

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

APPEAL NO. E115 OF 2022

BENSON MUIBURI.....

APPELLANT

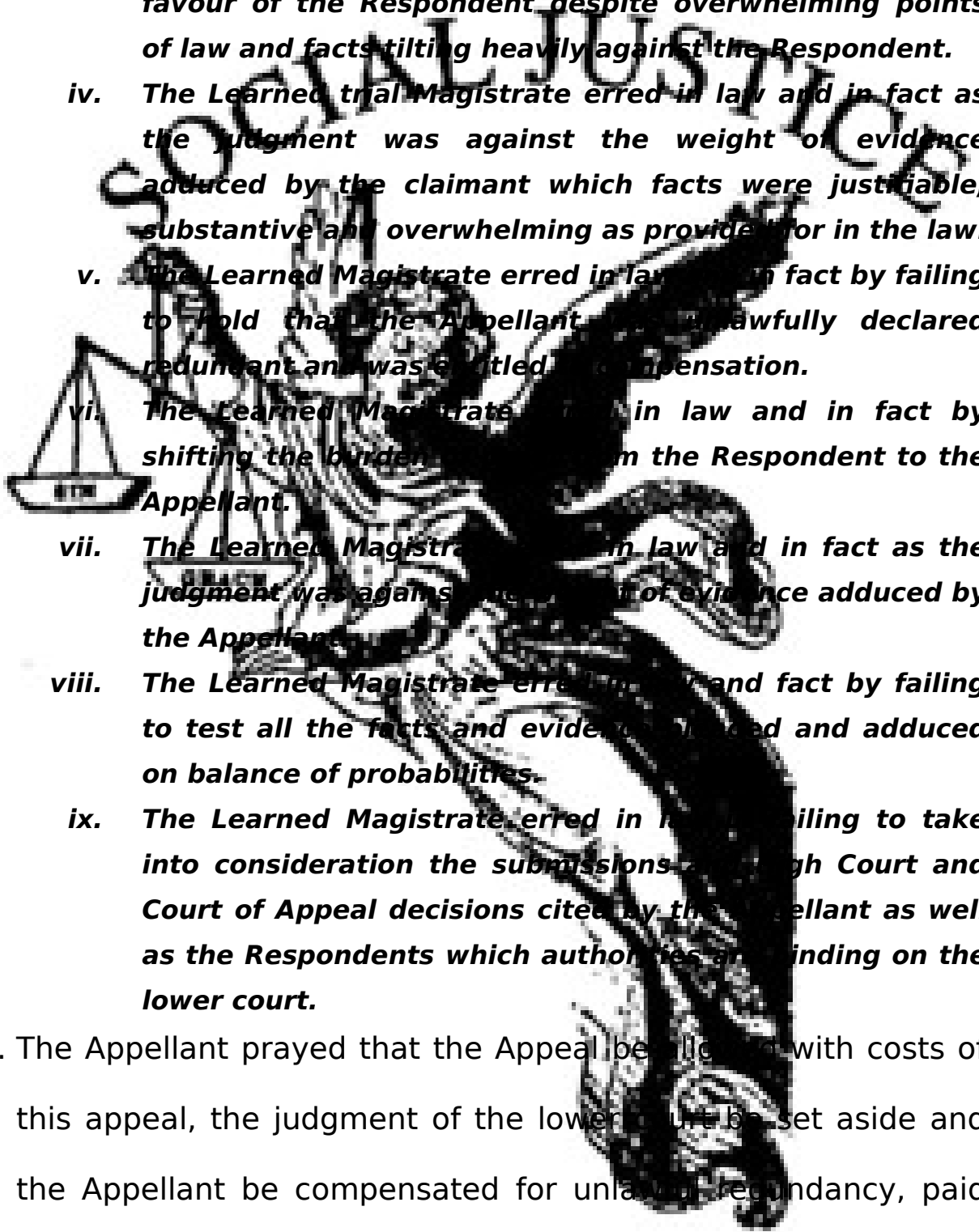
VERSUS

GEOMAPS AFRICA LIMITED.....
RESPONDENT

(Being an appeal from the Judgment of Edgar Hon. Kagoni (PM) delivered on 9th October 2022 in MCEL/C No. E895 of 2020 at the Millimani Chief Magistrate's Court)

