unpaid overtime for September, October, and November 2019. Total overtime was 141 hours x 1.5 x hourly rate of 260.55=Kshs55,106/=.
  - g. Transfer allowances due on 19/02/2019 from Nakuru to Nairobi at Kshs27,720=.
  - h. Transfer allowance due on 18/03/2019 from Nairobi to Nakuru at Kshs27,720/=.
  - i. Unpaid leave travelling allowances for 2018 and 2019 –  $5,500 \times 4=Kshs22,000/=$ .
  - j. Service gratuity pay for the 12 years worked being  $40,166/26 \text{ days} \times 15 \text{ days} \times 12 \text{ years}=Kshs278,072.30/=$ .
  - k. Exemplary damages for breach of his constitutional rights under Articles 21, 27, 28, 30, 40, 41, and 57 of *the Constitution* of Kenya, 2010.
  - l. An official and up-to-date pensions statement and introduction letter to enable the claimant access his pensions when the time is due.
  - m. Certificate of Service.
2. The appellants herein (the respondents in the lower court) defended the suit.
  3. In a judgment delivered on 9<sup>th</sup> June, 2023, corrected on 15<sup>th</sup> June, 2023, and subsequently expressed in a decree issued on 11<sup>th</sup> October, 2023 the lower trial court granted to the respondent the following –
    - a. Unpaid salaries.....Kshs230,120/= (April, June, September 2020)
    - b. Unpaid leave days.....Kshs24,717/=
    - c. Unpaid overtime.....Kshs55,106/=
    - d. Transfer allowance.....Kshs14,520/=
    - e. Half costs of the suit at 12% per annum from the date of the judgment till payment in full, and
    - f. Interest on a-d at 12% per annum from the date of this judgment till payment in full.
    - g. The 1<sup>st</sup> respondent to issue the claimant a certificate of service forthwith
  4. Dissatisfied with the above judgment, the appellants, through Nyaencha, Waichari & Company Advocates, commenced this appeal by way of a memorandum dated 27<sup>th</sup> June, 2023 raising the following grounds of appeal –
    1. That the learned magistrate erred in law and, in fact by finding and declaring that the respondent was entitled to unpaid salaries for April, June-September 2020 and awarding him the sum of Kshs230,120.00 in respect thereof.
    2. That the learned magistrate erred in law and in fact in finding that the respondent was entitled to payment of unpaid leave days and awarding him the sum of Kshs24,717.00 in respect thereof.
    3. That the learned magistrate erred in law and in fact by finding that the respondent was entitled to payment of overtime and awarding him the sum of Kshs55,106.00 in respect thereof.



4. That the learned magistrate erred in law and in fact by finding that the respondent was entitled to payment of transfer allowance and awarding him the sum of Kshs14,520.00 in respect thereof.
  5. That the learned magistrate erred in law and in fact by failing to take into account submissions filed on behalf of the appellants on the fact that the respondent was not in employment with effect from 1<sup>st</sup> July, 2020 and therefore no salary could accrue for the period between 1<sup>st</sup> July, 2020 and September 2020.
  6. That the learned magistrate having made a finding of fact that the respondent availed his birth certificate after filing of the claim erred in law and in fact in finding that he was entitled to payment in respect of the period July-September 2020 when he had already proceeded for retirement.
  7. That the learned magistrate erred in law in entering judgment in favour of the respondent against the 1<sup>st</sup> appellant for the sum of Kshs324,463.00.
  8. That the learned magistrate erred in law in awarding costs of the case and interest to the respondent.
5. The appellants are seeking the following reliefs –
1. That the appeal be allowed.
  2. That the Judgment delivered on 9<sup>th</sup> June, 2023 in favour of the respondent and against the 1<sup>st</sup> appellant be set aside and be substituted with a judgment dismissing the claim against the appellants.
  3. That the respondent be ordered to pay the appellants’ costs of this appeal and in the lower court.
6. The respondent opposed the appeal through Sabaya & Associates Company Advocates and filed a notice of cross-appeal dated 21<sup>st</sup> July, 2023 raising the following grounds of appeal –
1. That the learned trial magistrate erred in law and principle by failing to appreciate that it was up to the employer to inform the employee that they were considering terminating his services on grounds of age and afforded him an opportunity to make representations on the intended retirement.
  2. That the learned trial magistrate made an error in law by disregarding claimant’s bundle of evidence showing that immediately upon issuance of retirement notice, he contested it and provided his correct date and month of birth.
  3. That the learned trial magistrate erred in law by shifting the burden of proof of valid grounds of termination from the employer to the claimant.
  4. That the learned trial magistrate erred in principle by contradicting her findings that the claimant’s date of birth was uncontroverted then going ahead to find no fault, illegality and/ or impropriety in the premature retirement effected against the claimant from 1<sup>st</sup> July, 2020.
  5. That the learned trial magistrate erred in fact and in law by applying the principles set out in Daniel Wambugu Ngururi v Teachers Service Commission (2020) eKLR yet the circumstances of that case are materially distinguishable from the instant case in that there exists a robust code



governing retirement by Teachers Service Commission whereas no such code is available for AA of Kenya.

