



**RETIREMENT BENEFITS APPEALS TRIBUNAL**

# MID-TERM REPORT





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MAY 1, 2021

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## Contents

EXECUTIVE SUMMARY .....	v
INTRODUCTION .....	1
Overview .....	1
Constitution of the Retirement Benefits Appeals Tribunal .....	2
Membership.....	2
PERFORMANCE ANALYSIS .....	2
Access to Justice .....	5
Jurisprudence .....	7
1. Decision of the Retirement Benefits Authority .....	8
2. Refund of overpayment of retirement benefits to a member of the scheme.....	8
3. Jurisdiction and Invalidation of trustee elections due to contravention of procedural rules. ....	9
CONCLUSION .....	11
Recommendations .....	11



# **RETIREMENT BENEFITS APPEALS TRIBUNAL**

## **MID-TERM REPORT**

### **EXECUTIVE SUMMARY**

Tribunals are bodies established by Acts of Parliament to exercise judicial and quasi-judicial functions

Tribunals are an integral part of the administration of justice in Kenya as they facilitate faster management and settlement of disputes in the judicial system through their ability to deal with specialised/technical matters under different statutes thus reducing pressure on the regular Courts.

The Retirement Benefits Appeals Tribunal was first constituted in the year 2002. It is created Under Section 47 of the Retirement Benefits Act and is a key dispute resolution instrument for the Retirement Benefits Sector and plays an important role within the administration of the Pension Industry in Kenya.

The Tribunal consists of a Chairperson and four (4) members appointed by the Cabinet Secretary for National Treasury who are a mix of lawyers and Pension Industry professionals.

The Tribunal is expressly vested with jurisdiction to hear appeals by any person aggrieved by a decision taken by either the CEO in respect of a complaint filed against a Retirement Scheme or any action taken by the Authority in exercise of its powers under the provisions of the RBA Act.

The Tribunal determines whether, on the merits, the correct decision has been made by CEO or Retirement Benefits Authority. It is required by the Act to be independent from the Authority and to carry out its functions without any bias.

The current Tribunal was constituted on 3 May 2019 following a two-year hiatus after the tenure of the previous Tribunal ended on 13 February 2017 and it commenced hearings in October 2019 after undergoing induction and training.

This Mid-Term Review report outlines the activities of the current Tribunal from 3<sup>rd</sup> October 2019 to 31<sup>st</sup> May 2021.

The report demonstrates the Tribunal's commitment to ensuring the efficiency of judicial proceedings without compromising on the highest standards of procedural quality and fairness while also setting legal precedents that informs policy changes in the industry.

Since commencement of hearings the Tribunal has continued to implement its mandate in accordance with Section 47 of the Retirement Benefits Act and has made significant progress, clearing a backlog of 12 of the 13 appeals filed prior to its tenure. Out of 11 cases filed during its tenure, 6 have been completed with 12 judgements and 13 rulings rendered involving 601 members of various pension schemes. New legal precedents have been set.

Two of the significant decisions with policy changing implications are as hereunder:-

1. The Tribunal clarified the position with regards to its past decisions that a decision signed by another officer in the Retirement Benefits Authority and not by the Chief Executive Officer is an appealable decision within the framework set by Section 47 of the Retirement Benefits Act if the Appellant presents it as a decision of the Authority and not of the CEO. This Tribunal ruled that to hold otherwise would visit untold suffering amongst a majority of the society that the Retirement Benefits Act was enacted to serve, who may not have too much understanding on how the Retirement Benefits Authority and the Retirement Benefits Act works.
2. The Tribunal has also held that a Retirement Benefits Scheme can recover overpayments of retirement benefits made in error to a member in order to avoid an injustice against the scheme and its members. According to the Tribunal, a member of the scheme should not be allowed to unjustly gain from the errors of the scheme but at the same time the method of recoupment should be reasonable.