JUDGMENT

1. Through the Memorandum of Appeal dated 29 July 2022, the Appellant appeals against the Judgment of Honourable E.M Kagoni, PM.
2. The Appeal was based on the grounds that:
 - i. *The Learned trial Magistrate erred in law in dismissing the Appellants case.*
 - ii. *The Learned trial Magistrate misdirected himself in evidence in holding that the Appellants services were terminated as per the employment contract instead of redundancy.*



- iii. The Learned trial Magistrate erred in law in ruling in favour of the Respondent despite overwhelming points of law and facts tilting heavily against the Respondent.***
- iv. The Learned trial Magistrate erred in law and in fact as the judgment was against the weight of evidence adduced by the claimant which facts were justifiable, substantive and overwhelming as provided for in the law.***
- v. The Learned Magistrate erred in law and in fact by failing to hold that the Appellant was lawfully declared redundant and was entitled to compensation.***
- vi. The Learned Magistrate erred in law and in fact by shifting the burden of proof from the Respondent to the Appellant.***
- vii. The Learned Magistrate erred in law and in fact as the judgment was against the weight of evidence adduced by the Appellant.***
- viii. The Learned Magistrate erred in law and in fact by failing to test all the facts and evidence placed and adduced on balance of probabilities.***
- ix. The Learned Magistrate erred in law by failing to take into consideration the submissions of the High Court and Court of Appeal decisions cited by the Appellant as well as the Respondents which authorities are binding on the lower court.***

3. The Appellant prayed that the Appeal be allowed with costs of this appeal, the judgment of the lower court be set aside and the Appellant be compensated for unlawful redundancy, paid leave days and house allowance.