6. That the learned trial magistrate erred in not considering and appreciating the principles as enunciated in Judicial Review Application 8 of 2019 (Formerly HCMA (Judicial Review) 82 of 2019, that – ‘The respondent’s answer is that the claimant never provided written proof. The respondents have not shown that they ever asked the applicant to make clarification about his date of birth and instead it is urged for them that it was his duty to notify about his date of birth- and -the court considers that it would be unjustified and unfair for the respondents to shift their statutory obligation and make it the applicant’s burden’ - Justice Byram Ongaya in Judicial Review Application 8 of 2019 (formerly HCMA (Judicial Review) 82 of 2019 at Nairobi) Republic v Judicial Service Commission & 2 others Ex parte Erastus M Githinji.
  7. That the trial magistrate further erred in accepting appellant’s contradictory averments and granting 10 days’ leave while disallowing the claim for unpaid 26 days’ leave for the year 2020.
  8. That the learned trial magistrate erred in dismissing the appellant’s claim relating to leave travelling allowance without considering that it was provided as mandatory minimum in the collective bargaining agreement.
  9. That the learned trial magistrate erred in awarding the appellant Kshs 14,520/- only for transfer allowance as opposed to Kshs. 27,270 which includes transport costs as allowed in the CBA and as had been calculated and agreed upon by the parties the first time.
  10. That the learned trial magistrate erred in law and fact by failing to properly and correctly interpret and apply the collective bargaining agreement on payment of service gratuity.
  11. That the Learned trial magistrate failed to appreciate the law and guiding principles relating to award of costs.
7. The respondent is seeking the following reliefs –
1. That the memorandum of appeal dated 27<sup>th</sup> June 2023 be dismissed with costs.
  2. That the decretal award of kshs 324,463/- granted be affirmed.
  3. That further sums of kshs 795,264.30 be awarded as particularized in the memorandum of claim as follows –
    - i. Kshs 481,992/- being equivalent of 12 months’ basic salary, be awarded as compensation for wrongful termination.
    - ii. Kshs 22,000/- be awarded as unpaid leave travelling allowances for 2018 and 2019.
    - iii. Kshs 13,200 be added further to Kshs 14,520 awarded for transfer allowance due on 18/03/2019 from Nairobi to Nakuru to make it kshs 27,720.
    - iv. Kshs 278,072.30 be awarded as service gratuity pay for the 12 years worked.
    - v. Full costs in this appeal and the lower court with interest at the rate of 14% from the date of filing the claim till payment in full.
    - vi. Any other relief as the court may deem fit.



8. On 18<sup>th</sup> March, 2024 the court directed that the appeal be canvassed by way of written submissions. Mrs. Nyaencha for the appellants filed written submissions on 24<sup>th</sup> June, 2024 while Miss Sabaya for the respondent filed on 14<sup>th</sup> June, 2024.
9. The lower trial court had issued stay of execution on 19<sup>th</sup> July, 2023 upon deposit of the decretal sum in an interest-earning account in the joint names of the law firms representing the parties herein.

## **II. Submissions By Counsel**

10. On the one hand, counsel for the appellants condensed all the grounds raised in the memorandum of appeal into two broad issues – Whether the trial magistrate was correct in her finding on the issue of terminal dues payable to the respondent, and, What are the appropriate orders to be given by this honourable court.
11. On the first issue, it is submitted that the trial court erred in awarding salary payments beyond the retirement date from 1<sup>st</sup> July, 2020 to September 2020. It is submitted that while the trial court rightly found that the birth certificate was only availed after the filing of the cause, the trial court ought to have found that the employer had no basis to retain the respondent beyond his retirement age. It is submitted that the trial court erred in awarding unpaid salaries for April, and June to September, 2020 amounting to Kshs230,120. It is submitted that the respondent had been paid salary up to 22<sup>nd</sup> April, 2020 before he proceeded on unpaid leave from 23<sup>rd</sup> April, 2020 after the closure of the appellants’ operations due to COVID 19 pandemic. It is submitted that the respondent was informed of the closure of the operations, and he confirmed receipt of the letter thereof. It is further submitted that the respondent as a member of the Kenya Long Distance Truck Drivers & Allied Workers Union (the union), was bound by a consent dated 19<sup>th</sup> May, 2020 between the said union and the appellants to the effect that all employees not on duty between April and June 2020 and who had declined to receive half pay would be on unpaid leave.
12. On the issue of unpaid overtime for September, October, and November, 2019 of Kshs55,106/= it is submitted that the claim forms submitted in the respondent’s supplementary list of documents dated 8<sup>th</sup> January, 2021 had not been submitted to the appellants for approval and settlement and thus the claim ought to have been disallowed.
13. It is submitted that on the claim for unpaid leave days of Kshs24,717/= the respondent had taken his leave days before he retired and the same ought to have been disallowed. As regards the claim for transfer allowance due on 19<sup>th</sup> February, 2019 from Nairobi to Nakuru of Kshs27,720/= it is submitted that the respondent requested for transfer vide the letter of 13<sup>th</sup> March, 2020(R-exhibit-4) contained in the appellant’s list of documents dated 9<sup>th</sup> December, 2020. It is submitted that according to clause 18 of the applicable CBA, an employee is only entitled to a disturbance allowance where (s)he is transferred to a distant town or station. It is submitted that the trial court failed to appreciate that the respondent had been paid a transfer allowance from Nakuru to Nairobi and once he requested for transfer back to Nakuru he was not entitled to a transfer allowance. It is submitted that after the trial magistrate found that the transfer allowance payable under Clause 18(b) of the 2018-2019 CBA (the CBA) was Kshs 14,520/= and the respondent having conceded to having received Kshs27,720/= there was an overpayment on the one-way transfer allowance to Nairobi by Kshs 13,000, and the trial court should have only awarded, although the same is vehemently denied, the balance of Kshs1,520/=.
14. Citing *Simon Waweru Mugo vs Alice Mwangeli Munyao (2020) eKLR*, the appellants’ counsel submitted that as a first appellate court, this court has a duty to re-evaluate, re-analyze, and re-evaluate the evidence on record and make its own conclusions.



