

IN THE REPUBLIC OF KENYA
IN THE RETIREMENT BENEFITS APPEALS TRIBUNAL
AT NAIROBI
TRIBUNAL APPEAL NUMBER 7 OF 2011

BETWEEN

BONIFCE MARIGA & 948

OTHERS.....APPELLANTS

-VERSUS-

THE RETIREMENT BENEFITS

AUTHORITY.....1ST
RESPONDENT

THE BOARD OF TRUSTEES, TELPOSTA PENSION SCHEME
AND PROVIDENT FUND.....2ND
RESPONDENTS

JUDGEMENT

INTRODUCTION

1. Before the Tribunal is an Appeal presented through the Appellants' Amended Memorandum of Appeal dated 11th

March 2025. Before the aforesaid amendment, the initial Appeal was filed vide the Appellants' Memorandum of Appeal and Statement of Facts both dated 16th May 2011 and filed on the same day. The Appellants preferred this Appeal against the entire decision of the 1st Respondent delivered vide a letter dated 8th June 2009.

2. The Appellants seek the following prayers, that:-

1. The Retirement Benefits Authority decision be set aside and substituted with an order directing the Trustees to compute the Appellants' benefits by applying the Rules of the Scheme [being] Rules No. 10 (c) (d) and (g) on accrued rights without the application of any discounting factor whatsoever.
2. The sums found due at paragraph 1 above be increased by the cost of living adjustments, inflation and interest at the rates the scheme earned on the investments.
3. An order directing the Trustees to avail to each of the Appellants details of computations and the applicable Rules applied and statements to that effect in accordance with Regulations 8(2) (c) of the Retirement

Benefits (Occupational Retirement Benefits Scheme) Regulations.

BRIEF BACKGROUND

3. From the onset, it is essential for this Tribunal to state that this Appeal was remitted back to this Tribunal for re-hearing vide an order contained in the Judgement of the Court of Appeal sitting in Nairobi in ***The Board of Trustees, Telposta Pension Scheme vs Retirement Benefits Appeals Tribunal, The Honourable the Attorney General, Retirement Benefits Authority, Boniface Mariga & 948 Others, Civil Appeal No. E767 of 2023eKLR.***
4. The said Judgement of the Court of Appeal allowed the Appeal and set aside the Judgement and decree of the High Court of Kenya at Nairobi (***J. Chigiti (SC)***) dated 16th August 2023 in ***JR. Misc. Civil Application No. 141 of 2017*** delivered on 20th December 2024.
5. The Court of Appeal also set aside this Tribunal's decision dated 13th February 2017 in ***Boniface Mariga & Others vs Retirement Benefits Authority, Telposta Pension Scheme and Telposta Provident Fund, Retirement Appeals Tribunal***

Civil Appeal No. 7 of 2011. The journey of this dispute to the current Appeal is set down in summary in the following paragraphs.

6. The 1st Appellant and 948 others are former employees of Telkom Kenya. Upon exit from service, the 1st Appellant brought a complaint under Section 46 of the Retirement Benefits Act to the Retirement Benefits Authority, the 1st Respondent herein on his behalf and on behalf of 310 others. At that point, the Appellants had included Alexander Financial Services (E.A) Limited as the 3rd Respondent. On 23rd June 2013, they dropped Alexander Financial Services (E.A) Limited as a Respondent.
7. This Tribunal referred the Appellants' case to the 1st Respondent on 27th July 2011 with directions that the 1st Respondent determine the Appellants' complaint and give a written decision thereon with a rider that should any Appellant be dissatisfied, they should be free to file an Appeal in the same cause.
8. Following the orders of the Tribunal made on 27th July 2011, the 1st Respondent made a decision dated 3rd October 2012. In

the decision communicated to Koceyo& Company Advocates (representing the complainants), the 1st Respondent indicated that the decision was with respect to 600 deferred members and pensioners of Telposta Pension Scheme and Telposta Provident Fund.

9. Being dissatisfied with the decision of the 1st Respondent, the Appellants filed an Appeal in this Tribunal on 17th October 2012. It is worth noting that in that Appeal, the number of Appellants increased to 948. However, the grounds of Appeal remained the same as those set out in the Appellants' Memorandum of Appeal filed on 16th May 2011.

10. This Tribunal heard the Appellants' Appeal and rendered its Judgement dated 13th February 2017. The Tribunal's final orders were as follows

“

(a) The appeal be and is hereby allowed.

(b) The Trustees of the 2nd Respondent shall compute and pay to each of the Appellants the benefits due to each of the Appellants by applying the Rules of the Scheme on accrued rights stated in this judgement which is, “*a pension equal to 1/480ths of each of the*

Appellant's Final Pensionable Salary for each complete month of Pensionable Service''.

(c) The Trustees of the 2nd Respondent may offset from any monies found due to each Appellant any amount of benefits so far paid.

(d)The Trustees of the 2nd Respondent shall prepare and submit to each of the Appellants a statement of account showing how the benefit payable is calculated and arrived at.

(e) The Trustees of the 2nd Respondent shall pay interest on the sum found unpaid in (b) above from the date it fell due until payment in full which shall not be less than the investment interest declared by the 2nd Respondent in the years that the benefit has remained due.

(f) The 144 Members of the Telposta Provident Fund who have been paid their benefits in accordance with the Rules of the Fund have exhausted all their accrued rights and have no further claim against the 2nd Respondent.

(g) Either party shall pay its own costs.

11. Being dissatisfied with the decision of the Tribunal dated 13th February 2017, the 2nd Respondent instituted a judicial review

application against the decision of the Tribunal in ***Miscellaneous Application No. 141 of 2017; Republic vs. Retirement Benefits Appeals Tribunal & Others Ex parte The Board of Trustees of Telposta Pension Scheme, Nairobi*** seeking for an order of certiorari to quash the said decision and an order of prohibition to prohibit its enforcement.

12. The Ex parte Applicant (the 2nd Respondent herein) anchored the application under Order 53 Rule 3(1) of the Civil Procedure Rules, 2010, Sections 8 & 9 of the Law Reform Act and Section 11 of the Fair Administrative Action Act.
13. The court delivered its ruling on 16th August, 2023 and dismissed the Judicial review.
14. Being aggrieved by the decision of the High Court in ***JR. Miscellaneous Civil Application No. 141 of 2017***, the 1st Respondent herein filed **Civil Appeal No. E767 of 2023, The Board of Trustees, Telposta Pension Scheme vs. Retirement Benefits Appeals Tribunal, The Honourable Attorney General, Retirement Benefits Authority, Boniface Mariga and 948 Others.**

15. After hearing the rival arguments before it, the Court of Appeal rendered its decision in a judgement dated and delivered on 20th December 2024 allowing the appeal.
16. The Court of Appeal made final orders as laid down hereunder:

“Accordingly, we allow this appeal, set aside the judgement and decree of Chigiti, J. delivered on 16th August 2023 in JR No. 141 of 2017, and substitute it with an order allowing the appellant’s notice of motion dated 11th April 2017. We also set aside the 1st respondent’s decision dated 13th February 2017 and remit the dispute back to the 1st respondent for re-hearing. Each party shall bear his/its own costs of this appeal.”

PARTIES PERSPECTIVE CASES

17. Initially, the first complaint by the Appellants was brought before the 1st Respondent by Fatuma Njeri in 2009 together with 310 others. Thereafter, the complainants, not being satisfied with the proceedings before the 1st Respondent, approached the Tribunal and prayed for a number of orders.

On 27th July 2011, the Tribunal directed the Appellants to go back before the 1st Respondent and that the 1st Respondent to make a final determination of the matter. The Tribunal also ordered that after the determination by the 1st Respondent, should any of the Appellants be dissatisfied with the 1st Respondent's decision, they had a right to approach the Tribunal in the same cause.

18. It is worth of note that when the matter went back before the 1st Respondent, the number of complainants rose to about or above 600 members. After the 1st Respondent made its determination on 3rd October 2017, the number of Appellants who approached the Tribunal exponentially shot from 600 to 948 and the case acquired the name ***Boniface Mariga & 948 Others vs Retirement Benefits Authority & 2 Others.***

19. Of further importance to note also is that when the matter came back to the Tribunal for re-hearing following the orders of the Court of Appeal contained in the Court's judgement dated 24th December 2024, 348 Appellants withdrew their Appeal through a Notice of Withdrawal filed on 27th January 2025 bringing the number of Appellants in the present Appeal to 600.

20. Out of these 600, 556 Appellants are represented by the firm of Koceyo& Co Advocates while the firm of Amadi & Amadi Advocates came on record for 65 Appellants through a Notice of Appointment/Change of Advocates dated 10th April, 2025. Through an Amended Notice of Appointment/Change of Advocates dated 2nd May, 2025, Mr. Amadi amended and reduced the number of Appellants he was representing to 45.
21. The Tribunal also noted that during the hearing of the Appeal, Mr. Amadi informed the Tribunal that he was acting for only 19 members. This in effect, would render 26 out of the 45 Appellants unrepresented. Mr. Amadi did not file any further notices in the Tribunal to exclude the 26. When the Tribunal inquired from him about the fate of the 26 Appellants who could remain unrepresented, Mr. Amadi stated that he was okay to represent all the 45 Appellants for whom he was initially on record. Upon that statement, the Tribunal proceeded to hear the Appeal.

THE 556 APPELLANT'S CASE AND SUBMISSIONS

22. The 556 Appellants represented by the firm of Koceyo& Company Advocates filed a Statement of Facts dated 17th October 2012. They also filed a Witness Statement of Mr. James Jeremiah Nyokangi, an actuary, together with a List &

Bundle of Documents both dated 16th May 2025. During oral hearing of the Appeal, the 556 Appellants called Mr. James Jeremiah Nyokangi as their only witness. Mr. Nyokangi, after adopting his witness statement dated 19th May 2025, testified and produced two actuarial reports; an *NBC Report on Verification of Historical Exit Payments to Ex-Employees 2000 – 2007* and an *NBC Update Report on Verification of Historical Exit Payments to Ex-Employees 2007 – 2009* (the NBC Reports).

23. On computation of benefits, the witness stated that the rules allowed retirement at the age of 50 years. With respect to normal retirement at 55 years, he cited rule 10 (c) of the 1997 Rules which provides that a retiree should receive a pension equal to $1/480^{\text{th}}$ of his last salary multiplied by the total number of full months of pensionable service. On early retirement before attaining age 55, he referred the Tribunal to rule 10 (g) of the 1997 Rules which permits a member to access benefits at age 55 or to receive payment as a deferred member.

24. On the issue of reduction of pension benefits, the witness referred to Rule 24 (c) of 1997 Rules which allows the Trustees of the 2nd Respondent to amend or modify the Trust Deed or

Rules with the consent of the founder. He however qualified that no alteration or amendment of the Scheme Trust Deed and Rules should diminish the rights and interest accrued to the members. He further stated that rules cannot be applied to reduce the members' accrued benefits.

25. Upon being asked by the Tribunal to provide one example and demonstrate how the 2nd Respondent's computation of the retirement benefits reduced the Appellants' accrued rights, the witness stated he was not expecting to be asked to calculate any specific scenario of how each of the Appellants' pension was reduced and that he did not have the facts. When further pressed to show the Tribunal how the formulae can be applied to demonstrate how the benefits were miscalculated, he stated that his responsibility was only limited to reviewing and agreeing with the actuarial report prepared by Mr. Robert Oketch.

26. One of the issues that also featured in Mr. Nyokangi's oral testimony was the question of whether the 2nd Respondent was right in applying a discounting factor in calculating the cash equivalent of deferred benefits. The witness testified that a discounting factor should not be applied unless provided for in

the rules. When further pressed to state his opinion if other acceptable international actuarial principles are applicable, he said that the same should be applied in a cautious manner.

27. Upon cross-examination by Mr. Amadi, Mr. Nyokangi largely restated his testimony in chief. When cross-examined by Ms. Kosgei for the 1st Respondent, Mr. Nyokangi confirmed that he had perused the 2nd Respondent's calculations that were the subject matter of the present Appeal. He however stated that he did not read the 1st Respondent's decision that the Appellants had appealed against in the present Appeal. He also confirmed that he did not produce any evidence of how each member's calculations were reduced. On actuarial assumptions, he stated that although these assumptions applied in the report, the same were not in the rules. He further stated that the 1997 rules used assumptions while the 2004 rules relied on computation factors.

28. Upon cross-examination by Oraro SC, counsel for the 2nd Respondent, Mr. Nyokangi stated that he did not list his address in his witness statement. He also stated that he did not list in his statement the documents he had relied upon. He stated that he only reviewed the NBC Reports. He further

stated that he was not the maker of the NBC report. He confirmed that the 1st NBC Report was not signed at page 120 while the second report was prepared and signed by a Mr. Robert Oketch. He stated that he knew Robert, the maker of the second report. He testified that Robert was a director and consultant at Ekhaya Risk Services. He further confirmed that Robert signed the second report while being a member of the Institute and Faculty of Actuaries.

29. Upon further cross-examination by Mr. Oraro, SC, Mr. Nyokangi further confirmed that Mr. Robert Oketch, the maker of the NBC Report had been expelled from the Institute and Faculty of Actuaries on or about 2018. On further cross-examination about his affiliation with Ekhaya Risk Services, the witness confirmed that his LinkedIn profile indicated that he was currently working with Ekhaya Risk Services, the same company where Robert was a director and consultant.

30. Upon further cross-examination on the retirement issues, Mr. Nyokangi testified that a member who retires before 50 years shall be entitled to benefits at attaining normal retirement age of 55, which is defined in the Scheme rules. He also confirmed that rules 10 (b) and (d) do not apply to those who retire before

attaining age 50. Mr. Nyokangifurther testified that only members who retire before age 50 with the consent of the employer are entitled to be paid benefits at the normal retirement rate of $\frac{1}{480}^{\text{th}}$ of monthly pensionable salary of every year worked. When he was further cross-examined, the witness agreed that rule 10 (d) entitles members who have either completed 5 years or have been demoted or leave before 50 years under circumstances provided for in rule 10(b) ii, iv, v & vi to deferred pension commencing upon attaining the age of 55. He further testified that for those retiring after 50 years but before attaining the age of 55, the employer's consent was mandatory.