4. The Appeal was disposed of by written submissions.

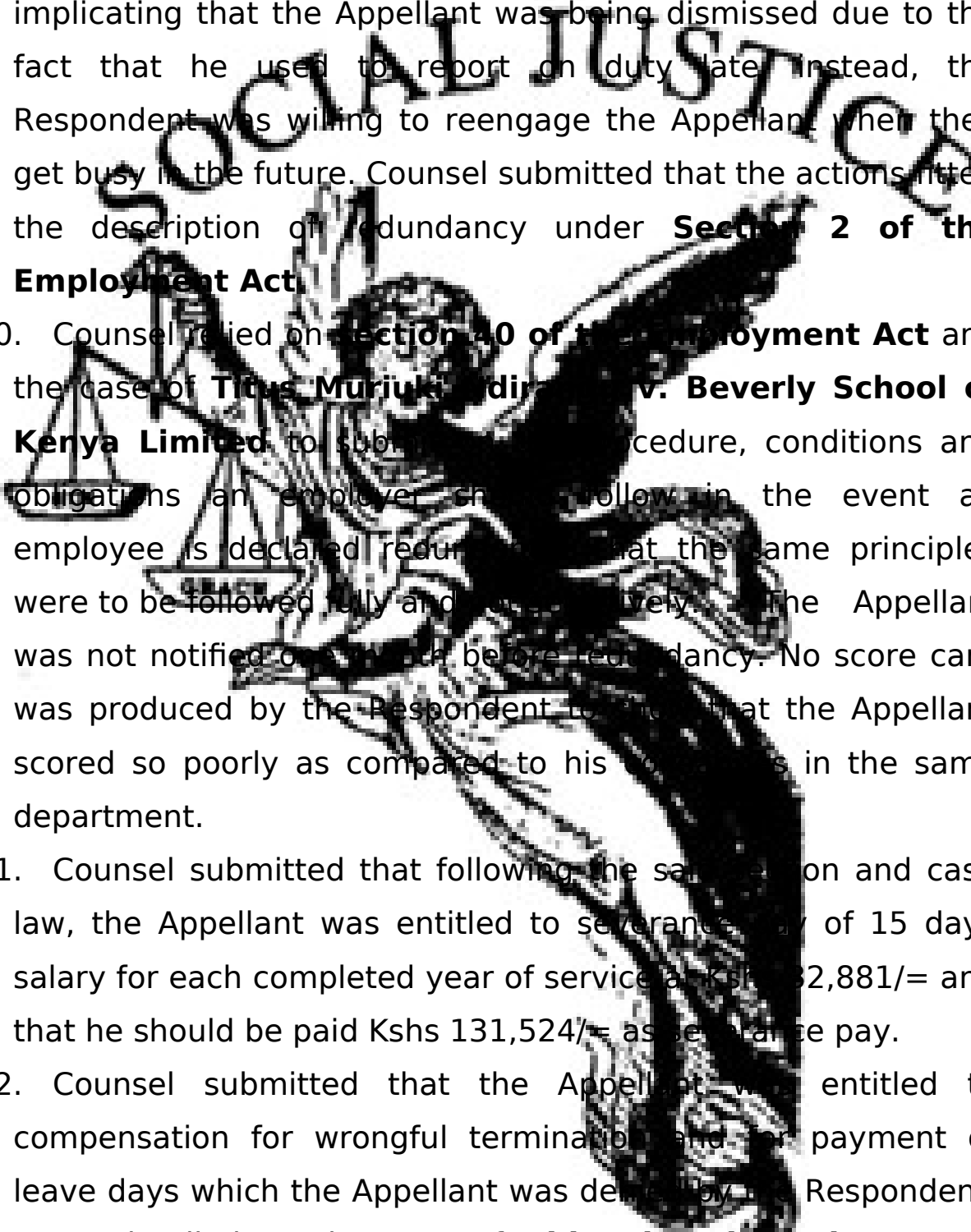
APPELLANTS SUBMISSIONS

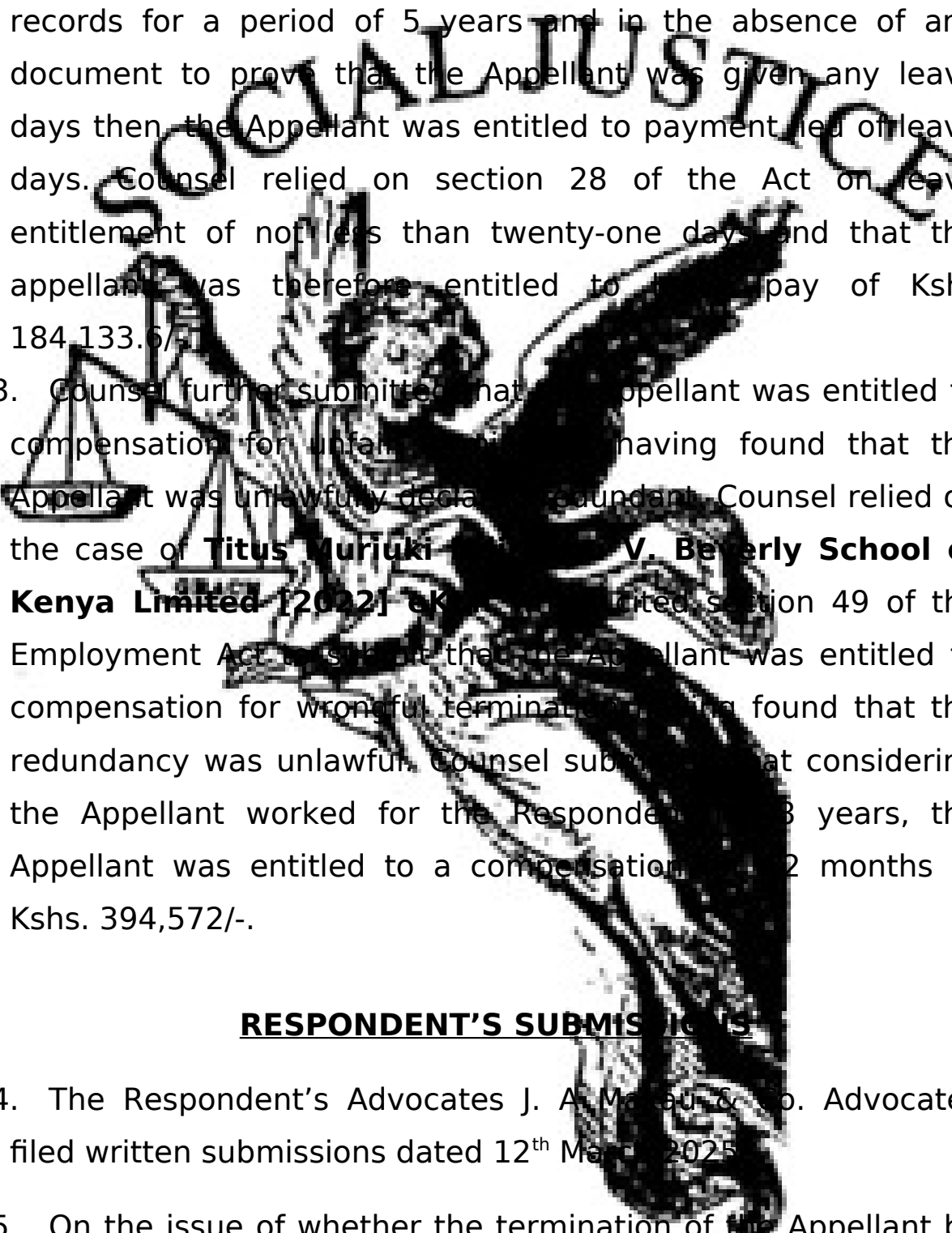
5. The Appellant's Advocates Emmanuel Wanyonyi & Company Advocates filed written submissions dated 19th January 2025.