15. On the cross-appeal, it is submitted that the notice of cross-appeal is not properly on record bearing in mind that only a memorandum of cross-appeal is contemplated from a magistrate's court to a superior court. It is however submitted that the trial court arrived at the proper finding that the retirement notice issued to the respondent was valid based on the respondent's national identity card held by the appellants. It is submitted that the trial court correctly distinguished the authorities cited by the respondent in that there was no clarification sought on the date of birth in the authorities cited. In the present cause the appellants sought clarification on the dated of birth of the respondent and none was availed until the present cause was filed with the respondent's certificate of birth attached.
16. The court is urged to affirm the trial court's finding that there was no illegality or wrongfulness, whether in procedure or substance, in the appellants issuing a retirement notice and that the compensation for wrongful termination, notice pay, or exemplary damages were not awarded. It is submitted that the trial magistrate rightly applied the principles guiding the award of costs and the court is urged to strike out or dismiss the cross-appeal with costs to the appellants.
17. On the other hand, counsel for the respondent condensed all the grounds raised in the memorandum of appeal and the notice to cross-appeal into six issues – Whether the trial court erred in awarding the claimant unpaid salaries for April, June, July, August, and September 2020 amounting to Kshs230,120/= (being Kshs46,024 x 5 months); Whether the trial court erred in awarding Kshs24,717/= in unpaid and untaken annual leave for the year 2020; Whether the trial court erred in awarding Kshs55,106/= as unpaid overtime; Whether the trial court erred in awarding transfer allowance of Kshs14,520/=; Whether the trial court erred in awarding half the costs of the suit to the claimant as well as interest at 12% p.a. on both the decretal sum and costs; and, Whether the appellants are entitled to costs of this appeal and for the cause in the lower court.
18. On the first issue on salaries for June to September, 2020 it is submitted that the trial court rightly awarded the same as the respondent could have worked in that period were it not for the unlawful retirement. It is submitted that Section 47(5) of the *Employment Act* (the Act) requires an employee to show that he was unfairly terminated. It is submitted that the respondent was prematurely retired, as evidenced by the uncontroverted evidence that he was due for retirement on 28<sup>th</sup> September, 2020 as he was born on 28<sup>th</sup> September, 1960 subject to Clause 29 of the CBA – see page 85 of the record of appeal. It is submitted that the respondent testified that he had been called to clarify his date of birth towards the end of 2019 and that he confirmed the same. He was not asked to provide a copy of his certificate of birth. The court is urged to be guided by the contra preferentum rule and find that there was no request made to the respondent to furnish any document(s).
19. It is further submitted that the respondent was not aware that the appellants intended to terminate him, and he assumed his verbal confirmation of his age had sufficed, otherwise, he would have submitted a copy of his certificate of birth. In any event, the applicants did not issue him with a notice of their intention to terminate him under Section 41 of the Act.
20. It is submitted that the respondent's retirement effective 1<sup>st</sup> July, 2020 was final and upon lockdown due to the COVID-19 pandemic, he could not access his official email to respond to any queries by the appellants. It is submitted that the respondent in following-up on the retirement issue used a different email account – See pages 33,35,37 of the record of appeal. It is submitted that the appellants ought to have called for documentary confirmation on the respondent's date of birth and the burden never shifted to the respondent. To buttress this assertion, counsel urged the court to be persuaded by the reasoning in *Republic V Judicial Service Commission & 2 Others Exparte Erastus M Githinji* (2019) eKLR.