31. With respect to assumptions appearing on page 156 of the NBC report, Mr. Nyokangi confirmed that the allowance made for commutation referred to 27,000 Rands and not Kenya shillings. He further confirmed that the 6% p.a. allowance for revaluation and 6% p.a. for pension increase were not provided for in the rules. Under rule 18 (exhibited at page 58 of the Appellants' bundle), Mr. Nyokangi confirmed that pension review and increase can only happen with consultation between trustees and stakeholders, and that his assumption did not factor in the provisions of the rules. He further stated

that there was no basis for assumption that 50% of the members retired at age 50 while 50% retired after 55 years. He emphasized that retirement after 50 should be with consent of the employer, and that anyone who retires after age 50 and before age 55 should be treated as a deferred member and can only access benefits from normal retirement age at 55 years as per rule 10 (g).

32. Mr. Nyokangi further confirmed that the computations in the table at page 9 of the NBC report which is exhibited at page 156 of the Appellants' bundle did not consider that some members were under the provident fund while others were in the defined benefit scheme.

33. On the NBC's cash value assumption of the possibility of retiring at age 50, the witness agreed that the cash value for the fund is provided for under rule 10 (g) of the 1997 rules and rule 8 (g) of the 2004 rules. He further testified that this assumption was not based on the rules at all. On allowance for revaluation, the witness agreed that the rules do not provide for the same. With respect to the argument that the members who left prior to 2007 were entitled to full benefits, the witness testified that under the Legal Notice of 8th June 2005, members

could not withdraw their benefits, and in case of retirement before normal retirement age, they were only entitled to their own contribution and interest. On further cross-examination by the 2nd Respondent's counsel, the witness was not able to substantiate the allegation that legislative amendments diminished the members' benefits. He also failed to pinpoint with specificity on how the Appellants' benefits were diminished or reduced.

34. The witness was also cross-examined on the Appellants' allegations that amendments to the 2nd Respondent's Trust Deed and Rules created an unsound financial situation in the scheme because they tailored to address the financial situation of the sponsor as opposed to the scheme. On this issue, when the witness was referred to the Trust Deed and Rules by the 2nd Respondent's counsel, he testified that whereas there was nothing in the rules to prove that the amendments had been done to deal with the sponsor's financial situation, the Appellants' allegations were true.

35. Upon further cross-examination on the Appellants' allegations that members were entitled to access their cash equivalents and not a refund of their contributions, Mr.

Nyokangi testified that the legal notices modified and entitled members to access their own contributions. He further stated, that from 2005, any deferred member who wanted to access a cash lump sum was entitled to his own contribution, and the employer's contribution was to be retained until the said member attains the normal retirement age of 55. Mr. Nyokangi further testified that in 2007, the members were entitled to 1/3rd of their own contribution.

THE 45 APPELLANTS' CASE

36. Mr. Amadi counsel, for Appellants called two witnesses, Mr. Darshan Ruparella and George Odhiambo Oloo. Mr. Ruparella adopted his witness statement dated 10th June 2025 and produced the expert report dated 10th June, 2025 prepared by Ruparella Consultants Limited. Mr. Ruparella testified that he calculated and gave a cash equivalent for the 19 out of the 45 Appellants. He stated that he calculated the pension receivable between the period they exited up to June 2024 by relying on the members' information, the Trust Deed & Rules, particularly the 2004 Rules and the audited accounts of the scheme between 2011 and 2024.

37. On methodology, Mr. Ruparella stated that he estimated the pension the members would have received on final service and accrued pension from the age of 50. He also calculated pension up to 2024 and applied the interest in line with the net investment income estimated from the financial statements received. Mr. Ruparelia further stated that he applied rule 8 (d) of the 2004 Trust Deed and Rules, which applies to members who retire with the consent of the founder and after completing 3 years of pensionable service. He further stated that all the 19 members left through retrenchment and that he believed that they all fall within the provisions of this clause.

38. With respect to the actuarial report of Alexander Forbes, Mr. Rupareliastated that he compared the said with his own report and noted some differences. On age average, the witness stated that the Alexander Forbes report used age of 55 while his report was pegged on exit at 50 years. Further, his report had pension which ought to have been paid and calculated interest up to 2024. He sampled member 77777 (BeatriceKabiria) and stated that her cumulative pension plus interest should have been K. Shs. 523,480.

39. When queried by the Tribunal on whether he was aware of the actual benefits already paid to the Appellants, Mr. Ruparelia stated that he did not have those details. He explained that although the information was crucial to the report, he calculated the pension that should have been paid and asked the Tribunal to deduct the actual benefits paid to the members. He also admitted that the report was not based on the actual members' data i.e. the date of birth, date of joining service, date of leaving the service and the pensionable salary at the point of leaving the service.

40. Upon cross-examination by Ms. Kosgei, counsel for the 1st Respondent, Mr. Ruparelia confirmed that the signature in his report did not match with the one on his witness statement. He further confirmed that the figures in the report were not accurate since it was not based on actual members' data. He also stated that the data he used in his report was provided by the Appellants' lawyers and not the 2nd Respondent. On cross-examination by George Oraro SC, counsel for the 2nd Respondent, he stated that the report did not indicate the details of individual members' information and any other material that he relied on. He also averred that his report did not separate members of the Provident Fund from those of

the Pension Scheme. He testified that the report assumed that all the members belonged to the scheme.

41. When Mr. Oraro queried Mr. Ruparelia on the his opinion on the application of rule 8 (d) of 2004 rules, the witness stated that he agreed with the interpretation that a member who retires with the consent of the founder before normal retirement age, and having attained three years pensionable service and is above the age of 50 years, is entitled to deferred pension commencing from the normal retirement age of 55. He further stated that such a member's benefits were to be calculated by applying the formula $\frac{1}{480}^{\text{th}}$ of the final pensionable salary for each of pensionable year of service. Mr. Ruparelia also testified that he agreed that his report did not provide for what happens when a member leaves before attaining age 50. He stated that his report assumed that all members retired at 50 years.

42. Upon further cross-examination, Mr. Ruparelia stated that his report did not factor instances where members opted for partial cash payment or lump sum access to pension benefits. When referred to rule 13 (b) of the Rules, the witness agreed that members were allowed to access pension before attaining

age 50. That the members had an option of receiving a cash lump sum in lieu of deferred pension under rule 8 (d) equal to cash equivalent of his deferred rights to be determined by an actuary.

43. When he was further queried on computation, Mr Ruparelia testified that his calculations were based on the interpretation of the Tribunal's judgment of 2017 which based normal retirement at 50 years instead of age 55 as defined in the rules. The witness however maintained that the calculations in his report were based on the above stated judgement, but further testified that his earlier testimony on this issue notwithstanding, he disagreed with the findings of the said Tribunal's judgement as the findings in the judgement were not based on the 2nd Respondent's Trust Deeds and Rules.

44. On assumptions, Mr. Ruparelia stated that he assumed that all 19 members retired at 50 years. He also assumed that all members took their pension benefits in full rather than commuting any part of their benefits. He however said that he was not aware that some members' benefits were transferred in 2007 on valuation which was based on 4% p.a. and 3% p.a. increment. When he was further cross-examined by Oraro SC,

he stated that his report did not consider the 2005 and 2007 legal notices on commutation of cash equivalent and access to lump sum by members. Eventually, when Mr. Oraro SC asked the witness to confirm whether his report was based on wrong information, he agreed that that was true and stated that his report was theoretical having been based on wrong information.

45. Learned Counsel, Mr. Amadi also called Mr. George Odhiambo Oloo as his second witness on behalf of the 45 Appellants. Mr. Oloo adopted his undated witness statement and stated that he was representing 19 Appellants. He further stated that he had been a pensionable employee and that the normal retirement age was 55 years. He however stated that he was retrenched at the age of 48 years in 2009 when Telkom Kenya was being restructured and taken over by Orange Kenya Limited. He stated that the staff who had attained 50 years and above were first to be retrenched, then followed by none-core staff like security, messengers, cleaners and riders. The third category was semi-skilled staff and the last batch was voluntary retrenchment. He confirmed that his pension was transferred to Alexander Forbes in 2007 and he received payments from Alexander Forbes. He however complained that

the payment vouchers had figures but not how the figures were computed.

46. Mr. Oloo further testified that he was aggrieved with the amounts paid and asked the Tribunal to determine whether the calculation was in accordance with the 2nd Respondent's Trust Deed and Rules. He urged the Tribunal to follow the judgment of 13th February, 2017 since the outcome of the present appeal may have a significant effect on more than 10,000 pensioners.

47. When the Tribunal asked Mr. Oloo to state what his exact claim before the Tribunal was, he first stated that his witness statement did not have any specific claim. Upon further questioning by the Tribunal, he changed his position and stated that his claim was K. Shs. 9,161,673. When the Tribunal further asked him whether he could access his full benefits at age 48, he replied that he believed that the Trust Deed and Rules allow access to pension at early retirement. When the Tribunal further asked him to explain how the computation of his benefits would be arrived at, he stated that he had retained the services of an actuary who had calculated his benefits and would want the Tribunal to rely on his actuary's calculations. When asked about the missing data for the other appellants he

had claimed he was representing, Mr. Oloo stated that it was unfortunate that those other Appellants did not provide their data.

48. Upon cross-examination by Ms. Otieno, counsel for 556 Appellants, Mr. Oloo stated at their exit from service, the employer had given them an option of early retirement through retrenchment. He also stated that the miscalculation of their benefits by the 2nd Respondent negatively impacted the Appellants because they had many financial obligations. He maintained that the 2nd Respondent did not give him the details of how the calculation of his benefits was done and the actuarial factors that were applied in the computation.

49. Upon cross-examination by Ms. Kosgei for the 1st Respondent, Mr. Oloo confirmed that he was paid K. Shs. 1,032,536 through Alexander Forbes. He however refuted the 2nd Respondent's assertion that the Appellants' actuary had miscalculated the Appellants' benefits. Mr. Oloo further stated that the 19 Appellants did not provide their actuary with the information of the benefits that the 2nd Respondent had already paid to them. In conclusion, Mr. Oloo stated that he understood that having retired at age of 48 years, he could not be entitled

to the same benefits as someone who retired at the normal age of 55 years.

50. On being cross-examined by George Oraro SC, counsel for the 2nd Respondent, Mr. Oloo stated that his witness statement was neither signed nor dated. On allegations that he was representing 45 Appellants, he confirmed that he did not have a written authority from the rest of the 44 Appellants to represent them. He also stated that he did not provide the Tribunal with their information or claims. Mr. Oloo further stated that at the time of leaving service in 2009, he was a member of Alexander Forbes. When Mr. Oraro asked him whether there was a pension arrangement when he was employed in 1982, the witness stated that at time of his employment, he was not contributing to any scheme because none was in existence.

51. Mr. Oloo further stated that he started to contribute in 1997 when the scheme was put in place. He stated that in 2007, he was notified of the transfer of his benefits to Alexander Forbes. When Mr. Oraro referred Mr. Oloo whether he had signed a letter similar to the letter appearing at page 149 of the 2nd Respondent's bundle of documents, Mr. Oloo agreed that he had signed a similar letter, only that he did it under coercion.

Mr. Oloo further testified that the letter he had signed provided for how the cash equivalent of his future benefits would be transferred to Alexander Forbes Retirement Fund. On whether he read and understood the letter, Mr. Oloo maintained that the decision to move his benefits to Alexander Forbes Retirement Fund had already been made by the 2nd Respondent. When Mr. Oraro SC further probed him on whether having signed the said form, Mr. Oloo had therefore made a choice to join Alexander Forbes Retirement Fund, Mr. Oloo stated that he signed the form on 28th March, 2008 and that therefore, he made a choice to join Alexander Forbes. He further confirmed that his signature was witnessed.

52. When further cross-examined by Oraro SC, Mr. Oloo stated that although he was paid Kshs. 1,032,536, he believed that there was a remainder of his benefits with the 2nd Respondent. On the correctness of the transferred value of his benefits, Mr. Oloo said that he did not have any evidence of how his transfer value had been computed and further, that he had requested for the 2nd Respondent for a for re-calculation. When pressed to produce evidence of his request for recalculation, Mr. Oloo said that he did not have any.

53. Upon further cross-examination, Mr. Oloo stated that he knew that the value of his benefits that was transferred was inclusive of an additional interest of 4%p.a. On further cross-examination, he stated that on retirement in 2009, he instructed Alexander Forbes to transfer his balance to APA Insurance after being paid K. Shs. 1,032,536. Mr. Oloo further stated that he thereafter withdrew all his benefits from APA Insurance. He further stated that during transfer of his benefits from the 2nd Respondent to Alexander Forbes, he signed a transfer value form which had computation of figures and his signature was witnessed. He further stated that he did not bring before the tribunal any evidence of any complaint lodged with respect to miscalculation of the transferred value. He further confirmed that he understood the difference between the provident fund and the pension scheme.

54. On further cross-examination, Mr. Oloo stated that the amount paid by Alexander Forbes was his employee contribution while the payment by APA Insurance was his employer's contribution. When he was referred to the Tribunal's judgment of 2017 and asked whether he agreed with the Tribunal's finding that any person who retires at any age is entitled to $\frac{1}{480}^{\text{th}}$ of pensionable salary multiplied by number of

completed years of service, the witness agreed with Mr. Oraro that the judgment was not in accordance with the 2nd Respondent's Trust Deed and Rules, especially with respect to commencement of deferred pension from the age of normal retirement at 55 years.