6. On the issue whether the learned magistrate erred in dismissing the Appellants case, counsel submitted that the Learned Magistrate failed to appreciate that this matter was purely a redundancy dispute and had arrived at a wrong and unjust conclusion. That the trial magistrate shifted the onus of proof from the Respondent to the Appellant therefore prejudicing the Appellants case. That the Respondent failed to discharge his burden of proof as the custodian of employment documents.

7. Counsel submitted that miscarriage of justice by the trial Court started when he held that the Appellant's service was terminated per the employment contract instead of redundancy. The trial court at one point held that there was redundancy and on the other hand held that there no redundancy. That there was no evidence that the Notice of lay off dated 9th July 2019 was received by the Appellant as required in law.

8. Counsel submitted that the letter stated that the Respondent company no longer had any running projects and the Appellant's position was to be affected therefore, the termination was not about the Appellant's act of commission or omission.

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9. Counsel submitted that in the said notice, nothing was stated implicating that the Appellant was being dismissed due to the fact that he used to report on duty late. Instead, the Respondent was willing to reengage the Appellant when they get busy in the future. Counsel submitted that the actions fitted the description of redundancy under **Section 2 of the Employment Act**.
10. Counsel relied on **Section 40 of the Employment Act** and the case of **Titus Muriuki Odira v. Beverly School of Kenya Limited** to submit that the procedure, conditions and obligations an employer should follow in the event an employee is declared redundant, that the same principles were to be followed fully and objectively. The Appellant was not notified of such before redundancy. No score card was produced by the Respondent to show that the Appellant scored so poorly as compared to his colleagues in the same department.
11. Counsel submitted that following the same provision and case law, the Appellant was entitled to severance pay of 15 days salary for each completed year of service at Kshs 82,881/= and that he should be paid Kshs 131,524/= as severance pay.
12. Counsel submitted that the Appellant was entitled to compensation for wrongful termination and for payment of leave days which the Appellant was denied by the Respondent. Counsel relied on the case of **Abigael Jepkosgei Yator & another v China Hanan International Co. Ltd [2018]**

EKLR to submit that an employer was required to keep all records for a period of 5 years and in the absence of any document to prove that the Appellant was given any leave days then the Appellant was entitled to payment for leave days. Counsel relied on section 28 of the Act on leave entitlement of not less than twenty-one days and that the appellant was therefore entitled to pay of Kshs 184,133.6/-.