The Tribunal has also undertaken measures to expedite and streamline judicial proceedings; reduce delays and unwarranted adjournments during hearings; optimise the use of digital technologies due to the COVID-19 crisis; and enhanced accessibility and affordability to the justice system in the areas under its purview. The Tribunal has leveraged on technology during the COVID crisis to minimise the risk of exposure for its members and other relevant stakeholders while ensuring access to justice. As a result, there has been positive feedback from various stakeholders expressing high levels of satisfaction on the well-balanced deliberations, rulings and judgements issued by the Tribunal that are fully grounded in the law.

These achievements can be attributed to a good working environment and provision of the necessary infrastructure to facilitate the Tribunal's work, including a fully equipped courtroom, office, and boardroom. The Tribunal has also enjoyed sound leadership that has leveraged the expertise of a diverse team of high-calibre professionals drawn from different industries in order to meet ambitious targets and tight deadlines. The Tribunal made use of the extensive knowledge and expertise of its members to make judgements and rulings that will lead to reform in the sector setting legal precedents.

Recommendations are set out in this report to build on the commendable progress achieved by the Tribunal to ensure enhanced performance for the remaining period of its tenure.





# INTRODUCTION

## OVERVIEW

The need for an effective, sustainable, Retirement Benefits Sector that allows for wider national coverage cannot be over-emphasised. According to the World Bank, an inclusive well-regulated Retirement Benefits Sector is a prerequisite for sustainable socio-economic development.

It can potentially have significant impacts on economic growth through a variety of pathways that trigger secondary multiplier effects. These include helping to build a strong and productive future workforce; encouraging risk-taking and investment by micro-entrepreneurs; increasing employment; providing a social safety net for vulnerable communities during shocks and crises; stimulating local and national markets; supporting the expansion of financial services; helping build funds for investment; strengthening social cohesion; generating more peaceful and equitable societies; and building an improved investment climate.

Article 1(3) (c) of the Constitution recognises the Judiciary and independent Tribunals as State organs to which sovereign power is delegated by the people of Kenya. According to Article 159 (1) of the Constitution, judicial authority vests in and is to be exercised by courts and Tribunals established by or under the Constitution. Article 169 (1) further defines subordinate courts under the Judiciary to include local Tribunals as may be established by an Act of Parliament. Tribunals also facilitate faster management and settlement of disputes in the judicial system through their ability to deal with specialised matters under different statutes.

The Retirement Benefits Appeal Tribunal is a key dispute resolution instrument for the Retirement Benefits Sector and thus contributes towards achieving these broader socio-economic outcomes. It plays an important role within the justice system in Kenya, by not only reducing pressure on Courts but also assisting industry stakeholders access justice in an expeditious way.

## **Constitution of the Retirement Benefits Appeals Tribunal**

The Tribunal was first constituted on 12<sup>th</sup> July 2002. It is composed of the Chairperson and four members all of whom are appointed by the Cabinet Secretary for Finance pursuant to Section 47 of the Retirement Benefits Act. The quorum required for a Tribunal sitting includes at-least two members and the Chairperson. The person responsible for the administration and management of the Tribunal is the Tribunal Clerk. Under the Tribunal Rules 2000, he is an officer of the Retirement Benefits Authority. The Tribunal is however an independent entity from the Retirement Benefits Authority (RBA). Since inception there have been 5 constituted Retirement Benefits Appeals Tribunals (RBAT) that have each served 3-year terms.

### **Membership**

The current Tribunal was constituted on 3 May 2019 via Gazette Notice numbers 4314 and 4315. It comprises the following members:

1. Muthoni Gichohi: Chairperson (Legal Counsel)
2. James Mamboleo: Member (Legal Counsel)
3. Gideon Solonka: Member (Legal Counsel)
4. Veronica Soila Leseya - Owende: Member (Pension Industry Specialist)
5. Wangechi Gikonyo-Mukoko: Member (Development Sector/Financial Specialist)

The members were sworn in on 23<sup>rd</sup> July 2019 and started operations on 3<sup>rd</sup> October 2019 after undergoing induction.