55. When this Tribunal sought clarifications on whether Mr. Oloo had been given a choice to join Alexander Forbes Retirement Fund or not, Mr. Oloo stated that he willingly joined Alexander Forbes Retirement Fund. When the Tribunal posed the question to Mr. Oloo whether on the face of it without any evidence, there was a way the Tribunal would read any duress upon him by the 2nd Respondent from the face of the value transfer form he had signed, Mr. Oloo stated that it was difficult for the Tribunal to infer duress or intimidation from the letter without any supporting documents.

56. Mr. Oloo further stated that whereas the letter asked them to join, the decision to transfer his benefits had already been made. Mr. Oloo further stated that he was given two (2) days to decide on whether to join Alexander Forbes Retirement Fund or not. He maintained that he was given the details of how the transfer value was calculated. He further stated that he did not

have any problem with the payments made by Alexander Forbes and APA Insurance. He said that he only had issues with the amounts when he joined the scheme and the value that was transferred to Alexander Forbes in 2007. He claimed that the amount that was transferred by the scheme to Alexander Forbes was Kshs. 670,000. He however stated that the amount estimated by the Appellants' actuary together with the interest is the correct figure that was due and payable to him. He maintained that his dispute with the 2nd Respondent was with respect to what had happened before the transfer in 2007.

57. Finally, Mr. Oloo confirmed that his witness statement before the Tribunal was not signed. Upon re-examination by Mr. Amadi, Mr. Oloo reiterated that his dispute with the 2nd Respondent was about his benefits from the period of joining the scheme in 1997 to the time of transfer to Alexander Forbes Retirement Fund in December 2007. He also stated from 2007 to 2009 is not contentious. He finally stated that the correct amount of benefits due to him is K. Shs. 9,161,617 whereas he was paid Kshs. 1,032, 567, and the tribunal should factor the difference.

THE 1ST RESPONDENT'S CASE

58. The 1st Respondent filed a Statement of Defence dated 6th May 2025 together with a Statement of facts dated 12th May 2025. The Tribunal notes that the 1st Respondent did not file a witness statement. However, as gleaned from the 1st Respondent's Statement of Defence and Statement of Facts, the 1st Respondent's case is that it received complaints from over 600 members of Telposta Pension Scheme (a defined benefits scheme) and Telposta Provident Fund (a defined contribution scheme), alleging miscalculation and underpayment of the Appellants' benefits.

59. That further, acting under its statutory mandate in section 46 of the Retirement Benefits Act, the 1st Respondent requested and obtained documentation from the 2nd Respondent regarding the complaint. The 2nd Respondent provided calculation procedures prepared by the scheme's actuary, Alexander Forbes, and a counter-report produced by the Independent Actuarial Consultants (IAC) on behalf of the complainants.

60. The 1st Respondent thereafter conducted a review of the 600 members' records, including retirement, deaths, resignation and transfer cases. The review focused on four main

allegations: (a) miscalculation of retirement benefits due to incorrect actuarial factors; (b) wrongful payment of resignation benefits as return of contributions instead of deferred pensions; (c) reduction of transfer values upon movement to the Alexander Forbes Retirement Fund and (d) improper transfer of benefits before settling an alleged actuarial deficit of K. Shs 7.2 billion.

61. In its decision dated 3rd October 2012, the 1st Respondent found that the benefits of all the 600 complainants were correctly computed after examining the complaint, the scheme's actuary's report, the complainant's IAC report, the data of each of the complainants as provided by the scheme, the applicable provisions of the 2nd Respondent's Trust Deed and Rules as well as the prevailing legislation.

62. The 1st Respondent further noted that the 2nd Respondent provided data for 435 members of the Pension Scheme and 177 Provident Fund members. The 1st Respondent stated that the early and normal retirement payments were 67 members while the early retirement from deferred member status were 17 members. It also noted that 23 deferred pensioners had fully commuted their pension while 49 members had commuted

50% payment of their deferred pension. The 1st Respondent further noted that 279 active members had transferred their benefits to Alexander Forbes Retirement Fund.

63. The 1st Respondent further stated that the applicable rules provided for payment of pension at the rate of $\frac{1}{480}$ th of pensionable salary multiplied by complete months of pensionable service, subject to a maximum of four-fifths of pensionable salary, with commutation factors based on actuarial advice. The 1st Respondent stated further that the computations reviewed were consistent with the Trust Deed and Rules including provisions on resignation and deferred pension. As for the difference between the values produced in actuarial reports filed by IAC and Alexander Forbes Retirement Fund, the 1st Respondent attributed those disparities to IAC's use of higher pension increase and revaluation rates, different methodologies, and inconsistent members' data.

64. In its decision of 3rd October 2012, the 1st Respondent noted that there were discrepancies in the data used by Alexander Forbes Retirement Fund and IAC. That the data used by Alexander Forbes Retirement Fund was provided by the 2nd Respondent while the data used by IAC was provided by the

complainants' advocates. The 1st Respondent further found that the data provided by the 2nd Respondent was members' specific data which the members had provided at the time of joining employment.

65. With respect to the complaint by provident fund members that their accumulated contributions were not invested prior to 2001 occasioning loss of investment income which affected their final benefits, the 1st Respondent noted that from 1978 to 2004, the sponsor provided a guaranteed return of investment at the rate of 10% p.a. That as a result, the complaint that they lost out on investment income was not true.

66. Further, the 1st Respondent found that all the members' benefits had been correctly computed in line with the Trust Deeds, Rules, and prevailing legislation, save for two members who had been underpaid by K. Shs. 32,629.06 and K. Shs. 20,816.11 respectively. Consequently, the 1st Respondent found that the complainants' benefits were properly calculated and found no merit in the complaint except for the two aforesaid members. The 1st Respondent dismissed the complaint and directed the 2nd Respondent to recalculate, present them with their revised statements and pay the correct

benefits to those two members only. In conclusion, the 1st Respondent maintained that its decision of 3rd October 2012 was lawful, rational, and procedurally fair, and that the appeal against it is wholly unmerited. The 1st Respondent urged the Tribunal to dismiss the Appellants' appeal with costs to the Respondents.

THE 2ND RESPONDENT'S CASE

67. In response to the appeal, the 2nd Respondent filed a Statement of Defense dated 16th May 2013; a Statement of Facts dated 6th May 2013 as well as a Bundle of Documents dated 11th June 2025. The 2nd Respondent also relied on witness statements and oral testimonies of Peter K. Rotich, Sundeep K. Raichura and David Tafiyei Mureriwa.

68. During the hearing of the Appeal, Mr Sundeep Raichura testified and adopted his witness statements dated 6th March, 2025 and 15th April, 2025. On his part, Mr. Peter K. Rotich testified and adopted his statements dated 30th October 2015 and 6th March, 2025 while Mr. Mureriwa adopted his witness statement of 18th March, 2025.

69. Mr. Sandeep testified that the issues in dispute touch on both the provident fund and the pension scheme. He further provided to the Tribunal the distinction between the two. He stated that the pension scheme is a plan that operates on a defined benefit basis. He explained that a defined benefit arrangement is one in which the benefits of members are based on a formula which sets out how the benefits are contributed and calculated. Mr. Raichura further stated that the 2nd Respondent is a contributory plan from 1999. The members' contribution is set at 7.5% of their pensionable salaries while the balance of the cost of meeting the promised benefits to members is met by the employer. He further stated that the scheme guarantees the balance between the members and employer's contribution.

70. With respect to the provident fund, Mr. Raichura stated that the fund's main objective is to provide lump sum payments to members. It is a defined contribution arrangement. The witness stated that the benefits for the provident fund are based on accumulated members' and employer's contributions plus a return on their investments. Mr. Raichura further stated that the formula applicable for the calculation of benefits in the provident fund is different from that applied in the pension

scheme. He stated that the provident fund and the pension scheme are two distinctly different plans with different legal and institutional frameworks. For further clarity, Mr. Raichura stated that the provident fund and the pension scheme, each have their own respective Trust Deeds and Rules. He however stated that both plans are governed by the Retirement Benefits Act and are tax exempt.

71. Mr. Sundeep further stated that before 1999, the pension scheme operated under a 'pay as you go' basis, meaning that there was no members' contribution. He also testified that the assets of the founder and the assets of the scheme were co-mingled. He stated that on 1st July 1999, some assets of Kenya Posts and Telecommunication Corporation (KPTC), now defunct, were transferred to the 2nd Respondent under a vesting order. The vested assets were in form of property and cash, and, upon vesting, covered only 60% of the liabilities of the 2nd Respondent.

72. On the claim that the underfunding of the scheme affected members' benefits, Mr. Raichura stated that the underfunding had no impact on the members' benefits at all. He stated that the payment of benefits was as per the provisions of the

2nd Respondent's Trust Deed and Rules; without any reduction whatsoever, without taking into consideration the underfunding in the scheme and were always paid on time. Mr. Sundeep further testified that the actuarial professionals advised the trustees of the underfunding and advised them to provide for the underfunding with the knowledge and approval of the 1st Respondent.

73. Mr. Raichura further stated that sometimes in the year 2004, the 2nd Respondent submitted a statutory remedial plan to the 1st Respondent setting out the steps it intended to take to address the underfunding in the scheme. Further, the witness stated that the 2nd Respondent engaged the employer and the Government of Kenya to address the underfunding. Due to the privatization process that the sponsor (Telkom Kenya) was going through, the sponsor notified the 2nd Respondent of its intention to discontinue contributions and required the scheme to close future accrual of benefits and that the future benefits to be provided on a defined contribution basis.

74. Mr. Raichura further testified that before the conversion of the scheme to a defined contribution arrangement, there was need for an actuarial valuation of the scheme prior to transferring the

members' benefits to the new defined contribution arrangement. He stated that in 2007, an actuarial valuation was conducted which determined that there was an actuarial deficit of Kshs. 7.2 billion. However, the approved scheme provided for a 3%p.a. increase with respect to pensions-in-payment and 4% p.a. revaluation for deferred pensions. He further stated that from 2007, the contributions by members were to be based on consolidated salaries. He further stated that as a result of the enhancement of members' benefits, the deficit in the scheme escalated to K. Shs. 9.061 billion. The witness emphasized that the increase of 4% p.a. during deferment and 3% p.a. during payment significantly enhanced the benefits and was later footed by the founder and government of Kenya.

75. On the issue of funding the scheme, Mr. Raichura testified that the deficit of K. Shs. 9.061 billion was fully financed by the Government of Kenya through a cash injection of K. Shs. 5 billion which was transferred from the National Treasury to Telkom Kenya and then transferred to the 2nd Respondent's account. He further stated that the deficit was also funded through three (3) treasury bonds each valued at K. Shs. 1 billion whose maturity period was five (5) years. These treasury bonds were transferred directly to the 2nd Respondent. The

balance of K. Shs. 1 billion was financed through cash transfer from the Provident Fund to the Pension scheme. The witness referred the Tribunal to documents appearing on pages 154, 155, 156 and 159 of the 2nd Respondent's bundle of documents to illustrate how those payments to cover the said deficit had been done.

76. Mr. Sundeep maintained that at all material times, members' benefits were always paid in accordance with the 2nd Respondent's Trust Deed and Rules and those payments were not dependent or affected by the status of funding of the scheme. Related to the issue of funding, Mr. Raichura stated that had the proposed remedial plan not been put in place and approved, and the deficit settled, the resulting deficit would have triggered the winding up of the scheme and the actuarial deficit would have stood at K. Shs. 5.6 billion.

77. In responding to the Appellants' allegations that the 2nd Respondent used inaccurate data during both processing of their benefits and determination of transfer values from the scheme to Alexander Forbes Retirement Fund, Mr. Raichura testified that at all times, the 2nd Respondent used the true records and data of all members as provided to the 2nd

Respondent by the sponsor. He stated that from establishment of the scheme in 1997 to 2005, the scheme used physical records from the employer's data. He further stated that whenever a member left employment, the physical file of the respective member was retrieved from the employer and the benefits calculated using the data in the file. He however testified that the turning point happened in 2005 when the trustees of the 2nd Respondent retrieved all physical files from the employer and computerized all records of all members. Mr. Raichura stated therefore, that at all times, the calculation of members' benefits by the 2nd Respondent was based on accurate data from the employer's employment records.

78. In response to the allegations that the provident fund members' benefits were underpaid due to lack of proper investment policies by the 2nd Respondent, Mr. Raichura stated that the provident fund members' benefits were at all times based on the Provident Fund's Trust Deed and Rules. He explained further that up to 1999, the 2nd Respondent's assets were co-mingled with KPTC's (founder) assets. Mr. Sundeep further stated that despite the co-mingling of assets of the provident fund with the founders' assets, the members were paid their benefits plus a guaranteed interest at 10% p.a. He

however stated that this guarantee of interest at 10% p.a lasted up to 2004.

79. Further, Mr. Raichura stated that between 1999 and 2004, the provident fund's assets were still part of the assets of the 2nd Respondent. During this period, the trustees continued to apply a 10% p.a. interest on the provident fund members' benefits. He further testified that even when contributions were delayed, the interest of 10% p.a. was still paid to the members, and as such, no loss was suffered by the members of the provident fund. He emphasized that the trustees have always prioritized the interest of the members.

80. Regarding the Appellants' claim that the provident fund members were subjected to double taxation, Mr. Sundeep testified that until 1990, the provident fund did not enjoy the same treatment as a registered pension scheme. The contribution, investment and pay outs under the provident fund were subject to taxation. The witness further stated that given the lower grades of the provident fund members and consequently low salaries of those members, their contributions were within tax allowable limits. In summary, the witness stated that all the 177 provident fund members were paid their

benefits without being subjected to double taxation or any taxation at all except three (3) members whose income was above the tax-deductible limit. Accordingly, Mr. Raichura stated that the Appellants' claim that provident fund members were irregularly subjected to double taxation was not correct.

81. In response to the allegation that the 2nd Respondent did not properly compute the Appellants' pension benefits, Mr. Raichura testified that the Trust Deed and Rules of the 2nd Respondent (both 1997 and 2004) clearly set out how the benefits should be computed and determined. He explained that out of the 600 Appellants, 177 are members of the provident fund while 435 are members of the pension scheme.