21. The court is urged to further consider the reasoning in *Njai Mutitu v University of Nairobi* (2020) eKLR and *Charles Kombe Charo v East African Portland Cement Company Limited* (2022) eKLR and find that there was procedural unfairness by the appellants in failing to inform the respondent that they intended to retire him based on his age and failure to invite him to produce his certificate of birth to confirm the actual date of his birth.
22. It is submitted that the appellants failed to keep updated employee records as demanded of them under Section 10(7) of the Act and hence their reliance on the National Social Security Fund (NSSF) certificate issued on 7<sup>th</sup> July, 1995 was wrong as the same is not proper in ascertaining age – See page 76 of the record of appeal.
23. It is further submitted that the respondent's letter of employment dated 4<sup>th</sup> July, 2008 did not make reference to the respondent's date of birth and the only way for the appellants to confirm the same was to call for the respondent's certificate of birth. It is submitted that the respondent's certificate of birth was issued on 25<sup>th</sup> March, 1981 before the respondent was engaged by the appellants and the court is asked to find that failure by the appellants to call for evidence to prove the date worked in favour of the respondent. It is submitted that the appellants failed to prove that the respondent had attained the age of 60. It is submitted that even if the respondent was to retire on 1<sup>st</sup> January, 2020 there was no basis why the retirement notice was effective from 1<sup>st</sup> July, 2020 contrary to clause 29 of the CBA which provided that early or late retirement could only be on mutual agreement of the employer and the employee, which was not the case in the present cause. The court is urged to find that the early retirement amounted to unfair termination and hence the claimant was entitled to unpaid salaries for the remainder of the term of employment. It is submitted that the respondent was not paid a salary from April to September, 2020.
24. On the second issue, on the award of unpaid and untaken annual leave for 2020, it is submitted that in March, 2020 when the termination notice was issued, the respondent was yet to take his annual leave and was thus entitled to 26 days' leave as per clause 7 of the CBA – See page 78 of the record of appeal. It is submitted that in the absence of leave forms or any record that the respondent took leave, the position taken by the respondent was unchallenged. It is submitted that the respondent denied having taken 10 days' leave and in any case if he indeed took leave, which is vehemently denied, 16 days ought to have been the remainder entitling him to Kshs24,630/= for unpaid leave.
25. On the third issue, unpaid leave from September to November 2019, it is submitted that the appellants did not dispute payment of the same, only that the respondent failed to follow the procedure for submitting the claim forms. It is submitted that under clause 4 of the CBA the respondent is entitled to overtime pay – See page 79 of the record of appeal.
26. On the 4<sup>th</sup> issue, transfer allowance of Kshs14,520/=, it is submitted that the respondent was entitled to leave under clause 18 of the CBA – see page 71 of the record of appeal. Whether or not he requested for the transfer or the same was by the appellants the allowance was payable. It is further submitted that the CBA formed part of the employment contract and denying the transfer allowance amounts to a unilateral alteration of the terms of service contrary to Section 10(5) of the Act. It is submitted that the CBA provided for a sum of Kshs14,520/= plus transport costs for the respondent, his spouse, and four children and thus, the allowance was raised to Kshs27,720/= – See pages 80 of the record of appeal. It is further submitted that the appellants violated clause 18(1) of the CBA by issuing a four-day notice in place of the required two weeks' notice before they transferred the respondent – See page 71 of the record.



27. On the award on half costs and interest, it is submitted that the respondent sought to recoup his CDF money inclusive of other rewards as only upon the filing of this cause was the CDF costs paid among other awards. It is thus submitted that the respondent is entitled to full costs.
28. On the issue of whether the appellants are entitled to costs, it is submitted that to condemn the respondent to pay costs to the appellants when it is the appellants who failed to pay his dues even after an amicable settlement shall amount to an injustice.
29. The court is urged to uphold the lower court's decision and dismiss the appeal with costs.
30. On the cross-appeal, the respondent submits that the same is properly on record having been filed within the statutory period. It is submitted that the judgment was rendered on 9<sup>th</sup> June 2023 and corrected on 15<sup>th</sup> June, 2023 and the time of filing an appeal commenced on 16<sup>th</sup> June 2023. It is submitted that in accord with Order 50, rule 2 of the Civil Procedure Rules where a period time allowed is less than six days, Sundays, Christmas Day, Good Friday, or any other public holidays are not counted in computing time. The cross-appeal was filed on 21<sup>st</sup> July, 2023 whereby, five Sundays, one public holiday of Id-ul Adha should be accounted for. The court is further urged to find that the naming of the cross-appeal as a notice instead of memorandum is a mere procedural technicality in light of Article 159(2) (d) of *the Constitution* of Kenya.
31. It is submitted that the respondent duly contested his retirement notice and the appellants were obligated under Section 41 of the Act to follow due process before terminating him. It is submitted that the trial court misdirected itself by, on the one hand, finding that the respondent's age was not uncontroverted but proceeded to find the retirement notice valid. It is submitted that the trial court, in relying on the principle in Daniel Wambugu Ngururi v Teachers Service Commission (2020) eKLR failed to consider that the retirement policy in the said cause did not apply to the respondent and the attendant employment relationship between him and the appellants.
32. It is submitted that the trial court failed to appreciate the finding in Republic V Judicial Service Commission & 2 Others Exparte Erastus M Githinji (2019) eKLR on the burden of the employer to prove that they had sought evidence from the respondent. It is further submitted that the respondent was entitled to notice pay under Section 49(a) of the Act.
33. It is submitted that the respondent was entitled to unpaid salary for April to September, 2020 as he ought to have retired in September 2020, and that the pay for April be deemed to cover the March salary balance. It is further submitted upon termination, which was unlawful, the respondent was entitled to 12 months' gross salary as compensation under Section 49(c) of the Act as he did not contribute to his termination.
34. On the unpaid leave allowances, it is submitted that the respondent is entitled to the same for 2018 and 2019 in accord with Clause 8 of the CBA. It is further submitted that the respondent is entitled to a service gratuity as a loyalty reward, having worked for the appellants for 12 years at Kshs278,072.30 under annexure (ii) of Clause 29 of the CBA.
35. On exemplary damages, it is submitted that based on Articles 21, 27, 28,30, 40,41 & 57 of *the Constitution*, the respondent was discriminated in the payment of his CDF allowances as his colleagues were paid their safari allowances before they took up their tasks. It is submitted that the withholding of the respondent's dues and retiring him early amounted to a violation of his rights to dignity and fair labour practices under Articles 28, 41 & 51 of *the Constitution*. The respondent claims exemplary damages of Kshs1,500,000/= and invites the court to be persuaded by the reasoning in *Mokaya v Kithure Kindiki t/a Kithure Kindiki & Associates (Petition 62 of 2019)* (2021) KEELRC 1(KLR).