### **PERFORMANCE ANALYSIS**

The Tribunal is tasked with four key objectives:

1. To hear appeals from decisions of the Chief Executive Officer of the Retirement Benefits Authority and disputes arising between any person and the Retirement Benefits Authority as to the exercise of the powers conferred upon the Authority under the Retirement Benefits Act.

2. To achieve the resolution of questions, disputes, and make or review decisions fairly and according to the substantial merits of the case.
3. To act speedily and with as little formality and technicality as is practicable and minimise the costs to parties.
4. To make appropriate use of the knowledge, expertise, and experience of Tribunal members.

Based on these objectives, the current Tribunal's work is focused on three core priorities:

1. Expedient Delivery of Justice.
2. Law and Policy Reform.
3. Accessibility & Affordability of Justice.

The Tribunal sets hearings once a week reserving other days for research, deliberations and writing of rulings and judgements. The Tribunal suspended hearings for a 2.5-month period as the country tried to navigate the uncharted environment occasioned by the Covid-19 Pandemic and later shifted to online virtual hearings. Clearing the case backlog was of key importance for the Tribunal as the delay affects the administration of justice by impeding access to justice and also leads to a violation of the appellants right to a fair and speedy trial.

During the reporting period, the Tribunal dealt with 12 of the 13 cases filed before its term and received an additional 11 cases; 6 of which have been completed expeditiously within a 3-month timeframe, while 5 are still pending as they are new matters.

*Table 1: Cases handled by the Tribunal*

	Total Cases	Number of Appellants	Filed under certificate of urgency	Matters completed by Settlement	Judgements delivered	Rulings delivered	Total Cases completed
Backlog Cases	13	242	0	3	7	7	12
Cases filed	11	359	2	0	5	6	6
<b>Total</b>	<b>24</b>	<b>601</b>	<b>2</b>	<b>2</b>	<b>12</b>	<b>13</b>	<b>18</b>

*Table 2: Nature of Matters Handled by the Tribunal*

Matters Filled	Appeals	Applications for review of Tribunal orders	Applications for extension of time to file Appeals/ defence	Other Applications	Total Matters Filled = 24 cases
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The inherited a backlog of cases were of matters between one to twelve years old.

*Table 3: Backlog Cases*

Case age	2007	2011	2013	2016	2017	2018	2019
Number of cases	1	1	1	2	4	3	1

In addition to the gap period being a contributing factor for the backlog, there are other cases which had been originally dispensed with by Tribunal but were referred to the to the Tribunal. This was as a result of various reasons among them High Court referrals after successful Judicial Review Applications for Appeals back to the Tribunal for fresh hearing.

During this reporting period, the Tribunal rendered 13 rulings and 12 judgements involving 601 members of various pension schemes following meticulous reviews of filed submissions prior to scheduled hearings and extensive deliberations on their merits in consultations with all relevant parties.

### **ACCESS TO JUSTICE**

Access to justice is an integral part of any society's socio-economic well-being and a key democratic right for under the Kenta Constitution. This Tribunal espouses the principles of Article 159 of the Constitution namely that justice shall be done to all, irrespective of status; that justice shall not be delayed; that alternative forms of dispute resolution shall be promoted; that justice shall be administered without undue regard to procedural technicalities; and that the purpose and principles of the constitution shall be protected and promoted.

The following are the achievements that were realised by the Tribunal in promoting access to Justice from 3<sup>rd</sup> October 2019 to 31<sup>st</sup> January 2021.

1. The Tribunal also introduced case management conferences to ensure compliance which has resulted in expediated delivery of justice and has brought structure and order to procedural processes. Unwarranted adjournments and delays are penalised, and the Tribunal provided clear guidance to appellants on rules and procedures to dispense with unnecessary applications.
2. The Tribunal has streamlined procedural processes to increase efficiency by initiating regular weekly hearings to bring order and predictability to judicial proceedings and ensure Appellants and Respondents have adequate notice to prepare and plan for hearings, increasing the efficiency and timeliness of proceedings.