82. Mr. Raichura further stated that out of the 435 pension scheme members, only 9 had attained the normal retirement age of 55. He further stated that another batch of 58 pension scheme members took early retirement having attained the age 50 but before attaining 55 years while 89 left before attaining age 50. Mr. Raichura further stated that 279 members transferred their benefits from the scheme to Alexander Forbes Retirement Fund. Mr. Raichura maintained that the computation of the benefits for the above stated categories of

members was done in accordance with applicable provisions of the 2nd Respondents' Trust Deed and Rules.

83. In support of his testimony, Mr. Raichura referred this Tribunal to sample calculations of the Appellants' benefits that were exhibited on pages 283 and 291 of the 2nd Respondent's bundle of documents. He reiterated that for Appellants who retired at normal retirement age of 55 years, such as Eunice Langat , their benefits were computed in accordance with rule 8 (c) of the 2004 Trust Deed and Rules. For Eunice Langat for example, her pension benefits were determined using the formula $\frac{1}{480}^{\text{th}}$ of her final pensionable salary multiplied by completed months of pensionable service. Mr. Raichura provided the tribunal with figures of calculations of Ms. Eunice Langat.

84. Mr. Raichura further testified, that, for the 58 members who left before normal retirement age with the consent of the employer (between age 50 and before 55 years), a sample calculation of their benefits was exhibited on page 291 of the 2nd Respondent's bundle which was computed in accordance with rule 10 (d) of the 1997 Trust Deed and Rules or rule 8 (d) of the 2004 Trust Deed and Rules. He further testified that with

respect to the 89 members who left service before attaining age 50, rule 8 (g) of the 2004 Trust Deed and Rules is explicit that they are entitled to deferred pension commencing from the normal retirement age of 55 years equal to $\frac{1}{480^{\text{th}}}$ of the final pensionable salary multiplied by the total completed months of pensionable service. The witness further stated that all the 89 members in that category opted to take a cash lump sum instead of deferred pension in accordance with rule 13 (b) of the 2004 Trust Deed and Rules and were paid all their benefits.

85. Mr. Raichura further stated that where a member opts to take cash in lieu of deferred pension, the trustees in consultation with the actuary should determine the cash equivalent of their deferred pension, being the present value of the deferred benefits. Mr. Raichura further explained that while determining the cash equivalent of members' deferred benefits, the actuary takes into account factors such as life expectancy and future interest rates among other actuarial factors. The witness explained that discounting is the determination of the present value of the future deferred benefits. The witness further stated that the scheme Trust Deed and Rules provided that if a member leaves service, he/she is either defers their

pension until normal retirement age or opts to be paid a cash equivalent in lieu of deferred pension.

86. Mr. Raichura further stated that prior to 2005, there were no restrictions barring members from accessing all pension benefits in a one-off lump sum payment. He explained that through Legal Notice No. 8 of June 2005, payment of cash lump sum was restricted to members' contributions only with the balance being deferred to normal retirement age. He further stated that through a Legal Notice of 2007, early leaver's access was restricted to a $\frac{1}{3}^{\text{rd}}$ of the value of the deferred pension as determined by an actuary. Mr. Raichura further stated that through a Legal Notice of 2010, access to cash lump sum was increased to 50% of the value of the accrued deferred pension as calculated by an actuary.

87. In responding to the issue of differences in computation of pension arising from the different reports filed before the Tribunal, Mr. Raichura explained that the application of discounting factors in determination of members' pension benefits will definitely result in different values of cash equivalent for deferred pension. He stated that in the IAC report which was relied on by the Appellants when they

presented their claim before the 1st Respondent, the data used by the actuary was incorrect. He stated that the Appellants' actuary calculated pension benefits for 177 provident fund members as if they were pension scheme members. He emphasized that these retirement plans use different Trust Deeds and Rules to determine their respective members pension benefits. Mr. Raichura further stated that the IAC report did not distinguish the different retirement ages i.e. normal retirement at age 55, early retirement between age 50 and before 55 and retirement before age 50 as anticipated in the Trust Deed and Rules.

88. Mr. Raichura further stated that the actuary in the IAC report assumed that both pension in payment and deferred pension increases at 6% p.a. which was not provided for in the Trust Deed and Rules of the 2nd Respondent. Mr. Raichura further stated that from the assumptions used in the IAC computations, his conclusion was that the Appellants' actuary was taking instructions rather than making an independent judgement on the facts and figures before him. Mr. Raichura pointed out to the Tribunal that in their report, IAC expressly admitted that they used assumptions provided to them by the Appellants' advocates. Mr. Raichura concluded that as a result

of the use of those wrong assumptions in the IAC report, the computations of the Appellants' benefits was wrong.

89. In response to the issues raised by the Appellants' actuary in the two NBC reports, Mr. Raichura stated that the NBC actuary indeed agreed with the correct methodology used to calculate pension benefits by the 2nd Respondent. He also stated that Mr. Oketch who authored the NBC reports acknowledged that the 2nd Respondent's approach was reasonable and that the determination of cash equivalent of the deferred pension benefits in the event of early retirement was correct. The witness further stated that the Appellants' actuary, Mr. Oketch, acknowledged in his report that the 2nd Respondent's report used the correct approach, methodology and applicable discounting factors such as life expectancy.

90. With respect to Mr. Oketch's claims that the Trust Deed and Rules were not financially sound, Mr. Raichura stated that those were sensational statement that were without basis. He stated that notwithstanding that Mr. Oketch expressly acknowledging that the methodology and the approach used by the 2nd Respondent was correct, the Appellants' actuary went off on a tangent and replicated the wrong calculations

contained in the IAC report, which had been previously filed by the Appellants before the 1st Respondent. Mr. Raichura further stated that the NBC reports were factually incorrect having been prepared using wrong assumptions and incorrect data contrary to the Trust Deed and Rules of the 2nd Respondent.

91. In response to the Appellants' allegations in the amended grounds of appeal that the 2nd Respondent illegally transferred members' pension benefits to a third party, Alexander Forbes Retirement Fund, Mr. Raichura stated that the Trust Deed and Rules grant the 2nd Respondent powers to transfer any retirement benefits to any registered scheme such as Alexander Forbes Retirement Fund. In conclusion, Mr. Raichura stated that if the computation indicated by the Appellants' actuary in the NBC reports were to be upheld by this Tribunal, the 2nd Respondent will face imminent collapse since the assets of the scheme aggregate to approximately K. Shs. 9 billion which will not be sufficient to cover K. Shs. 18 billion claimed in the Appellants' actuarial reports. He further stated that such action will trigger the winding up of the 2nd Respondent which will negatively impact all the members of the scheme.

92. Mr. Raichura was cross-examined by learned counsel for the other parties. In response to cross-examination by Ms. Atieno for the 556 Appellants, Mr. Raichura maintained that the amendments to the Trust Deed and Rules did not prejudice members at any given time. He stated that these amendments were necessary during that time and they were in conformity with Regulation 16 of the Retirement Benefits (Occupational Retirement Benefits Scheme) Regulations. On the issue of retrenchment, Mr. Raichura stated that he was not conversant with the concepts of retrenchment and termination of employment on grounds of public interest as anticipated in employment law. He further reiterated that for Appellants who left before attaining age 50, their benefits were to be paid as deferred pension upon attaining normal retirement age of 55 years. These members were also entitled to an option of taking cash lump sum as provided for in the 2nd Respondent's Trust Deed and Rules.

93. Upon further cross-examination, Mr. Raichura also stated that the members who retired between age 50 and before 55 could do so with the consent of the employer. He further stated that the 2nd Respondent's Trust Deed and Rules provided for how pension benefits for such members would be calculated.

Upon being referred to pension benefits calculations for a Mr. Daniel Kipyegon Ruto and Geoffrey Kipkurui Sigei which were exhibited on page 282 of the Appellants' bundle of documents, the witness stated that he had not checked whether these members were provident fund or pension scheme members.

94. When cross-examined by Mr. Amadi, Mr. Raichura stated that the actuarial deficit of K. Shs. 9 billion was fully funded prior to the transfer of retirement benefits to Alexander Forbes Retirement Fund. When pressed to give a distinction between the terms retrenchment and restructuring, the witness stated that the restructuring meant effecting changes in a company while retrenchment meant the exit of an employee that is initiated by the employer. He however stated that the exit by way of retrenchment is not defined in the trust deeds and rules.

95. Mr. Raichura further testified that in computing the Appellants' benefits, he used the data obtained from the 2nd Respondent, the schemes' Trust Deed and Rules as well as the relevant prevailing law. When tasked to explain the computation of benefits for 19 Appellants represented by Mr. Amadi, Mr. Raichura stated that he did know if all 19 members were retrenched. When referred to Ruparella's actuarial report

for the 19 members, he testified that he did not check the calculations since the report was filed on 10th June 2025, long after he had filed his report and witness statement before the Tribunal. On computations of members' benefits for transfer to Alexander Forbes Retirement Fund, Mr. Raichura stated that although the actuarial report was not filed, the calculations were done in accordance with Trust Deed and Rules and members were advised accordingly.

96. Mr. Raichura was also cross-examined by Ms. Kosgei, learned counsel for 1st Respondent. On the NBC reports, Mr. Raichura stated that the reports by NBC were wrong since they had used wrong actuarial assumptions, incorrect methodology and approach in computation, they failed to consider pension benefits already paid to pensioners, and they factored in life expectancy which was not provided for in the rules. The witness further stated that unlike in the reports provided by the Appellants' actuaries, he used specific provisions of the Trust Deed and Rules of the 2nd Respondent and accurate data provided by the 2nd Respondent's trustees in his calculation. He concluded that the claim before the tribunal was retirement benefits dispute and not an employment dispute. He also reiterated that the 1st Respondent's decision was correct.

97. The third witness called before the Tribunal on behalf of the 2nd Respondent was a Mr. David Tafireyi Mureriwa. Mr. Mureriwa adopted his witness statement sworn on 18th March, 2025. He also stated that the matters contained in his witness statement were correct and accurate and urged the Tribunal to use his testimony in support of the 2nd Respondent's case.

98. Upon cross-examination by Ms. Atieno, counsel for 556 Appellants, Mr. Mureriwa stated that he prepared his witness statement using the members' data provided by the scheme, the applicable Trust Deed and Rules as well as the RBA Act, Regulations and the legal notices. The witness also confirmed that he had examined and referenced the actuarial reports by both the Alexander Forbes Report of 2007 and the NBC report while preparing his witness statement. On Appellants' data, Mr. Mureriwa stated that the 2nd Respondent provided him with accurate members' data. When asked about reasons why the Appellants left employment, the witness stated that the Trust Deed and Rules provide for modes of exit. He confirmed that he was aware that there are some members who left service at the age of 55 years, some at the age between age 50 and before attaining normal retirement age of 55 while others left

before attaining age 50. Further, with respect to Appellants who left service before attaining the age of 50 as a result of retrenchment, Mr. Mureriwa stated that such members' pension benefits were calculated in accordance with the Trust Deed and Rules, and that the computation of their benefits was different from that of those members who retired between age 50 and below 55 and those who retired normally at the age of 55.

99. Mr. Mureriwa was also cross-examined by Mr. Amadi, counsel for 45 Appellants. He testified that although his company was not registered in Kenya and that he was not registered by the 1st Respondent as an actuary in Kenya, he was retained by the 2nd Respondent to testify before the Tribunal as an expert witness. On whether he had read the Appellant's actuarial report dated 10th June 2025 by Ruparelia Consultants Limited, the witness stated that he did not comment about that report in his testimony since the Appellants' report was filed after he had prepared his witness statement. With respect to the applicable Trust Deed and Rules and the international standards referred in his testimony, Mr. Mureriwa stated the Trust Deed and Rules of 1997 and 2004 were applicable and that international standards applicable in

determination of pension benefits by actuarial practitioners are well known within the industry.

100. On being cross-examined by Ms. Kosgei, counsel for the 1st Respondent, Mr. Mureriwa confirmed that the 1st Respondent's decision with respect to matters in dispute in the present Appeal was correct. When he was further queried by the Tribunal, Mr. Mureriwa stated that he was advised that the issues with respect to the provident fund were resolved and the dispute before the tribunal was with respect to pension benefits for pension scheme members only. On sample calculations, Mr. Mureriwa referred the Tribunal to calculations contained in his witness statement. With regard to deferred pension, Mr. Mureriwa stated that the retirement benefits are paid to a member who leaves before attaining the age 50 years and having completed at least 3 years of pensionable service, and the benefits are payable to the member when he attains the normal retirement age of 55.

101. The last witness called by the 2nd Respondent was a Mr. Peter K. Rotich. Mr. Rotich testified and adopted his two witness statements dated 30th October 2015 and 6th March 2025 respectively. He briefly stated that his roles as the

Administrator and Trust Secretary to the Board of Trustees of the 2nd Respondent include coordinating the functions of the scheme and the fund to ensure the execution of statutory and fiduciary obligations by the Board of Trustees.

102. With respect to the matters in dispute before this Tribunal, Mr. Rotich stated that the 2nd Respondent deals with both the pension scheme and the provident fund. He further stated that joining either the scheme or the fund depends on how the member is hired. With regard to the computation and payment of members' benefits, the witness stated that the Trust Deed and Rules apply differently for the scheme and the fund members. For the pension scheme, Mr. Rotich stated the benefits are computed at the normal retirement date of 55 years using a formula of $1/480^{\text{th}}$ of final pensionable salary multiplied by complete months of pensionable service. However, he further stated that the provident fund is a defined contribution arrangement. The benefits payable to members in the fund is the aggregate of contribution of both the member and employer over the years of service plus the investment yield on those contributions.

103. With respect to the contribution, Mr. Rotich testified that in a pension scheme, a percentage of basic salary is deducted and the employer contributes the balance which are remitted to the trustees by the employer. He further stated that the contribution rate is spelt out in the Trust Deed and Rules. With respect to the Appellants' actuarial report, the witness pointed out that some members, like No.PF33981-Beatrice Njeri Ngugi, were indicated as members of the pension scheme yet they belong to the provident fund. He further stated that members of the provident fund cannot be paid a monthly pension; being a defined contribution arrangement. He explained that such members are entitled to a lump sum payment comprising the members' and employers' contributions and investment yield as defined in the Trust Deed and Rules of the fund.