36. The court is further urged to find that costs follow the event and apply Section 27 of the *Civil Procedure Act* and find that the respondent is entitled to the full costs of the cause and interest on the award at 14% per annum from the date of filing of the cause until payment in full.

### III. Issues For Determination

37. The court has perused the record of appeal, the supplementary record of appeal, the proceedings in the lower trial court, the memorandum of appeal, the notice to cross-appeal, and the submissions by counsel for both parties as summarized above. The following issues commend themselves to the court for determination –
- a. Whether the cross-appeal is properly on record?
  - b. Did the trial court arrive at the right findings and decision in regard to the retirement and the reliefs awarded?
  - c. What appropriate orders should this court make in regard to the above issues and on costs?

### IV. Cross-appeal

38. The appellants argue that the notice of cross-appeal as filed is devoid of the required form as the same is named as a notice instead of a memorandum. The respondent asserts that the heading of the cross-appeal is a technicality that is curable under Article 159(2)(d) of *the Constitution*. The notice of cross-appeal was filed on 21<sup>st</sup> July, 2023 when the applicable rules then were the Employment and Labour Relations Court (Procedure) Rules, No. 146 of 2016(now repealed). Apart from providing for the memorandum of appeal under Rule 8, there was no provision for a cross-appeal. As at the time of determining this appeal, Rule 17 of the Employment and Labour Relations Court(Procedure) Rules, 2024(the new Rules) provides for cross-appeal as follows –

“(1) The respondent may file and serve a cross-appeal by way of a cross memorandum of appeal in Form 1 as set out in the first schedule with the necessary modifications, setting out the grounds of the cross-appeal. (2) A cross-appeal shall be filed and served within twenty - one days from the date of service of the memorandum of appeal.”

39. The form that a cross-appeal takes is the same as that of a memorandum of appeal in the first schedule, with parties accorded the liberty to make the necessary modifications. The court agrees with the respondent that in the absence of the provisions on the form at the time of filing the cross-appeal under the old rules of this court, the naming of the cross-appeal as a notice is a mere procedural technicality. The same is curable under Article 159(2)(d) of *the Constitution* which prevails upon the court to uphold substantive justice rather than dwelling on technicalities. The notice, as filed, set out the grounds of the cross-appeal that the respondent wished to raise. Furthermore, the memorandum of appeal was filed on 3<sup>rd</sup> July, 2023 while the notice of cross-appeal appeal was filed on 21<sup>st</sup> July, 2023, within the 21-day statutory timeline after the filing of the memorandum of appeal that is required under the Rules. The court finds that the cross-appeal is properly on record.

### V. Retirement

40. As the first appellate court this court is obligated to evaluate the evidence and arrive at its own conclusions, but bearing in mind that it neither heard nor recorded the evidence in the trial – See *Selle V Associated Motor Boat Co. Ltd* (1968) E.A 123.