3. This Tribunal informs Legal Counsel that they are expected to highlight their applications, this has ensured that they come prepared and give their clients quality service.
4. Article 159 (2)(a) provides that justice shall be done to all, irrespective of status; in this regard, this Tribunal has through streamlined and timely processes and instituting measures to further accommodate and provide guidance to Appellants without legal representation, ensured equal access and affordability of justice to all relevant parties regardless of their financial circumstances.
5. Further to that and in line with Article 159 (2) (d) which provides that justice shall be administered without undue regard to procedural technicalities, this Tribunal has issued directions and guided parties on various procedural questions with the aim of avoiding unnecessary interlocutory applications which normally leads to delaying the respective appeals thereby increasing the costs to the parties.
6. In response to the COVID-19 crisis, the Tribunal adapted its operations to minimise the risk of exposure for its members and other relevant stakeholders by optimising the use of digital technologies and shifting to online submissions and virtual hearings, where regular sessions were not feasible. Litigants filed applications through emails, the Tribunal adopted Microsoft Teams a safe and secure platform to facilitate virtual hearing which has ensured a continued administration of justice amid the COVID 19 epidemic. The Tribunal then delivers rulings and judgements through electronic means mainly via email and through video link.

*Table 4: Virtual Hearings*

Virtual sessions of both Applications and main hearings	Rulings delivered virtually	Judgements delivered virtually
17	10	12

Other measures adopted by the Tribunal to ensure control of COVID19 during its operations include the acquisition Personal Protective Equipment such as hand sanitisers, face masks and thermo-guns. The Tribunal also used its general powers, where applicable to extend timelines for hearing of matters.

The Tribunal has received positive feedback from various stakeholders including appellants, representatives from the Retirements Benefits Authority, pension scheme representatives that its rulings and judgements are fair, well-reasoned and grounded in the law.

## **JURISPRUDENCE**

This Tribunal has played a crucial role in protecting the fundamental rights of a citizen such as the right to social security as enshrined under Article 43 (1) (e) of the Constitution.

Two of the significant decisions with policy changing implications are as hereunder:-

1. The Tribunal clarified the position with regards to its past decisions that a decision signed by another officer in the Retirement Benefits Authority and not by the Chief Executive Officer is an appealable decision within the framework set by Section 47 of the Retirement Benefits Act if the Appellant presents it as a decision of the Authority and not of the CEO. This Tribunal ruled that to hold otherwise would visit untold suffering amongst a majority of the society that the Retirement Benefits Act was enacted to serve, who may not have too much understanding on how the Retirement Benefits Authority and the Retirement Benefits Act works.
2. The Tribunal has also held that a Retirement Benefits Scheme can recover overpayments of retirement benefits made in error to a member in order to avoid an injustice against the scheme and its members. According to the Tribunal, a member of the scheme should not be allowed to unjustly gain from the errors of the scheme but at the same time the method of recoupment should be reasonable.

The highlight of the cases is given below.



## **1. Decision of the Retirement Benefits Authority**

### **Brief facts**

An appeal was made against the decision of the Retirement Benefits Authority on a complaint filed regarding the determination of retirement benefits by the trustees of the Cooperative Bank of Kenya Staff Retirement Benefits Scheme.

### ***Issues for determination***

Whether the decision of the Retirement Benefits Authority signed by another officer other than the Chief Executive Officer is appealable to the Tribunal under section 47 of the Retirement Benefits Act.

### **Decision of the Tribunal**

A decision signed by another officer in the Retirement Benefits Authority and not by the Chief Executive Officer is an appealable decision within the framework set by Section 47 of the Retirement Benefits Act if the Appellant presents it as a decision of the Authority and not of the CEO. This Tribunal ruled that to hold otherwise would visit untold suffering amongst a majority of the society that the Retirement Benefits Act was enacted to serve, who may not have too much understanding on how the Retirement Benefits Authority and the Retirement Benefits Act works.