13. Counsel further submitted that the Appellant was entitled to compensation for unfair dismissal having found that the Appellant was unlawfully declared redundant. Counsel relied on the case of **Titus Muriuki Mutitu v. Beverly School of Kenya Limited [2002] eKLR** cited section 49 of the Employment Act which states that the Appellant was entitled to compensation for wrongful termination. The court found that the redundancy was unlawful. Counsel submitted that considering the Appellant worked for the Respondent for 8 years, the Appellant was entitled to a compensation of 2 months of Kshs. 394,572/-.

RESPONDENT'S SUBMISSIONS

14. The Respondent's Advocates J. A. Masau & Co. Advocates filed written submissions dated 12th March 2025.

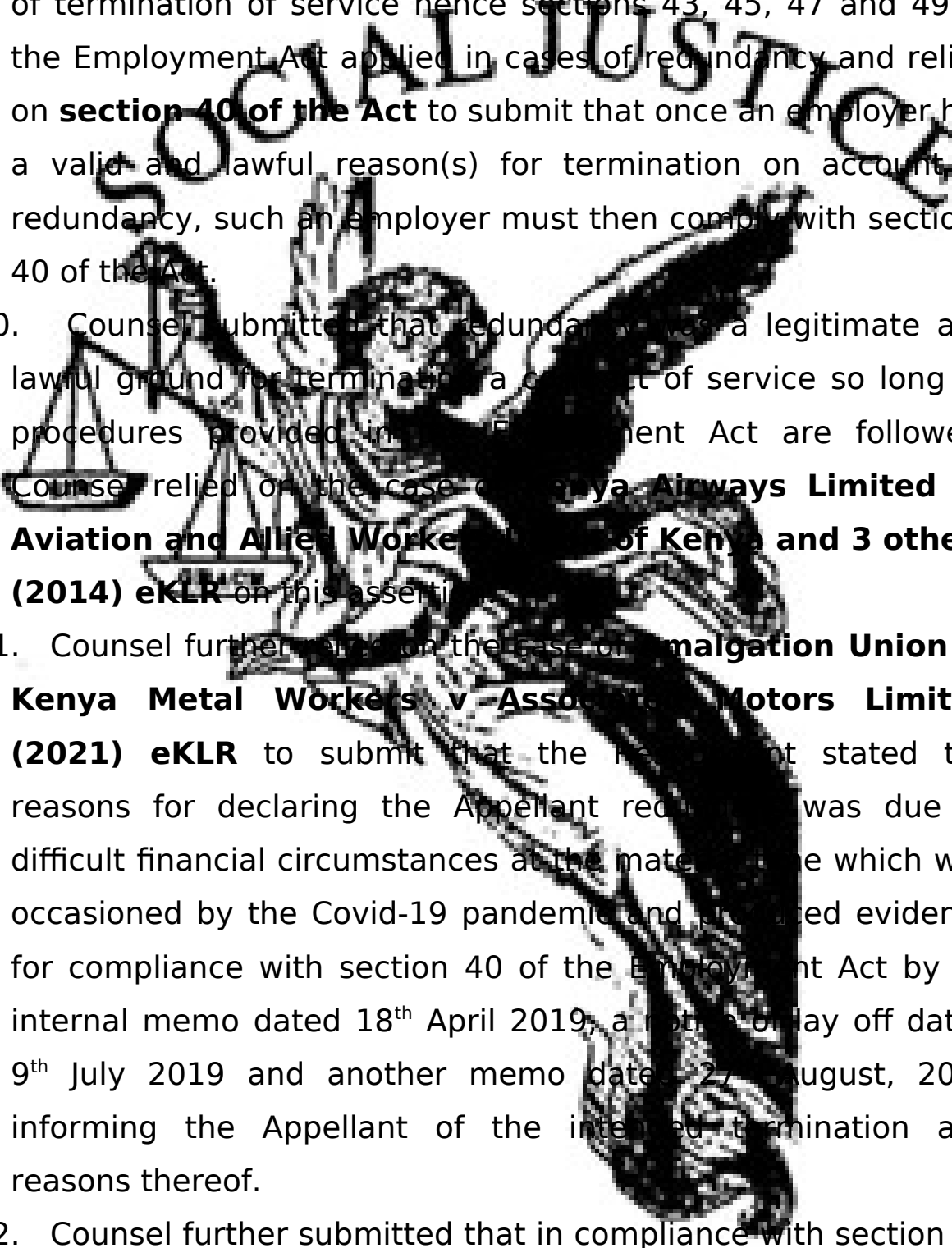
15. On the issue of whether the termination of the Appellant by the Respondent on account of redundancy was valid and lawful counsel relied on **Section 107 of the Evidence Act** to submit