104. With regard to the computations of the benefits produced before the Tribunal by the Appellants, Mr Rotich stated that the Appellants' actuaries used incorrect data. He further stated that there were errors on the dates of births, dates of employment, dates of leaving service and last pensionable salaries used in Appellants' calculations. Mr. Rotich further stated that the trustee's records were obtained from the Appellants' employer. He further testified that during hiring, the

employee's data was kept in form PD1 while the date of employment is contained in PB30 (for documentation of personal raw data of the Appellants).

105. Mr. Rotich further stated that whenever an employee exited employment, the employer provides the trustees with PD1 and PB30 and the letter of leaving or exiting service. He also mentioned that PD1 has the date of birth. The witness further stated that PB30 has the date when the employee was hired by the employer. He stated that PB30 is an internal communication from Human Resource Department of the employer to the Department of Finance asking that the employee should be paid salary from a certain date, which is the correct date of employment. He stated that this information is captured in the employee's pension claim register. He further explained that PD1 and PB30 are documents which are filled by the employee and employer respectively at the time of joining service.

106. In response to the Appellants' allegations that there was lack of communication between the trustees and the appellants, Mr. Rotich stated that members were constantly given their statements. He further stated that they were also supplied with

all necessary information and advised to raise any concerns that they may have with respect to that information. The witness further stated that members were also invited to attend Annual General Meetings (AGM), and in all cases, the notices and agenda were of those meetings were communicated to members as per the law. Mr. Rotich further stated that at the time of exiting service, the employee is advised to visit the trustee's office where he/she will be taken through the calculation manual as well as the file from the employer. He stated that the employer's file contained the raw information like the date of birth which is in PD1, date of employment as per the PB30 and the last pensionable salary.

107. Mr. Rotich maintained that at all times, members received explanations from the 2nd Respondent, on how their benefits were calculated. He further stated that some members would visit the trustees' offices but some would not go to the office. In those cases where members do not visit the trustees' offices, the members would collect a pension commutation form from the employer's human resource department, which he would file and sign indicating his benefits should be paid.

108. Mr. Rotich further stated that in the commutation form, the member would have the option of commuting his entire benefits, or taking a partial lump sum and committing the rest to monthly pension. He further stated that in that commutation form, the member would also provide the bank account details of where his lump sum or monthly pension would be paid. Mr. Rotich stated that once the member had signed the commutation form, the employer would forward the documents to the 2nd Respondent for processing. Mr. Rotich further testified that thereafter, the member is notified that his benefits have been processed and their benefits paid to the bank account indicated in the members' pension commutation form using his last known contact address. Mr. Rotich also stated that the 2nd Respondent always endeavored to encourage its members to attend AGM and to update the beneficiaries and their addresses.

109. In his further testimony, Mr. Rotich referred the Tribunal to exhibits on pages 167 to 176 of the 2nd Respondent's bundle of documents. He stated that these documents are usually provided by the employer's human resource (HR) department and they including PB30 which was exhibited on page 176. He stated that the PB30 form contains instructions from HR

department of the employer communicating to the finance department of the said employer to start paying a member a salary from a particular date.

110. Mr. Rotich referred to a commutation form exhibited on pages 170 to 173 of the 2nd Respondent's bundle of documents as an example of an actual pension commutation form for one of the Appellants in present Appeal. The witness explained that in the said pension commutation form, the member had clearly indicated his intention to commute a portion of his benefits to a cash lump payment and the residual amount to be paid on a monthly basis. Mr. Rotich further stated that in the form referred to the Tribunal as an example, the witness also indicated the beneficiaries as his spouse and children.

111. Mr. Rotich also referred the Tribunal to page 177 of the 2nd Respondent's bundle of documents containing a pension contribution schedule that he explained to be the source of the final pensionable salary of the member together with the date of the member's exit from service. The witness further pointed out page 168 of the 2nd Respondent's bundle which contains information on the monthly pensionable salary, the date of birth, the date of employment and final pensionable salary. Mr.

Rotich further referred the tribunal to the form at page 187 to 188 of the 2nd Respondent's bundle. He stated that the member had opted to commute part of his pension to a cash lump sum and a monthly pension both of which were to be paid through Barclays Bank.

112. With respect to the allegations of miscalculation of the Appellants' pension benefits, Mr. Rotich explained that calculations in the Appellants' actuarial reports did not consider the members' choice for commutations and payment of partial lump sum. Mr. Rotich stated that the members had been misguided by miscalculated benefits which did not follow the provisions of the Trust Deed and Rules. The witness gave an example of one of the members being, PF19618-Nancy Jeruto Sigilai, whose date of birth was indicated as 27th October 1963 yet she was born in 1944. He further stated that Nancy's employment date was indicated as 1982 and the date of leaving service as 24th April 2009, yet in the raw data as provided in the employer's record, she was employed on 16th January 1965 and left employment on 4th April 1994. Mr. Rotich further stated as at the date of hearing of the Appeal, the said Nancy was earning a monthly pension of K. Shs. 5,000, but

she had been misled by the Appellants' actuary to believe that she is supposed to earn a monthly pension of K. Shs. 9,000.

113. In response to the allegations by Mr. George Odhiambo Oloo that he was coerced to sign forms during the transfer of benefits from the 2nd Respondent to Alexander Forbes Retirement Fund, Mr. Rotich stated that no member was coerced by the 2nd Respondent or its employees to sign any form. Mr. Rotich showed the tribunal a copy of an option to transfer form, which he stated was evidence that the members were informed about the new arrangement before they joined it.

114. Mr. Rotich further stated that in the new defined contribution arrangement, the transfer values had been enhanced and were higher than the cash equivalent accrued to members under the old arrangement. Mr. Rotich further stated that some of the members were not getting information or explanation concerning the affairs of the scheme and the fund because they failed to attend the annual general meetings. On the issue of underfunding, Mr. Rotich stated that the trustees had the option to exercise the right to wind up the scheme, but in order to protect the interest of members, the trustees of the 2nd

Respondent secured full funding of the scheme in 2007. He stated that despite the underfunding, the pensioners were always paid their pension benefits in full, on time and without taking into account the underfunding.

115. On cross-examination, Mr. Rotich stated that he was not aware that retrenchment is a form of termination. He further stated that not all appellants were retrenched as claimed. He explained that some members left employment through voluntary resignation while others left on public interest. He further testified that some members were transferred while others took early retirement with the consent of the employer. Mr. Rotich stated that some members retired at the normal retirement age of 55.

116. When further cross-examined by Mr. Amadi on some discrepancies regarding Geoffrey Kipkurui Sigei, Beatrice Wamboi Kaberia and Elizabeth Chebok, Mr. Rotich stated that he was not in a position to give comparisons with respect to the data at that point. When he was further asked to state whether he was aware that members were fully paid, Mr. Rotich stated that depending on the option that the members had chosen, some members took their pension in full while others left their

full or partial benefits with the scheme. He further stated that it was difficult to tell those who had taken their benefits in full or partially and those who had not from the bundles before the tribunal during cross-examination. With respect to the salary which was applied in computation, Mr. Rotich stated that the basic salary was applied during transfer while consolidated salaries were applied effective November 2009.

117. Mr. Rotich was also cross-examined by Ms. Kosgei for the 1st Respondent. He testified that only one set of raw data for every member was received from the employer. He further stated that one of the two sets of data contained in the 2nd Respondent's bundle of documents which was coloured blue was the 2nd Respondent's data and was the correct data for the Appellants and the other set of data coloured yellow was data presented by the Appellants and was incorrect data.

118. Upon re-examination by Ms. Noella for the 2nd Respondent, Mr. Rotich stated that the 2nd Respondent's Trust Deed and Rules do not refer to retrenchment and that retrenchment and termination on public interest are not the same. He further stated that the Trust Deed and Rules of 1997 had cross-referencing errors. The witness stated that the provident fund

members who had attained full retirement age were paid in full. He also stated that the 2nd Respondent did not present two sets of documents. On the issue of salary applied during restructuring, the witness stated that the basic salary was applied to the enhanced transfer values. He concluded by stating that effective December 2007, the members' contributions were based on consolidated salary.

SUBMISSIONS BY THE PARTIES

119. After the close of hearing, the parties were directed to file and exchange their respective written submissions. The Appellants filed two sets of submissions. The 556 Appellants represented by the law firm of Koceyo & Company Advocates filed submissions dated 8th August 2025 while Amadi & Amadi Advocates for the 45 appellants filed written submissions dated 15th August 2025. In their submissions, the 556 Appellants submitted on two issues only, namely:-

- i. whether the appellants benefits were paid in accordance with the applicable Trust Deed and Rules, and

- ii. whether the computation of the benefits was the duty of the Appellants.

120. On their part, the firm of Amadi & Amadi Advocates for the 45 Appellants framed the following issues for determination:-

- i. whether the appellants benefits were paid in accordance with the applicable Trust Deed and Rules,
- ii. whether the computation of the benefits was the duty of the Appellants,
- iii. whether the execution of the discharge forms by the appellants absolves the 2nd Respondent from liability, and
- iv. whether the retrenchment impacted/affected the mode of computation of the appellants' benefits.

121. The 1st Respondent filed written submissions dated 28th August 2025 while the 2nd Respondent's submissions are dated 21st August 2025. The 1st Respondent framed and submitted on two issues, namely:-

- i. whether the 1st Respondent acted within its statutory mandate under section 46 of the Retirement Benefits Act, and

- ii. whether the computation of members' benefits under the Telposta Pension Scheme and Provident Fund was correctly done in accordance with the scheme rules and applicable law.

122. In their submissions, the 2nd Respondent framed the following issues: -

- i. whether the Appellants' pension benefits were miscalculated, unpaid and/or underpaid?,
- ii. whether the scheme experienced underfunding, double taxation, data shortcomings and investment issues, and if so, whether these negatively impacted the Appellants' pension benefits?
- iii. whether the 2nd Respondent failed to disclose material information to the appellants?
- iv. whether the transfer to Alexander Forbes Retirement Fund was illegal and/or adversely affected the rights and benefits of the Appellants?

ISSUES FOR DETERMINATION

123. After hearing the Appeal herein, and having carefully considered the contents of the pleadings filed by all parties, including but not limited to; the 556 Appellants' Amended Memorandum of Appeal dated 11th March 2025, the 556

Appellants' Statement of Facts dated 17th October 2012, the 556 Appellants' List & Bundle of Documents dated 16th May 2025, a witness statement of Mr. James Jeremiah Nyokangi dated 19th May 2025 and the 556 Appellants' written submissions dated 8th August 2025 all filed by the firm of Koceyo & Company Advocates for the 556 Appellants; a Witness Statement of Mr. Darshan Ruparella dated 10th June 2025, an Actuarial report of Ruparellia Consultants Limited dated 10th June 2025, an undated witness statement of Mr. George Odhiambo Oloo, and written submissions dated 15th August 2025 all filed by the firm of Amadi & Amadi Advocates for the 45 Appellants; the 1st Respondent's Statement of Defense dated 6th May 2025, Statement of facts dated 12th May 2025, and written submissions dated 28th August 2025 all filed by Ms. Gloria Kosgei, Advocate for the 1st Respondent; the 2nd Respondent's Statement of Defense dated 16th May 2013, the 2nd Respondent's Statement of Facts dated 6th May 2013, the 2nd Respondent's Bundle of Documents dated 11th June 2025, a witness statement of Mr. Sundeep K. Raichura dated 6th March 2025, a further witness statement of Mr. Sundeep K. Raichura dated 15th April 2025, a witness statement of Mr. Peter K. Rotich dated 30th October 2015, a Supplementary Witness Statement of Mr. Peter K.

Rotich dated 6th March 2025, a witness statement of Mr. David Tiferiye Mureriwa dated 18th March 2025 and the 2nd Respondents' written submissions dated 21st August 2025 all filed by the firm of Oraro & Company Advocates for the 2nd Respondent.

124. After the close of pleadings, the Tribunal heard the oral testimonies of parties' respective witnesses. The 1st Respondent did not file any witness statement and did not call any witness during the hearing of this Appeal. Mr. James Jeremiah Nyokangi testified on behalf of the 556 Appellants. Mr. Darshan Ruparella and Mr. George Odhiambo Oloo testified on behalf of the 45 Appellants. On behalf of the 2nd Respondent, the Tribunal heard the testimonies of Mr. Sundeep K. Raichura, Mr. Peter K. Rotich and Mr. David Mureriwa.

125. After the close of the respective parties' cases, the Tribunal with the consent of the parties, directed the parties to file written submissions in support of their respective cases. On 22nd of August 2025, all parties appeared before the Tribunal and by consent, all parties agreed that the Appeal before this Tribunal be disposed of without parties highlighting their

respective submissions. Consequently, the Tribunal, with consent of all parties directed that the Tribunal's judgment in this Appeal be delivered on 2nd October 2025.

126. Having carefully considered the pleadings, evidence, testimonies of witnesses for the various parties, rival submissions filed by all parties, and all relevant laws applicable to the dispute before us, this Tribunal frames the following issues for determination of the present Appeal.

- A. Whether the 1st Respondent erred in concluding that the 2nd Respondent computed and paid the Appellants' benefits in accordance with the 2nd Respondent's Trust Deed and Rules and all applicable laws.
- B. Whether the 1st Respondent decision, the subject matter of this Appeal, is tainted with illegality, arbitrariness, misdirection, mistake of law and facts, indecisiveness and breach of its statutory obligations.
- C. Who shall bear the costs of this Appeal.