41. It is not in dispute that the respondent was engaged by the appellant as a driving instructor. The employment relationship was regulated and governed by a formal contract exhibited on page 19 of the record of appeal. This contract was produced by the respondent during the trial in the lower court and the same is duly signed by the parties. The production of the same was not objected to during the trial and as such the court shall rely on the same as the foundation of the relationship between the parties.
42. The contract commenced on 4th July, 2008 and amongst the terms therein was a reviewable consolidated monthly salary of Kshs7,200/= and a commission of Kshs1,155 per session. The contract provided for a one-month notice by either party before termination. According to the respondent, the appellants wrongly calculated his retirement age even after he had confirmed the same with the appellants' head of human resources and administration. The respondent argued that in any case, if he was to be sent on early or late retirement, a mutual agreement was a pre-requisite. The respondent pleaded that he was born on 18th November 1960 and the failure by the appellants to afford him a second opportunity to set the record straight amounted to unfair termination.
43. The appellants argued that the respondent failed to prove that he was born in November, 1960. The appellants stressed that they accorded the respondent a six-month allowance and retired him on 30th June, 2020. The appellants assert that all the documents availed by the respondent indicated his year of birth as 1960 and especially his National identity card – See page 92 of the record of appeal. During the trial, the respondent testified that he was born in September, 1960 and he was thus to retire by November, 2020. On cross-examination, he testified that his year of birth as per his national identity card was 1960. He argued that he was at no point asked for his certificate of birth – See pages 203-204 of the record of appeal.
44. The appellants argued that they used January 2020 as the retirement date as the respondent's date of birth was January, 1960 since the respondent allegedly failed to produce his certificate of birth. It is not disputed that at the time of issuing the retirement notice the only available record the respondent's age was his national identity card which indicated the year of birth as 1960. The respondent asserts that his date of birth is not January 1960 and hence the respondent ought to have called for documents in ascertaining the date of his retirement.
45. The court agrees with the trial court that the appellants acted based on the records they held and could not have been expected to decide otherwise without the respondent having provided his certificate of birth. In fact, the respondent seemed to not be aware of the exact date of his birth – See page 3 of the record of appeal wherein the respondent alleged that his date of birth was November, 1960. The respondent's certificate of birth was produced in a supplementary list of documents dated 8th January, 2021 indicating his date of birth as 28th September 1960 – See page 104 of the record of appeal. This is long after the cause had been filed before in the trial court.
46. No explanation was offered as to why the certificate of birth was not availed to the appellants when the respondent received the notice of retirement. The appellants were not obligated to go on a fishing expedition to find out the exact date of the respondent's date of birth when they already had his national identity card. Rather, the respondent was required to avail the certificate as same was in his possession.
47. The court finds and holds that the appellants acted reasonably in issuing the retirement notice based on the available information, and the respondent ought to have countered the retirement notice with solid evidence rather than with a word of mouth. In clause 29 of the CBA, the retirement age is stated as 60 years.



48. Rule 7(kk) of the Retirement Benefits (Individual Retirement Benefits Schemes) Regulations No. 118 of 2000 obligates any retirement scheme to set rules, among others, “the normal retirement age of the members: Provided that the normal retirement age shall not be less than fifty years.” In the absence of the date of birth, but only the year thereof, the appellants rightly found the respondent had reached retirement age of 60 as per the CBA. The respondents then issued him with a three-month notice of retirement. In that regard, the trial lower court arrived at the right decision and the court has no reason(s) for disturbing that holding.

## **VI. Reliefs**

49. During the trial the respondent conceded that he was paid the CDF monies and transfer allowance due on 18/03/2019 for the relocation from Nairobi to Nakuru of Kshs27,720 – See page 204 of the record of appeal. There is no appeal against these items and thus there is no lawful reason for the court to interfere with the findings of the trial court.
50. On notice pay of Kshs46,024/=, the trial court found that there was no unfair termination and declined to award the same. Having found and held that the retirement notice was valid there was no premature notice of retirement and the respondent having been given three months notice was thus not entitled to notice pay. The court finds no lawful reason to interfere with the trial court’s finding.
51. As for the unpaid salary for April to September, 2020 at Kshs276,144/= per month, the trial court found that the respondent had not agreed to a salary cut for April, and then for June up to September, 2020. The respondent’s date of retirement was established during the hearing to be 28<sup>th</sup> September, 2020. The trial court found that the partial consent between the union and the appellants could not act retrospectively on matters of salary for March and April 2020, as the respondent had not agreed to a salary cut. As relates to the subsequent months of June up to September, 2020 when he was to retire, there was no indication in the partial consent how salary for those months was payable. Therefore, the respondent was entitled to full pay for the four months – See Pages 114 of the record of appeal.
52. The appellants informed the respondent through a letter dated 25<sup>th</sup> March, 2020- See page 111 of the record of the appeal – that all employees would receive half pay for March and April 2020. The respondent was asked to signify acceptance of the said terms at the bottom of the said letter. No evidence was adduced that the respondent accepted the said terms.
53. Further, vide a letter dated 16<sup>th</sup> April, 2020, the appellants informed the respondent to signify his acceptance to proceed on unpaid leave by signing on the said letter. The respondent did not accept the said terms. In the absence of acceptance, the respondent was entitled to salary for March and April, 2020. The respondent claimed salary for April, 2020 and not for March, 2020. Parties are bound by their pleadings, and having not so pleaded for March salary, the salary payable is for April. For May, 2020 the partial consent signed by the respondent’s union indicated that all employees who had refused to receive half pay would be on unpaid leave for that month – See Page 114 of the record of appeal. There was no indication of the position on salaries for the subsequent months after May 2020. Indeed, in the subsequent partial consent of 10<sup>th</sup> June, 2020, there was no discussion on salaries.
54. In the absence of any agreement on continued unpaid leave, salaries were payable for subsequent months. In the respondent’s case, he was entitled to salary from June to 28<sup>th</sup> September, 2020, when he was expected to retire, as evidenced by the certificate of birth which was not challenged by the respondent. The court finds that the trial court arrived at the proper finding and there is no lawful reason to interfere with the same.