that it was trite law that he who alleges must prove and submitted that the Appellant alleged unfair and unlawful termination of his employment contract and therefore at all times during the hearing of the matter in the subordinate court, the burden of proof of the allegation rested with the Appellant not on the Respondent.

16. Counsel further relied on Section 43 of the Employment Act which he contended places on the Respondent duty to prove the reason(s) for termination and that the same was lawful and valid. That the pendulum of proof only shifted to the Respondent if the termination was fair, valid and lawful and in accordance with the procedure provided in the Act which responsibility the Respondent discharged leading to the dismissal of the Appellant's case by the trial court.

17. Counsel submitted that the Appellant was unable to prove in the trial court that his employment contract was on permanent and pensionable terms and that the termination was unfair and unlawful while the Respondent proved that the Appellant's employment was on fixed term contract which already lapsed at the time of declaring him redundant. The Respondent produced contract of service and notices served under law for declaring an employee redundant.

18. Counsel relied on the case of **Joseph Rubia Onyangi vs Kenya Education Management Institute (KEMI) (2018) eKLR** on fixed term contracts terminating by effluxion of time and section 2 of the Act on definition of redundancy.

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19. Counsel submitted that redundancy was just like other forms of termination of service hence sections 43, 45, 47 and 49 of the Employment Act applied in cases of redundancy and relied on **section 40 of the Act** to submit that once an employer has a valid and lawful reason(s) for termination on account of redundancy, such an employer must then comply with sections 40 of the Act.
20. Counsel submitted that redundancy was a legitimate and lawful ground for termination of a contract of service so long as procedures provided in the Employment Act are followed. Counsel relied on the case of **Kenya Airways Limited vs Aviation and Allied Workers Union of Kenya and 3 others (2014) eKLR** on this essential point.
21. Counsel further relied on the case of **Amalgamation Union of Kenya Metal Workers v Association of Motors Limited (2021) eKLR** to submit that the Respondent stated the reasons for declaring the Appellant redundant was due to difficult financial circumstances at the material time which was occasioned by the Covid-19 pandemic and provided evidence for compliance with section 40 of the Employment Act by an internal memo dated 18th April 2019, a notice of lay off dated 9th July 2019 and another memo dated 27th August, 2019 informing the Appellant of the intended termination and reasons thereof.
22. Counsel further submitted that in compliance with section 40 of the Act, the respondent issued a notice of lay-off to the

Labour officer dated 9th July,2019 and the same was produced in evidence at the trial court. That in addition to the substantive and procedural measures taken into account by the Respondent while declaring the Appellant redundant, the Appellant did not dispute the fact that his contract was a fixed term for a period of three years which had lapsed and which informed the basis for the dismissal of the case at the trial court.

23. Counsel further relied on the ratio of **George Buoro vs Kerindia Assurance Co Ltd (2010) eKLR** which cited Section 45 (2) (b) to submit that the reasons of termination was fair if it was based on the operational requirements of the employer to remain competitive. Counsel submitted that the termination of the Appellant on account of redundancy met both the procedural and substantive requirements set in law and therefore was valid and lawful.