ANALYSIS

127. This Tribunal notes that the dispute the subject matter of this Appeal before us has travelled a long judicial distance to come to this judgment. In that journey, parties have raised many

arguments and filed many documents initially before the 1st Respondent, before this Tribunal and higher courts resting with the Court of Appeal which referred this dispute to the Tribunal for re-hearing in its judgment dated and delivered on 20th December 2024.

128. Having considered all pleadings, evidence and submissions filed by all parties with respect to the dispute before us, this Tribunal finds that the main controversy for determination revolves around the question of computation and payment of the Appellants' retirement benefits by the 2nd Respondent. This Tribunal also notes that in determining issue number (A) as framed by the Tribunal, it is of utmost importance to determine how the controversial practice of discounting was applied or ought to have been applied by the actuaries with respect to calculation of the Appellants pension benefits which is the subject matter of this Appeal. This Tribunal shall now proceed to consider each of the framed issues hereinabove in turn in the following paragraphs as follows.

A. Whether the 1st Respondent erred in concluding that the 2nd Respondent computed and paid the Appellants' benefits in accordance with the 2nd

Respondent's Trust Deed and Rules and all applicable laws

129. This Tribunal is established under section 47 of the Retirement Benefits Act Cap 197 of the Laws of Kenya (the RBA Act). Section 48 of the RBA Act vests this Tribunal with jurisdiction to entertain and determine appeals arising from the decisions of the Chief Executive Officer of the 1st Respondent under section 48 (1) and to hear and determine disputes arising from decisions of the 1st Respondent under section 48 (2).

130. The Appellants herein lodged a complaint against the 2nd Respondent before the 1st Respondent under section 46 of the RBA Act on 9th September 2011. The 1st Respondent made a decision on the complaint which it communicated to the complainants' Advocates vide a letter dated 3rd October 2012 together with aforesaid, the 1st Respondent annexed a report detailing its decision with respect to the complaint of more than 600 deferred members and pensioners of the 2nd Respondent.

131. In its decision, the 1st Respondent dismissed the complaint filed by the Appellants and stated that it did not find merit in the

Appellants' complaint except for two members for whom the 1st Respondent ordered the 2nd Respondent to calculate their benefits, present them with their revised statement and pay them accordingly. Being dissatisfied with the 1st Respondents' decision, the Appellants' filed the present appeal. This Tribunal, in keeping the recurring sub-issues as delineated by the 1st Respondent in its decision will proceed to deal with each of those sub-issues arising under Issue No. A framed hereinabove as follows.

a) Computation of Appellants' retirement benefits

132. Telposta Pension Scheme, the 2nd Respondent herein is a creature of the Trust Deed and Rules dated 1st July 1997. It is established as a defined benefit pension scheme. The calculation and/or computation of the pension benefits of the members of the 2nd Respondent are principally based on the provisions of the Trust Deed and Rules of the scheme as may be modified by relevant changes in legislation.

133. This Tribunal finds that the applicable Trust Deed and Rules with respect to the Appeal before us are the Trust Deed and Rules dated 1st July 1997, 3rd December 2004, 20th December

2007 and 5th August 2010, the Income Tax Act Cap 470 of the Laws of Kenya, the RBA Act and Regulations made thereunder, the Legal Notices No. 56 & 57 of 8th June 2005, the Legal No. 93 of 2007 and Legal Notice No. 165 of 2010 among other relevant provisions of law.

Computation of benefits for Provident Fund Members

134. In the present Appeal, 177 out of the 600 Appellants were members of the Provident Fund while 435 members belonged to the Pension Scheme. During hearing, the Appellants' witnesses, James Jeremiah Nyokangi and Darshan Ruparelia, confirmed that all the issues regarding the Provident Fund members, including the computation and payment of their retirement benefits were resolved. Considering the foregoing, this Tribunal shall restrict the issue in this Appeal to issues that relate only to Appellants who were or are members of the pension scheme.

Computation of benefits for members retiring at normal at Normal Retirement Age (NRA)

135. The definition of normal retirement date as provided in the 1997, 2004, and 2007 Trust Deed and Rules of the 2nd Respondent is the 55th birthday of a member and if the date of birth is not known, it is provided as the first day of January of the 55th birth year of such member.
136. In our analysis we have taken into account actuarial reports of the Appellants and the Respondents and the Appellants represented by Koceyo & Company Advocates produced a report prepared by Robert Okech as a director of NBC dated 2016 and another one dated the same date but not signed .
137. Mr. Oketch states that the basis of their report is out of the information provided by Koceyo & Company Advocates for purposes of review and has listed the same in pages 3 to 4 of his report.
138. The Appellants represented by Amadi also produced an actuarial report prepared by Darshan Ruparelia dated 10th June 2025.
139. Mr. Robert Oketch in his report stated that the revised Trust deed and Rules which were effective from 2004 were not financially sound. According to him they were drafted to remove the requirement of the employer to meet balance of cost which was there in the original scheme, he further stated

that a law that reduces accrued rights on member expectation should not affect them.

140. Ruparelia consultants limited stated that they were under instructions from Amadi & Amadi advocates to calculate the amount due to a sample of members of the Telposta Pension Scheme based on the ruling of the Tribunal delivered on 13th February, 2017.

141. What is clear from the two reports and that is confirmed by Jeremiah Nyokangi who produced the NBC reports and Darsha Ruparelia is that they did not have clear and accurate data of all the Appellants to enable them to prepare an accurate report.

142. In pension matters like this one before the Tribunal the following documents are very important; Letter of appointment, pay slips, salary statements, letters of termination or retirement, pension schemes membership, contribution statements or records but none of the above was filed before the Tribunal by the Appellants or the two witnesses who appeared on behalf of the Appellants.

143. Apart from the dates given and figures there was nothing to confirm that those were the actual and accurate dates.

144. The Appellants confirmed from the two reports and in their oral testimony that they did not have clear data and records from the 2nd Respondent.

145. The absence of those records then becomes very difficult for the Tribunal to ascertain the accuracy of the report.

146. Darshan Ruparelia when asked by Gloria Kosgei for the 1st Respondent whether he relied on the data provided without independently verifying its accuracy or completeness he responded as follows

“Yes. Members data is critical, dates of joining, exit, reason for exit and salaries. We received this information from Mr. Amadi but could not independently verify it by the scheme. Consistency of data is important and we had to rely on what was provided”.

147. According to Darshan Ruparelia the 19 members on whose behalf he prepared the actuarial report fell within rule 8(d) and his understanding is that retrenchment is by the consent of the employee. Rule 8(d) of 2004 Trust Deed states as follows

“A member who retires with the consent of the founder before normal retirement date after having completed a

minimum of 3 years pensionable service and after having attained the age of fifty (50) years shall receive a pension calculated at the rate of 1/480th of his final pensionable salary for each complete month of pensionable service. Any pension payable in accordance with this rule will cease if a member is subsequently re-engaged by the founder”

148. To understand whether retrenchment is with consent we look at the meaning of retrenchment. Retrenchment simply means reduction of cost or spending in economic difficulties.

149. Retrenchment doesn't require consent but it does involve specific procedures and regulations such as Notice, consultations process, fair reason, objective criteria and severance pay. In the case of **DIRECTORATE OF PERSONNEL MANAGEMENT (GOK) v UNION OF KENYA CIVIL SERVANTS [2005] eKLR**

Section 2 of the Act as follows:-

“redundancy” means the loss of employment, occupation, job or career by involuntary means through no fault of an employee involving termination of employment at the initiative of the employer where the services of an employee are superfluous, and the practices commonly known as abolition of office, job or occupation and loss of

employment due to the Kenyanization of a business; but it does not include any such loss of employment by a domestic servant.” ’

The word “retrenchment” means discharge of surplus labour by the employer in a continuing or running industry or concern for any reason whatsoever, otherwise than punishment inflicted by way of disciplinary action. It denotes only the discharge of surplus labour or staff and does not mean that termination of the contract of employment for other causes. The word “retrenchment” should, therefore, be understood in the ordinary sense. It is not every termination of service that can be retrenchment, but only termination of service of surplus labour in a continuing or running industry or concern. Thus, redundancy and retrenchment mean the same thing, i.e; an involuntary and permanent loss of employment caused by an excess of labour or manpower”

150. The court also in the case of Kiya Kalakhe Boru v Rift Valley Railways [K] Ltd [2014] KEELRC 306 (KLR) stated as follows on retrenchment:

“Retrenchment is synonymous to redundancy which simply means loss of employment through reason beyond the employee in circumstances where an employer wishes to lay off excess labour. In Kenya the procedure of

declaring workers redundant is governed by the provisions of Section 40 of the Employment Act.”

151. From the foregoing the Tribunal finds that the interpretation by Darshan Ruparelia on Rule 8(d) of 2004 Trust Deed and Rules was wrong as retrenchment doesn't amount to consent by the employer.

152. Through the evidence produced before the Tribunal by the 2nd Respondent's witness, Mr. Sundeep K. Raichura, and more particularly analyzed in the actuarial report of Zamara Actuaries and Consultants, 9 out of the 600 Appellants retired at normal retirement age at 55.

153. The benefits for the said 9 Appellants who retired at normal retirement age of 55 years were to be calculated in accordance with the provisions of Rule 8(c) of the 2nd Respondent's 2004 Trust Deed and Rules which as follows, that: -

“A member who retires on his Normal Retirement Date after having completed a minimum of three (3) years' Pensionable Service shall receive a pension equal to 1/480^{ths} of his Final Pensionable Salary for each complete month of Pensionable Service.”

154. The 2nd Respondent demonstrated how retirement benefits for members leaving service at normal retirement age were calculated. Mr. Sundeep Raichura referred the Tribunal of member PF No. 25811, Eunice Cheruto Langat whose benefits were calculated using the above formula provided by the 2nd Respondent's Trust Deed and Rules.

155. The Appellants did not provide any evidence to controvert the evidence of Mr. Sundeep Raichura on this issue. Consequently, this Tribunal finds that the allegations by the Appellants that retirement benefits for 9 members of the 2nd Respondent who retired at the normal retirement age of 55 years were miscalculated is not merited and is therefore dismissed. The 1st Respondent's decision dated 3rd October 2012 which concurred with the 2nd Respondent that the retirement benefits for this category of the Appellants were properly done in accordance with the 2nd Respondent's Trust Deed and Rules is correct.

Computation of benefits for Early Retirement

156. This Tribunal notes that this category of Appellants has generated quite a significant amount of controversy and rival interpretations by parties in this Appeal. After analysing the evidence provided by all parties and carefully scrutinizing the applicable Trust Deed and Rules of the 2nd Respondent, this Tribunal finds that this category of Appellants falls into a further two sub-categories depending on whether they left employment before attaining age 50 or after. The first sub-category of members who left the service of the employer before attaining age 50 is categorized as deferred pensioners. In regard to the sub-category of Appellants who left service after attaining age 50 but before attaining the normal retirement age, such members are entitled to receive their full benefits immediately so long as they left service with the consent of the employer.

Members leaving service after attaining age 50 but before attaining normal retirement age of 55 years

157. This category of members is provided for under Rule 8(d) of the 2nd Respondent's 2004 Trust Deed and Rules, which we deem fit to reproduce as hereunder:-

“(d) Pension on Retirement Before Normal Retirement Date

A member who retires with the consent of the Founder before Normal Retirement Age having completed a minimum of three (3) years Pensionable Service and after having attained the age of fifty (50) shall receive a pension calculated at the rate of 1/480ths of his Final Pensionable Salary for each complete month of Pensionable Service. Any pension payable in accordance with this Rule will cease if the Member is subsequently be re-engagedo by the Founder”

158. In the 1st Respondent's decision dated 3rd October 2012, the 1st Respondent having received data from the 2nd Respondent in respect of the complaints before the 1st Respondent categorized 67 of the Appellants as falling within early and normal retirement payments. Mr. Sundeep K. Raichura testified on behalf of the 2nd Respondent and at page 11 of his witness statement dated 6th March 2025, he produced table in which he

indicated that out of the 600 Appellants before this Tribunal, 58 retired early after age 50 with the consent of the employer but before attaining the normal retirement age of 55 years. There was no evidence provided by the Appellants to controvert this classification by both Respondents.

159. This Tribunal, upon further scrutiny of Mr. Sundeep K. Raichura's witness statement dated 6th March 2025 noted that he had produced an example of computation of benefits for an Appellant, Mr. Fredrick Masinde Stock, who retired at the age of 52.8 who falls within the category of members provided under Rule (d) of the 2nd Respondent's 2004 Trust Deed and Rules. This computation provided as part of annexure SR-2 annexed to Mr. Raichura's witness statement dated 6th March 2025. The computation hereinabove stated shows that the said Mr. Fredrick Masinde Stock received a commuted lump sum of K.Shs 1,511,658. The table further shows that at the time of retirement, Mr. Stock started earning a monthly pension of K.Shs21,605. Having poured through the documents and evidence produced before us by all parties, this Tribunal finds that for all the 58 Appellants who took early retirement with the consent of the employer before attaining the normal retirement age of 55, the 2nd Respondent properly calculated the said

Appellants benefits in accordance with the said Rule 8 (d) of the 2nd Respondent's 2004 Trust Deed and Rules. We further find that the 1st Respondent was correct in agreeing with the 2nd Respondent that the calculation of the benefits for these 58 Appellants was correct.

160. This Tribunal therefore holds that the claim by the 58 Appellants that their benefits were miscalculated by the 2nd Respondent by use of incorrect actuarial factors is without merit and that allegation fails. Further, this Tribunal does not find any good reason to disturb the finding of the 1st Respondent with respect to this category of Appellants.

**Members leaving the service of the founder
before attaining age 50**

161. A part of the controversy presented for resolution before this Tribunal is whether the 2nd Respondent properly calculated the benefits of Appellants who left the service of their employer before attaining the age of 50 years.