## **2. Refund of overpayment of retirement benefits to a member of the scheme**

### ***Brief Facts***

This is an appeal by the Trustees of a Pension Trust against the decision of the Retirement Benefits Authority where the Authority had declined the scheme's request to offset an over payment made to a member of the Pension Trust from future pension benefits due to be paid to him.

## **Issues for determination**

Whether a pension scheme can recoup overpayments made to a member from future payments to that member

## **Decision of the Tribunal**

The Tribunal after thorough research on new jurisprudence from different jurisdictions held that a Retirement Benefits Scheme can indeed recover overpayments of retirement benefits made in error to a member to avoid an injustice against the scheme and its members. It further held that a member of the scheme should not be allowed to unjustly gain from the errors of the scheme but at the same time the method of recoupment should be reasonable.

### **3. Jurisdiction and Invalidation of trustee elections due to contravention of procedural rules.**

## **Brief facts**

This is an appeal by one of the contestants of the trustee elections of a Pension Scheme against the decision and/ or directions of the Retirement Benefits Authority where it nullified the scheme's election results released by the Scheme's Elections Committee on 12<sup>th</sup> March 2020 and instead upheld a result allegedly declared by the same Scheme's Elections Committee on 6<sup>th</sup> March 2020.

## **Issues for Determination**

Whether the Tribunal has jurisdiction to entertain the Appeal and whether the trustees' election held on 6<sup>th</sup> March 2020 was conducted in accordance with the Trustees Elections Manual and the law.

## **Decision of the Tribunal**

After considering the evidence brought before it and the law, the Tribunal held that it indeed had jurisdiction to entertain the matter at hand. In allowing the appeal, the Tribunal ordered the scheme to organise a fresh election in accordance with its Trustees Election Manual and the law with respect to the second representative of the members as a trustee of the said scheme.

## CONCLUSION

Mid-way through its tenure, the Tribunal is therefore well on track towards achieving its key objectives and priorities.

However, to further spearhead much needed reform within the Retirements Benefits Sector and to ensure its potential to also contribute to broader socio-economic outcomes is harnessed, the Tribunal wishes to make the following recommendations for implementation during the second half of its tenure:

### RECOMMENDATIONS

1. **Enhancing Accountability & Transparency:** Reporting and publishing the rulings and judgements in the Kenya Law to ensure industry players have access to this information and the public know their rights.
2. **Policy & Law Reform:** The Ministry and Government department take precedent setting judgements to enable them to reform the law and policy where necessary.
3. **Review of the Tribunal Act** in particular the rules of procedure and guidelines to incorporate from the learnings from recurrent issues coming to the attention of the Tribunal in the process of handling the matters and to update it to be in line with the 2010 constitution. This will support in better delivery of the Tribunal mandate. The Tribunal frequently refers to the Civil Procedures Act where the Rules of Procedure and Guidelines are lacking.
4. **Advocacy & Community Outreach:** Sensitisation by Pension funds to their members that they can approach the RBAT without representation.
5. **Civic Education:** RBA conducts civic education to the industry and incorporates the Tribunal clerk to ensure that the procedures of the Tribunal are incorporated as part of the civic education.

6. **Networking:** The Tribunal holds an open day with participation of industry players jointly with the Retirement Benefits Authority (RBA).
7. **Capacity Building:** Members of the Tribunal offered capacity building through training and benchmarking.
8. **Commensurate Remuneration for Tribunal:** It is important to consider putting the members on a retainer to cater for the time spent doing research and writing rulings and judgements. This time is outside the sitting times and members have been using their personal resources to ensure justice is dispensed.
9. **Member Education:** We recommend that pension schemes especially the existing defined benefits schemes where members' benefits are determined by a formula to continuously carry out proper member education with a focus on how benefits will be calculated. This is quite critical whenever there are any changes in the Trust Deed and Rules. This will help in managing scheme members' expectations and eventually reduce the disputes.



## Retirement Benefits Appeals Tribunal

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