55. On compensation for wrongful termination equivalent to 12 months gross salary totaling to Kshs481,992/= there was no unfairness or unlawfulness in the retirement notice issued and thus the respondent was not entitled to any compensation. The court finds no lawful reason to interfere with the trial court's finding and holding in that regard.
56. The respondent argued that he did not go on leave in 2020. The letter dated 16<sup>th</sup> April, 2020 produced by the appellants – see Page 112 of the appeal – indicated that the respondent was on leave that was to end on 22<sup>nd</sup> April, 2020. Additionally, the terminal leave voucher produced by the appellants dated 7<sup>th</sup> December 2020 – see page 117 of the record of appeal – indicated that the respondent had taken 10 days' leave, leaving a balance of 10 days. Clause 7(a) of the CBA provided that an employee was entitled to 26 days in annual leave. The respondent did not object to the production of the documents indicating that he had taken leave as stated above. The appellants, by dint of Section 74 of the Act, produced the terminal dues voucher indicating that the respondent had taken 10 days of leave. As per the CBA, the remainder of leave was thus 16 days in that year. The trial court was right in finding that the respondent was entitled to 16 days of leave. The court finds no lawful reason to interfere with the trial court's finding and holding.
57. On the award for overtime for September, October, and November, 2019 of Kshs55,106/= the appellant produced the overtime sheet and its summary for November, 2019 indicating that the respondent had 45 hours of overtime, which was approved by the Branch Manager – see C-exhibit-29 – Pages 101 to 103 of the record of appeal. The court has perused the said exhibit and noticed that there is no claim for overtime sheets for September or October, 2019. The overtime sheets only relate to November, 2019 and a summary of the same is attached. The approved overtime hours were 45 hours by the branch manager. The respondent claimed for 141 hours but no evidence was adduced in support thereof. While the trial court found that the respondent was entitled to the award on overtime, the trial court failed to interrogate the evidence to find out how the 141 hours were arrived at.
58. While Sections 9, 10, and 74 of the Act bestows upon the appellants as employers the duty to keep employment records and to produce the same when required to do so, a claim for overtime is special and must be both pleaded and proven before it can be awarded, and it cannot be inferred. There was no pleading on the number of overtime hours and dates worked in either the months of September, October, or November, though the overtime sheet for November, 2019 showed 45 hours of overtime for November, 2019. In the absence of contrary records, the evidence by the respondent for 45 hours of overtime in November 2019 stands unchallenged. While the employer is required to keep records including those on overtime, the respondent is also mandated to precisely plead how many hours he worked each month. There is no evidence on how the 96 hours for September and October, 2019 had been accrued. The rhetorical question that the court is invited to ask is – How many overtime hours did the respondent work in September or October, 2019? This was not properly pleaded. The ambiguous pleading by the respondent failed to shift the burden to the appellants to avail the specific records for specific dates.
59. The trial magistrate erred in awarding overtime for 141 hours when the respondent had only proved he was entitled to 45 hours of overtime for November, 2019. There was no proof on how the 96 hours over and above were earned. The court finds that the respondent only proved 45 hours of overtime calculated as follows – 45 hours x 1.5 x 260.55 hours rate = Kshs17,587.13. For that reason, the award of Kshs55,106 as overtime pay is hereby set aside and substituted with Kshs17,587.13.
60. On the Transfer allowances due on 19/02/2019 from Nakuru to Nairobi at Kshs27,720= the appellants assert that the transfer to Nairobi from Nakuru was on disciplinary grounds and thus no allowance was payable. In the transfer letter dated 15<sup>th</sup> February, 2019, there was no mention that the



transfer was on disciplinary grounds. By dint of clause 18 of the CBA on disturbance allowance, an employee was entitled to Kshs14,520/= as disturbance allowance and paid bus fare or rail ticket for the employee, his spouse, and up to four children. The allowance was payable whether the transfer was on request or imposed. The respondent was thus entitled to the allowance of Kshs14,520/= and the paid cost of the fare payable upon presentation of the receipts therefor. No receipt was produced for the proof of the fare used.