162. Under the 2nd Respondent's 2004 Trust Deed and Rules, the computation of benefits for members who leave the service of

the employer before attaining the age of 50 years is based on Rule 8 (g) which we reproduce hereunder as follows: -

“(g) Deferred Pension payable from Normal Retirement Date

A member who:

- (i) Resigns from service of the Founder before the Normal Retirement Date but after having completed at least three (3) years Pensionable Service; or**
- (ii) Having been demoted loses Pensionable status and such status is not subsequently restored; or**
- (iii) Leaves the service of the Founder before attaining age fifty (50),**

shall be entitled to a deferred pension commencing on the normal retirement date equal to 1/480^{ths} of his Final Pensionable Salary for each complete month of Pensionable Service.”

163. This Tribunal notes that the interpretation of the exact meaning of “***deferred pension commencing on the normal retirement date***” has been a matter of serious contention among the parties in this Appeal. On one hand, a section of the Appellants herein who left the service of the employer before

attaining the age of 50 have interpreted the above provision of the Trust Deed and Rules to mean that, upon leaving service, they were entitled to immediately access their benefits (calculated using the formula: $1/480^{\text{ths}}$ of final pensionable salary for each complete month of pensionable service - the formula) in full without any reduction whatsoever. The Appellants' actuaries urged that the benefits for a member who leaves service before the age of 50 should be calculated based on the formula but be paid beginning from age 50 with no reduction. On the other hand, the Respondents have maintained that their interpretation of Rule 8(g) is that any member leaving service before attaining the age of 50 years is entitled to a pension on the basis of the formula with the benefit becoming payable only when the member attains the normal retirement age of 55 years. The title in Rule 8(g), "*deferred pension payable from the normal retirement date (emphasis ours)*" and the words "commencing on the normal retirement date" in the last paragraph of Rule 8(g) in their ordinary meaning appear to support the interpretation stated by the Respondents, that is, a deferred pension is due for payment when a member attains age 55.

164. We also note that Rule 13 (b) of the 2nd Respondent's 2004 Trust Deed and Rules as read together with Legal Notices No. 56 and 57 of 8th June 2005, Legal Notice No. 93 of 14th June 2007 and Legal Notice No. 165 of 30th September 2010 all of which provide path ways for early access of deferred benefits for members who have left service before attaining the age of 50 and whose benefits are computed as provided under Rule 8(g) of 2004 Trust Deed and Rules. We have reproduced the said Rule 13 (b) as hereunder:-

“(b) If a member leaves service of the founder before attaining the age of fifty (50) years but having three (3) or more years Pensionable Service, he may elect to receive a cash sum in lieu of his benefits under rule 8 (g) equal to the cash equivalent of his deferred rights as determined by the Trustees on the advice of the actuary.”

165. In order to shed light on the exact import of Rule 13(b) as a basis for understanding, the key elements to consider when dealing with the contentious issue of access of members benefits who leave the employer's service before attaining age 50, this Tribunal finds it necessary to delve into a number of issues that have arisen in these proceedings relating to

deferred benefits and how these issues have been dealt with by industry professionals over time.

166. This Tribunal interprets '**deferred rights**' referred to in Rule 13(b) to mean the right to receive a deferred pension calculated using the formula but payable commencing from age of 55. We interpret the phrases "**Cash lump sum in lieu**" and "**cash equivalent**" to mean "**of equal value**" as the deferred rights. Finally, one has to pose and consider why the phrase "**determined by the Trustees on the advice of the actuary**" is part of Rule 13(b).

167. This Tribunal has gone to great depths to review the actuarial reports filed by the actuaries appearing for the Appellants and the 2nd Respondent. The Tribunal also keenly listened to oral evidence during the hearing including the testimonies of the actuaries who appeared before us. On behalf of the Appellants, at page 8 of the NBC report, paragraph 25 and 29 describe in detail how to calculate "**deferred cash value**" and it lists several actuarial assumptions that actuaries use in calculating benefits including a discounting factor. Further, paragraph 29 of the NBC

provided a discounting formula for making the calculations intended to arrive at the said deferred cash value.

168. Mr. Sundeep Raichura, an actuary for the 2nd Respondent, expounded on how to calculate a cash equivalent in paragraphs 141 to 143 of his witness statement dated 6th March 2025. On page 14 of the NBC report, Mr. Oketch states that *“the approach and methodology of calculations as carried out by the Actuary (the 2nd Respondents actuary) is similar to our approach and is common actuarial practice ordinarily expected in determining deferred cash values”*. It is clear from the foregoing that calculation of a cash equivalent requires actuarial input. There is concurrence among the actuaries for the Appellants and the Respondents who appeared before us that calculating a cash equivalent involves discounting. The cash equivalent or cash value is the present value of the benefit that is payable at a future date. In the context of Rule 13(b), the cash equivalent is the value at the member’s age (below 50) of the pension he would have received from a future date.

169. At paragraph 64 on page 14 of the NBC report, Mr. Oketch states that *“following our consultations, the approach on*

increases and effective date of implementation was clarified. The Deferred values calculated by ourselves (using age 55 as retirement age) were very close to the values disclosed by the Scheme Actuary as shown in NBC Value 1, NBC Value 2, and NBC Value 3). Since we have determined in the preceding paragraphs that under Rule 8(g), a deferred pension commences to be paid from age 55, we hold that the determination of a cash equivalent or cash value of the deferred pension should be calculated by discounting from age 55.

170. This Tribunal, therefore, having carefully considered evidence of the eminent actuaries who appeared before us, and having benefited from the submissions made by all parties in support of their respective positions in the present dispute, and having considered all relevant laws and materials filed in this Appeal, reaches the conclusion that the Respondents' position with respect to the calculation of benefits for the Appellants who left service of the employer before attaining age 50 and who chose to access their benefits before attaining the age of 55 is the correct interpretation of Rule 8(g) and 13(b) of the 2nd Respondent's 2004 Trust Deed and Rules.

171. Consequently, this Tribunal finds that the contention by a section of Appellants in this Appeal contrary to our finding in paragraph 170 above is manifestly wrong. We say so because, the provisions of the Trust Deed and Rules with respect to members who leave service before attaining the age of 50 create a clear distinction in the computation of their benefit from the determination of the benefits of members who either leave early with the consent of the employer or at normal retirement age of 55 years. Clear in this Tribunal's mind is the fact that the framers of the 2nd Respondent's 2004 Trust Deed and Rules intended that bringing forward those deferred benefits to be accessed by members in the present definitely requires actuarial engineering. This Tribunal holds that the provisions of the 2nd Respondent's 2004 Trust Deed and Rules that require the calculation of a cash equivalent of those deferred rights, and that these calculations have to be done by an actuary are not idle provisions and it would be a dereliction of our jurisdiction as a tribunal if we reach a contrary finding.

172. For the avoidance of doubt, this Tribunal finds that the computations of the Appellants' benefits herein who left the service of their employer before attaining the age of 50 and who chose to access their benefits before attaining the normal retirement age of 55 was done properly by the 2nd Respondent

and further, that, the 1st Respondent's decision of 3rd October 2012 which upheld the 2nd Respondent's calculations is also correct. Accordingly, we find that the claim by the Appellants who left the service of the employer before attaining the age of 50, and who chose to access their benefits before attaining the normal retirement age of 55, that their benefits were miscalculated by the 2nd Respondent is without merit and it fails.

B. Whether the 1st Respondent's decision the subject matter of this Appeal is tainted with illegality, arbitrariness, misdirection, mistake of law and facts, indecisiveness and breach of its statutory obligations.

173. Under grounds 2 (1) (2), 3 (a) (b) (c), 4 (a) (b) (c), 5 (a) (b) and 6 (1) (2) (3) (4) and (5) of the Appellants' Amended Memorandum of Appeal dated 11th March 2025, the Appellants have faulted the 1st Respondent for failing to discharge its statutory obligations. The Appellants have further claimed that in arriving at the decision dated 3rd October 2012, the 1st Respondent acted arbitrarily, misdirected itself, was indecisive, made mistakes of fact and law, and permitted illegalities in contravention to its mandate as provided in law.

174. Having considered the Appellants grounds of appeal in the Amended Memorandum of Appeal, the initial Complaint dated 11th September 2009 lodged by the 600 Appellants before the 1st Respondent and the 1st Respondent's decision delivered on 3rd October 2012, this Tribunal finds it necessary to pronounce itself on the statutory powers of the 1st Respondent side by side with the complaints that were filed before the 1st Respondent by the Appellants herein.

175. Section 46 of the RBA Act vests the 1st Respondent with quasi-judicial powers to review the decisions of the managers, administrators, custodians or trustees of registered schemes upon appeal by any member of the scheme who may be dissatisfied with the decision, action or inaction of a scheme or the officers of such scheme. The primary mandate of the 1st Respondent or the CEO of the 1st Respondent is to test whether such decision, action or inaction by such scheme or officers of such scheme was done in accordance with such scheme's trust deed and rules and all relevant laws.

176. This Tribunal reads section 46 of the RBA Act as conferring the 1st Respondent with quasi-judicial dispute resolution

functions which include the power to review the decisions of any manager, administrator, custodian or trustee of a scheme with a view to ensuring that such decisions are made in accordance with the provisions of the relevant scheme rules or the Act under which the scheme is established. For avoidance of doubt, we have reproduced section 46 of the RBA Act as follows: -

“(1) Any member of a scheme who is dissatisfied with a decision of the manager, administrator, custodian or trustees of the scheme may request, in writing, that such decision be reviewed by the Chief Executive Officer with a view to ensuring that such decision is made in accordance with the provisions of the relevant scheme rules or the Act under which the scheme is established.

(2) A copy of every request under this section shall be served on the manager, administrator, custodian or trustees of the scheme”

177. The provisions of section 46 of the RBA Act have been variously interpreted by superior courts of record in Kenya

resting but not limited to Supreme Court's decision in the landmark case of **Mumba & 7 others (Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Munyao & 148 others (Suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) (Petition 3 of 2016) [2019] KESC 83 (KLR)**, where the Apex Court held as follows with respect to the quasi – judicial functions of the 1st Respondent: -

“88.A reading and interpretation of the provisions of the section 46(1) poses no difficulty and leaves no doubt that the section requires that any member, beneficiary or dependents of the Scheme who is aggrieved or dissatisfied by any decisions made by a manager, administrator or trustees of the Scheme while exercising their powers under the provisions of the relevant scheme rules or the Act under which the scheme is established, may if he or she wishes make a written request to the CEO to review such decisions with a view to ensuring that such decisions are in accordance with the provisions of

the relevant Scheme Rules or the Act under which the Scheme is established and above all lawful.”

178. The Supreme Court proceeded to hold as follows, that: -

“89.It is clear that the powers of adjudication given to the CEO under the said provision is in respect of the application of the rules of a retirement benefits scheme and the prevailing written law under which the scheme is established...

90.It is evident from the RBA Act that pursuant to section 11 and section 46, the CEO has a dual or a two-fold mandate under the Act. The powers vested under section 11(4) of the Act as the accounting officer or the operational head of the Authority responsible for the day to day management of the affairs of the Authority while under section 46(1) of the Act, the CEO is vested with a quasi-judicial mandate in adjudication of disputes arising under the RBA Act, in the first instance. Section 5 of the RBA Act in any event provides for the objects and functions of the Authority which include the

regulation and supervision of the management of retirement benefits schemes and the protection of the interests of members and sponsors of retirement benefits sector;

91.The CEO is therefore obliged while performing his quasi-judicial functions to objectively determine facts and draw conclusions from them as to provide the basis of official action. Such actions are able to remedy a situation or impose legal penalties, and may affect the legal rights, duties or privileges of specific parties. The CEO is required when exercising discretionary power to maintain a proper balance between any adverse effects which his decision may have on the rights, liberties, or interests of persons and the purpose which he pursues.

92.The above renditions are not just flowery norms but are imperative constitutional commands under article 10 of the Constitution binding the CEO to observe the values and principles of governance in

the discharge of quasi-judicial functions in the application and interpretation of the RBA Act.

93.The Retirement Benefits Authority is a state corporation or a public entity and the CEO is a public officer and they are both bound by the values and principles of public service espoused under article 232 to include (a) high standards of professional ethics; (b) efficient, effective and economic use of resources; (c) responsive, prompt, effective, impartial and equitable provision of services; (d) involvement of the people in the process of policy making; (e) accountability for administrative acts...

Where an Act of Parliament confers administrative power to an authority or a person, there is a presumption that it will be exercised in a manner which is fair. The court's role in such matters was explained in Judicial Review Handbook by Michael Fordham (Third Edition) p.249- 256 as hereunder:

“Every public body has its own role and has matters which it is to be trusted to decide for itself. The courts are careful to avoid usurping that role

and interfering whenever it might disagree as regards those matters.” [108] A similar position was taken in Council of Civil Service Unions vs. Minister for the Civil Service [1985] AC 374 HL to the effect that:

“It is not for the courts to determine whether a particular policy or particular decisions taken in fulfilment of that policy are fair. They are only concerned with the manner in which those decisions have been taken and the extent of the duty to act fairly will vary greatly from case to case as indeed the decided cases since 1950 consistently show...”

179. As can be gleaned from the above pronouncements by the Supreme Court, in making a decision under section 46 of the RAB Act, the 1st Respondent is espoused to observe the full import of Article 47 of the Constitution as read together with the provisions of section 4 of the Fair Administrative Action Act 2015.

180. In this Appeal, it is our understanding that the constitutional and statutory scope of the 1st Respondent’s quasi-judicial function was **to review the decision** of the 2nd Respondent

with a view to ensuring that such decision was made in accordance with the provisions of the 2nd Respondent's Trust Deed and Rules and all other applicable laws. Accordingly, when called upon to exercise this mandate under section 46, the 1st Respondent must give the complainants the right to have their complaint heard by conducting a comprehensive review of the complaint at hand, the materials presented before it including the actuarial reports presented by both the Appellants and the 2nd Respondent, the complainants' data presented by the 2nd Respondent, the applicable Trust Deed and Rules of the 2nd Respondent, and the prevailing legislation. We shall now deal with the sub-issues arising out of the Appellants' grounds of appeal under this issue as hereunder.