24. Counsel further submitted that having followed due process set out in law in terminating the Appellant and having given reasons for the same and requisite notices served with the Appellant's fixed term contract for service having lapsed and all his dues having been paid, the learned trial magistrate did not err in dismissing the Appellant's case at trial and therefore the appeal lacked merit.

DETERMINATION

25. The court has considered the grounds in the Memorandum of Appeal, the Record of Appeal and submissions filed by the parties herein states at the onset that the role of the Court as an appellate Court is now more or less settled as has been observed in several case such in the case of **Peters -vs- Sunday Post Limited [1958] EA 424** the Court of Appeal for East Africa observed thus:

"...on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions...In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and...It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time."

26. In this case, the judgment of the trial court was that the Claimant's suit and the Respondent's counterclaim was dismissed with no order as to costs and the Claimant was procedurally lawfully terminated. The Appellant was aggrieved by the said judgment and raised nine grounds of appeal which the court will condense in to two issues namely:

- a) **Whether the trial court erred by finding that the Appellant's termination was fair and procedural as per the employment contract and not on account of redundancy.**
- b) **Whether the trial court erred in not awarding the Appellant the reliefs sought.**

Whether the trial court erred by finding that the Appellant's termination was fair and procedural as per the employment contract and not on account of redundancy

27. It is the Appellant's case that the reason for termination of his employment was due to redundancy and that the provisions of section 40 of the Employment Act was not followed resulting to an unfair and unprocedural termination while the Respondent averred that the Appellant's contract was a fixed term contract which had stipulated the effluxion of time.

28. The trial court on the other hand found that the Appellant's termination was fair and lawful as per the employment contract but still appreciated that the Appellant was terminated on redundancy basis. The issue of fixed term contracts was brought in by the Respondent in its counter claim while claiming that the Appellant was dismissed for misconduct.

29. The termination letter dated 30th August 2019 stated that the Appellant was terminated due to lack of work which clearly points out to a termination on account of redundancy. The Respondent also in its pleadings admitted that the Appellant was terminated on account of redundancy. Section 2 of the

Employment Act defines redundancy which is at the initiative of the employer with the employee being not at fault.

30. The court agrees with the trial court that the Respondent ought not be heard to introduce issues of misconduct after declaring the Appellant redundant when it is indicated that it would re-engage him in future when the time is busy.

31. The trial court based its decision on the employment contract of July, 2016. The Appellant never disagrees with the lower court and notes that there was no such employment contract. The Appellant did not produce any employment contract and the only contract produced by the Respondent was the one dated 5th September, 2014 for three years. This contract was not signed by the Appellant and he did not object to it. The same contract lapsed on September 2014 and there was no indication of whether the same contract was renewed. The Appellant continued working as usual hence he was presumed as a permanent employee. His contract was constructively renewed since he was not terminated upon expiry of his term contract. There was no contract brought to

the court's attention of 2016 or attached by the parties hence the trial court erred by relying on such a contract.

32. In addition, the termination letter did not allude to a contract being ended by effluxion of time. The court therefore finds that the reason for termination as observed by the trial court was on account of redundancy.

33. Termination on account of redundancy must as far as possible comply with the provisions of section 40 of the Employment Act. In the case of **Kenya Airways Limited V Aviation & Allied Workers Union of Kenya & 3 Others [2014] eKLR** it was held that substantial justification of employment on account of redundancy is justified if there is substantive justification for declaring redundancy and if there is procedural fairness in the consequent retrenchment.

34. On substantial justification, the employee is required to prove the reason for termination under section 43 of the Employment Act which if not proved amounted to unfair termination under section 45 of the same act. The Appellant was issued with a termination letter dated 30th August, 2019 stating that there was no work.