61. On allegations of short notice for transfer than required under the CBA, the same was not pleaded or raised in the lower court and thus this court cannot deal with the same on appeal. The trial court was thus right in finding that the respondent was only entitled to a claim of Kshs14,520 in the absence of proof of the fare paid. The court finds no lawful reason for interfering with the trial court's finding and holding in this regard.
62. On the transfer allowance due on 18/03/2019 from Nairobi to Nakuru at Kshs27,720/= the respondent admitted during the trial that he was paid Kshs27,720/= as travel allowance – see page 204 of the record of appeal. The trial court's finding is thus upheld.
63. On unpaid leave traveling allowances for 2018 and 2019 of Kshs5,500/= x 4=Kshs22,000/= the trial court declined to award the same to the respondent as the respondent did not adduce evidence that he went on leave in 2018 and 2019. Clause 8 of the CBA entitled an employee to traveling allowance while on annual leave for the years 2018 and 2019 of Kshs5,500/=. There was no evidence led as to when the respondent proceeded on leave in the years 2018 and 2019 for him to have been entitled to the leave travelling allowance. The claim was not properly pleaded as it lacked particulars of when the respondent indeed traveled for the said leave. The court finds no lawful reason to interfere with the trial court's finding and holding in that regard.
64. The trial court declined to award gratuity of Kshs278,072.30 as the same was only payable where one was not in a pension scheme as per clause 29 (e) of the CBA. Further under the appendix to the CBA service pay as a loyalty reward was an item under conciliation and not yet adopted as a term of the CBA. The respondent could not base his claim on the aforesaid term. The respondent confirmed that he was paid a pension of Kshs400,000. In that regard, the trial lower court arrived at the right decision and the court has no reason to disturb that finding and holding.
65. On the claim for exemplary damages for breach of his constitutional rights under Articles 21, 27, 28, 30, 40, 41, & 57 of *the Constitution* the respondent in the cross-appeal alleges that he was discriminated against in the payment of his CDF salaries as his colleagues were paid their safari allowances before they took up their duties, which he states was preferential treatment and discriminatory to him. He further argues that the decision to retire him early and the withholding of his dues violated his rights to dignity and fair labour practices under Articles 28, 51 & 41 of *the Constitution*. RW1 testified that the payment of CDF was delayed as the payment requests to the headquarters were submitted late by the respondent's supervisor, and the appellants could not pay in the absence of the necessary documentation. No evidence was adduced by the respondent that his CDF payment had been withheld maliciously and, in any event, the court has already found that the retirement notice was valid. Exemplary damages are punitive damages that are awarded in two instances as enumerated in *Grinyamwaya vs. Nairobi City Commission* [1985] eKLR where the court, in defining what amounts to exemplary damages referred to *Rookes v Barnard and others* (1964) AC 1129 where it was held that –

“It will be convenient to begin summarizing very briefly the effect of *Brookes v Barnard*. In the first place, it was held that exemplary damages for tort may only be awarded in two classes, of case (apart from any case where it is authorized by statute), these are first, where there is oppressive, arbitrary or unconstitutional action by the servants of the government



and secondly, where the defendant's conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff. As regards the actual award, the plaintiff must have suffered as a result of the punishable behaviour, the punishment imposed must not exceed what would be likely to have been imposed in criminal proceedings if the conduct were criminal: and the means of the parties and everything which aggravates or mitigates the defendant's conduct is to be taken into account. It will be seen that the house took the firm view that exemplary damages are penal, not consolatory as had sometime been suggested." (Emphasis added).

66. There was no proof that the respondent suffered any discriminative or oppressive action or treatment. The appellants paid the respondent's CDF dues, albeit late, and explained that the pay could only be paid upon submission of evidence by the respondent's supervisor which came in late. The court finds that the respondent is not entitled to the award of exemplary damages of Kshs1,500,000 or at all. The trial court's finding, though no explanation was offered, was correct and is hereby upheld.
67. On the claim for a pension statement and a letter of introduction to enable the claimant access his pension, the respondent admitted that he received his pension of Kshs400,000/= and thus this claim is moot and or overtaken by events.
68. There are no lawful reasons for the court to interfere with the trial court's finding on the certificate of service as the grant of the same is unconditional under Section 51 of the Act.
69. On the award of half costs of the suit at 12% per annum from the date of the judgment in full, costs normally follow the event but as a principle costs are awarded at the discretion of the court. In this case, it is clear from the judgment that the respondent only succeeded partly as he was not able to prove all the claims as discussed above. Therefore, I do find that the order awarding to him half costs by the trial court was proper in the circumstances and I find no compelling reason for me to interfere with the same.

## VII. Costs

70. The court orders that each party shall meet own costs in this appeal.
71. The cross-appeal is dismissed with no order as to costs.

## VIII. Orders

72. Flowing from the foregoing, the court makes the following orders –
  - a. The appeal shall partially succeed to the extent that the award of Kshs55,106 in overtime is hereby set aside and substituted therefor with Kshs17,587.13.
  - b. In substitution for the judgment of Kshs324,463/= a judgment be and is hereby entered in favour of the respondent in the sum of Kshs286,944.13/= plus interest from the date of judgment of the lower court, 9<sup>th</sup> June, 2023, till payment in full. The said sum is made of –
    - i. Unpaid salaries (April, June-September, 2020) .....Kshs230,120.00
    - ii. Unpaid leave days.....Kshs24,717.00
    - iii. Unpaid overtime.....Kshs17,587.13
    - iv. Transfer allowance.....Kshs14,520.00



Total.....Kshs286,944.13

- c. The other awards remain undisturbed and a fresh decree shall issue accordingly.
- d. Each party shall meet own costs for this appeal.
- e. The cross-appeal is dismissed with no order as to costs.
- f. The decretal sum deposited in a joint account shall be released to the respondent subject to the necessary adjustments as per the fresh decree to be issued.

The award is subject to statutory deductions.

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 14<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**DAVID NDERITU**

**JUDGE**