Permitting illegalities

181. In grounds 2 (1) and (2) of the Amended Memorandum of Appeal dated 11th March 2025, the Appellants urged that the 1st Respondent committed illegality by allowing the 2nd Respondent to transfer its fiduciary duties and obligations to a third party, Alexander Forbes Retirement Benefits, who was not a party to the trust deed and rules in total contravention of the law. The Appellants further alleged that the 1st Respondent

permitted illegality by failing to decide on their complaint that on or about 2010 or 2011 they found out that the payments they had received upon leaving service had not been correctly computed resulting in them being underpaid and/or being paid reduced amounts contrary to the provisions of the Trust Deed and Rules and the law.

182. In paragraphs 33 of the Appellants' complaint dated 11th September 2009, the Appellants presented a complaint before the 1st Respondent complaining that the 2nd Respondent transferred its fiduciary duties and obligations to a third party, Alexander Forbes Retirement Fund, who was not a party to the trust deed and rules in total contravention of the law. As we have noted elsewhere in this judgment, the 2nd Respondent's 2004 Trust Deed and Rules vests power in the trustees of the scheme to transfer members' benefits to other registered schemes. The Tribunal notes that such power is provided under Clause 30 of the 2nd Respondent's 2004 Trust Deed and Rules which states as follows:

“the trustees shall have the power to transfer the assets and liabilities of the Scheme or portion thereof to another registered pension scheme approved as such by the Authority and the Commissioner or to take transfer of the

assets and liabilities or portion thereof of another registered scheme approved by the Authority and the Commissioner provided that any such transfer or amalgamation shall be carried out in accordance with the RBA provided further. That no such transfer shall become effective until it shall have been notified to the Commissioner. (if the fund shall then be a Registered Fund)’’.

183. In his testimony before the Tribunal, Mr. George Odhiambo Oloo on behalf of 45 Appellants testified that he had an issue with the transfer value of his benefits to Alexander Forbes Retirement Fund. He also testified that he received payment from Alexander Forbes Retirement Fund upon leaving service of the employer and that he authorised Alexander Forbes Retirement Fund to transfer the residual balance of his benefits to APA Insurance which he stated that he later withdrew in full. This Tribunal has elaborately considered the question whether the Appellants’ benefits were computed properly in accordance with the 2nd Respondent’s Trust Deed and Rules in preceding paragraphs and reached the conclusion that the 2nd Respondent calculated such benefits properly in accordance with the scheme’s Trust Deed and Rules. Having so found, and

having found that the 2nd Respondent's had power under the Trust Deed and Rules to transfer the Appellants' benefits to another registered scheme, we find the Appellants have not proven that the 2nd Respondent committed any illegality in transferring the Appellants' benefits to another registered scheme, and that consequently, the 1st Respondent did not commit any illegality in reaching the conclusion that the Appellants' benefits had been properly transferred to Alexander Forbes Retirement Fund.

Arbitrariness

184. The Appellants stated that the 1st Respondent acted arbitrarily in failing to direct an independent computation for their claims and other claims by other members of the scheme. The Appellants further claimed that the 1st Respondent acted in total disregard of the law and failed to ascertain the Appellants' complaint that the trustees did not exercise prudent investment practices to protect the Appellants benefits.

185. In decision making, the principle of arbitrariness denotes the making of a decision in a manner that lacks fairness, that is not solid, and that lacks substantial cause or reason. It often stems from improper use of individual discretion and unsound

reasoning. In the context of administrative justice, arbitrariness denotes irrationality or procedural impropriety. In ***Associated Provincial Picture Houses Ltd. vs. Wednesbury Corporation [1948] 1 K.B. 223*** the court held that where a decision is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided would have arrived at it, that is a decision that has been arrived at arbitrarily. The court further found that such irrationality cannot be allowed to stand whenever such a decision is brought for review the relevant court or tribunal.

186. In this Appeal, the Appellants complained that the 1st Respondent failed to direct an independent computation of their claims or the claims of other members of the scheme. When the Tribunal retired to consider the material presented by the parties in this Appeal, we found that in the Appellants complaint dated 11th September 2009 before the 1st Respondent, the Appellants did not make a specific prayer for computation of their benefits by an independent authority or actuary. Instead, the Appellants had presented the 1st Respondent with an actuarial report prepared by a South African firm, Independent Actuarial Consultants (IAC) and specifically asked the 1st Respondent to order that “... **the**

Complainants be paid their pension dues as computed by the Independent Actuarial Consultants.”

187. Upon further examination of the 1st Respondent's decision, the Tribunal notes that upon reviewing the Appellants' data presented to it by the 2nd Respondent, the Appellants' actuarial report authored by IAC, the 2nd Respondent's actuarial report prepared by Alexander Forbes Retirement Fund, the applicable Trust Deed and Rules, and the relevant applicable laws, the 1st Respondent concluded that the computation of the Appellants' benefits in the actuarial report presented by IAC were materially incorrect because the Appellants' actuary relied on incorrect data which was presented by the Appellants advocates while the data relied on by the 2nd Respondent's actuary was provided by the employer. The 1st Respondent found that the Appellants' actuary had used wrong assumptions and methodology including but not limited to applying a pension increase of 6% p.a. yet the trust deed and rules provided a pension increase at the rate of 3% p.a. and they also applied a higher revaluation rate of 6% p.a. instead of 4% p.a. for deferred pensions. The 1st Respondent also noted that the computations by IAC did not take into consideration benefits already paid to the Appellants upon exit.

188. Under this limb, the Appellants also contended that the 1st Respondent acted in total disregard of the law and failed to ascertain whether the 2nd Respondent's trustees exercised prudent investment practices to protect the Appellants benefits. Having carefully considered the totality of the materials and arguments before us, this Tribunal does not find any error in the 1st Respondent's finding that the Provident Fund did not lose any investment income and that provident fund members' final benefits were not affected in any way. The Tribunal found that in the contrary, provident fund members' final benefits were actually enhanced since the employer provided a guaranteed rate of return of their investment at 10% p.a. from 1978 to 2004. In any case, the Tribunal also noted that during the hearing of this Appeal, the Appellants confirmed that the issues touching on provident fund members including the computation and payment of benefits had been resolved. Accordingly, this Tribunal finds that the 1st Respondent did not act arbitrarily in arriving at its decision dated 3rd October 2012.

Misdirection

189. The Appellants complained that the 1st Respondent misdirected itself by failing to consider, analyze and avail

individual calculations or to require an independent authority or actuary to carry out calculations of their benefits. They have further alleged that the 1st Respondent simply relied on the figures provided by the 2nd Respondent without inquiring on the computation factors relied upon prior to transfer of benefits from the scheme to Alexander Forbes Retirement Fund. The Appellants further contended that the 1st Respondent misdirected itself by failing to find that the 2nd Respondent wrongly refunded their own contributions instead of paying them the cash equivalent of their deferred benefits.

190. The Tribunal has carefully studied the 1st Respondent's decision delivered on 3rd October 2012 and noted that upon the reviewing of the members' data presented by the 2nd Respondent, the Appellants' actuarial report authored by IAC, the 2nd Respondent's actuarial report prepared by Alexander Forbes Retirement Fund, the applicable Trust Deed and Rules, and the prevailing laws, the 1st Respondent concluded the computations of the Appellants' individual retirement benefits were in accordance with the provisions of the scheme's trust deed and rules. On the issue of requiring an independent authority or actuary to carry out calculations of

their benefits, this Tribunal reiterates finding earlier in this judgment this allegation by the Appellants has no merit.

191. On the further issue that the 1st Respondent misdirected itself by failing to find that the 2nd Respondent paid the Appellants their benefits based on return on their contributions instead of paying them a cash equivalent of their deferred benefits, this Tribunal found that the Appellants did not provide any evidence to that effect. On that basis, this Tribunal finds no merit in disturbing the 1st Respondent's findings with respect to this issue.

Mistakes of law and fact, indecision and failure to discharge statutory duties

192. On these grounds, the Appellants alleged that the 1st Respondent failed to hold that the 2nd Respondent did not comply with the Trust Deed and Rules. The Appellants have further contended that the 1st Respondent failed to find that the 2nd Respondent was not supposed to pay refund of contribution since the Appellants were entitled to an actuarial cash equivalent of their deferred pensions. The Appellants have further alleged that the 1st Respondent abdicated its statutory responsibilities and surrendered it to the 2nd Respondent and

actuaries by failing to independently inquire into the actuarial factors and methodologies used, and further, that the 1st Respondent failed to inquire and make decisions on the complaint before it and that being a monetary claim, the 2nd Respondent ought to have presented proof of actual figures of computation of the Appellants' benefits.

193. Upon careful examination of the 1st Respondent's decision dated 3rd October 2012, we find from a reading of the elaborate report annexed to the 1st Respondent's letter dated 3rd October 2012, that the 1st Respondent comprehensively reviewed the complainants' complaint and the 2nd Respondents' response to the said complaint. This Tribunal finds, as it has noted hereinbefore, that the 1st Respondent called for all relevant information about the complainants before it, received it from the 2nd Respondent and tested it against the allegations made by the Appellants and the computations of the Appellants' actuaries submitted in support of the Appellants' complaint.

194. Notably, in the impugned decision, the 1st Respondent returned a verdict on all the issues raised by the appellants as follows:-

1. On miscalculation of early and normal retirement benefits by use of incorrect actuarial factors, the

1st Respondent concluded that based on the data submitted, the computations were in accordance with the provisions of the scheme's trust deed and rules.

2. On miscalculation of members' benefits on resignation based on return of contributions instead of deferred pension, the 1st Respondent concluded that from the review of data submitted, the computations of deferred members who left before attaining age 50 after payment of a lump sum upon exit (whether a return of own contributions or 1/3rd of the cash value equivalent of the accrued pensions) were correct.
3. With respect to benefits transferred to an umbrella scheme, Alexander Forbes Retirement Fund, before payment of the actuarial deficit of K. Shs. 7.2 billion leading to reduced transfer values, the 1st Respondent concluded that the amounts transferred to the umbrella scheme were not affected by the deficit amount.
4. On the issue of discrepancies of computations by IAC relied by the complainants with that of the Alexander Forbes Retirement Fund, the 1st

Respondent concluded that there were differences on actuarial assumptions employed by the respective actuaries. The 1st Respondent found that the Appellants' actuary had used wrong assumptions and methodology including but not limited to applying a pension increase of 6% p.a. yet the trust deed and rules provided a pension increase at the rate of 3% p.a. and they also applied a higher revaluation rate of 6% p.a. instead of 4% p.a. for deferred pensions. The 1st Respondent also noted that the computations by IAC did not take into consideration benefits already paid to the Appellants upon exit.

5. On complaints by the Provident Fund members, the 1st Respondent concluded that the assertion that the funds were lost out on investment prior to 2001 was not true since the sponsor had provided a guaranteed rate of return of 10% p.a. from 1978 to 2004.
6. Finally, the 1st Respondent concluded that the Appellants' benefits were computed and paid out correctly in accordance with the scheme trust deed and rules save for the benefits of two

members,namely, PF No. 71805, David Kiprop Chepkonga and PF. No. 69357, Susan Mukuhi Wanjohi, who were underpaid by K.Shs. 32,629.06 and K.Shs. 20,816.11 respectively.

7. In conclusion, the 1st Respondent partially dismissed the complaint and directed the 2nd Respondent do calculate the benefits of the two above said members and to present them with statements and pay them accordingly.

195. This Tribunal, after careful consideration of all the pleadings filed by all parties together with all relevant materials in evidence in support of the respective parties' cases, and having painstakingly considered all rival arguments by all parties and the testimonies of their witnesses, and further, this Tribunal having applied its mind to all relevant provisions of the Constitution of Kenya 2010 and statutory provisions made thereunder, the 2nd Respondent's Trust Deed and Rules, and after conducting extensive research on relevant industry practice with respect to the weighty issues that were canvassed before us, this Tribunal reaches the conclusion that the Appellants herein have not discharged their evidentiary burden required of such an Appeal in order for this Tribunal to set

aside the decision of the 1st Respondent dated 3rd October 2012. Accordingly, this Tribunal finds no merit in this Appeal and upholds the decision of the 1st Respondent dated 3rd October 2012.

C. Who shall bear the costs of this Appeal

196. On the guiding principles in the award of costs, Justice John M. Mativo (as he then was) in the case of ***Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR*** cited the case of ***Republic vs. Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd, Judicial Review application no 6 of 2014*** in which the High Court held as follows:

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”

197. In those cases where the Court may be constrained to depart from the rule that costs follow the event, the Supreme Court, in the case of ***Jasbir Singh Rai & Others vs Tarlochan Rai & Others {2014} eKLR*** observed that:

“in the classic common law style, the courts have to proceed on a case by case basis, to identify “good reasons” for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs.....”

198. We agree with the holding in the above cited authorities that in determining the issue of costs, the court is entitled to look at inter alia:

“... (i) the conduct of the parties, (ii) the subject of , (iii) the circumstances which led to the institution of the proceedings, (iv) the events which eventually led to their termination, (v) the stage at which the proceedings were terminated, (vi) the manner in which they were terminated, (vii) the relationship

between the parties and (viii) the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of the Constitution. In other wards the court may not only consider the conduct of the party in the actual litigation, but the matters which led to the litigation, the eventual termination thereof and the likely consequences of the order for costs.”

199. Considering the above guiding principles and the specific circumstances of this case, this Tribunal finds that justice is better served by each party in these proceedings meeting their respective costs, and we so order, accordingly.

200. In view of the foregoing, this Tribunal makes the following orders: -

a) The appeal be and is hereby dismissed.

b) The 1st Respondent’s decision and/or directions dated 3rd October 2012 be and are hereby upheld.

c) Each party shall bear its own costs.

DATED and DELIVERED at NAIROBI this ^{2nd} day of ^{October,} 2025.

CHARLES MONG'ARE ONGOTO – Chairperson.



TIMOTHY KIMATHI – Member.



ANTHONY KIPRONO – Member.



Present: -

Tribunal Clerk-