35. Whereas the employer is given power under section 40 of the Employment Act to restructure its business to stay afloat the reason(s) for retrenchment must be valid. As to the procedure for redundancy, section 40 of the Employment Act caters for the procedure to be adopted by an employer who intends to terminate an employee on grounds of redundancy. Particularly Section 40(1) (a) of the Employment Act provides that the employer must advise the employee personally and in writing of the reasons and the nature of the redundancy at least one month before the date when the redundancy is to take effect.

36. The Appellant received the termination letter dated 30th August, 2019 three days after the internal memo dated 27th August, 2019 to all employees on the internal retrenchment. The Appellant denied receiving the notice of lay-off dated 9th July, 2019. The same was received by the Labour office on 11th July, 2019.

37. The court therefore notes that the Appellant was terminated on three days' notice instead of one month notice. In any case the Respondent instead of giving the Appellant the

required one month notice, it proposed to instead pay him one month-salary in lieu of notice as per the contract yet the same payment is independent from the one-month notice period.

38. On the requirement for consultation, the Respondent never proved that the Appellant was consulted since he was terminated immediately on account of redundancy. Unless the circumstances are such that it would be an utterly futile exercise to hold any meaningful consultations, consultation has to be real and not cosmetic. New Zealand Chief Judge succinctly expressed this in the case of **Cammish v. Parliamentary Service**¹²:

“Consultation has to be a reality, not a sham. The party to be consulted must be told what is proposed and must be given sufficiently precise information to allow a real opportunity to respond. A reasonable time in which to do so must be permitted. The person doing the consulting must keep an open mind and listen to suggestions, consider them properly, and then (and only then) decide what is to be done.”

39. Regarding selection criteria, the Respondent did not provide any criteria it used to declare the Appellant redundant. The Respondent did not pay the Appellant his severance pay and his leave days apart from the one month salary pay in lieu of notice as required by the law.

40. Whereas the Respondent was justified in declaring the Appellant redundant in order to remain competitive during the COVID 19 pandemic, it was however bound to follow the procedure as far as possible as set out under section 40 of the Employment Act. The Court therefore disposes with the procedure the Respondent adopted in declaring the appellant redundant.

Whether the trial court erred in not awarding the Appellant the reliefs sought.

41. The Respondent alleged that the Appellant was terminated fairly and paid his dues. The termination letter offered the Appellant only one month salary and more. This court having found that the Appellant was terminated unfairly proceeds to award him his dues claimed. On actual monthly salary the court will go by the Appellant's bank statement which showed that he used to receive KSh. 10,381/= which was most likely after deductions hence it is probable his gross salary was the claimed KSh. 10,000/= before deductions. No Payslip was attached to show the gross salary. It was also not in dispute that the Appellant worked for the Respondent from 2011 to 2019 which was a period of approximately 8 years.

42. On the compensation for unfair termination the court is guided by section 49(4) on the considerations it should take in

making such award. The court therefore takes note of the period the Appellant worked for the Respondent for 8 years, the nature of termination which was unfair and awards the Appellant 6 months salary as compensation for unfair termination.

43. Having found that the appellant was unlawfully declared redundant the Appellant was entitled to notice pay at the rate of 15 days' salary for each year of complete service which in this case was for the 8 years.

44. On the prayer for leave pay and housing allowance which are classified as continuing interest same as per section 90 of the Employment Act want to be claimed within one year after cessation thereof. The Appellant was terminated on 30th August, 2019 and filed his claim in September 2020 hence outside the time given by section 90 of the Act these heads of claim will therefore be disallowed for being time barred.

45. In the upshot the court finds and holds that the Appellant's Appeal merited and the same is hereby allowed with costs as follows: -

- a. One month's salary in lieu of notice of redundancy.....32,881**

b. 6 months' salary as compensation for unfair termination.....Kshs 197,286/=

c. Severance pay..... Kshs 131,524/=

TOTAL KSHS 361,691/=

46. It is so ordered.

Dated at Nairobi this 3rd day of October 2025

Delivered virtually this 3rd day of October 2025

Abuodha Nelson Jorum

Presiding Judge - Appeals Division