REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

APPEAL NUMBER E046 OF 2025

ELIZABETH NYAMBURA KINYANJUI…….....APPELLANT

-VERSUS

BURHANI ENGINEERS LIMITED…….....RESPONDENT

(Being an Appeal from the Judgment and Decree of the Hon. T.M. Orlando (PM) delivered on 6th February 2025, Nairobi in MCELRC E1198 of 2023)

CORAM

Before Lady Justice J.W.Keli

C/A Otieno

JUDGMENT

1. The Appellant herein, being dissatisfied with the Judgment and Decree of the Hon. T.M. Orlando (PM) delivered on 6th February 2025, Nairobi in MCELRC E1198 of 2023 between the parties filed a Memorandum of Appeal dated the 17th February, 2025 and raised the following grounds of appeal -
2. THAT the Honourable Magistrate erred in law and in fact by failing to adequately consider the oral and documentary evidence placed on record by the Claimant.

3. THAT the Honourable Magistrate misdirected himself in finding that the Respondent explained to the Claimant the reasons for declaring her position redundant in the absence of any evidence to support this.

4. THAT the Honourable Magistrate erred in law and in fact in not finding that the Respondent did not comply with the requirements of Section 40 of the Employment Act 2007 before terminating the Claimant's employment by way of redundancy.

5. THAT the Honourable Magistrate erred in law and in fact in finding that the claim for house allowance was not proved by the Claimant.

6. THAT the Honourable Magistrate erred in law and in fact in finding that the Claimant did not prove her case on a balance of probabilities that her termination was unfair.

7. THAT THAT the Honourable Magistrate misdirected himself on the award made in the said judgment.

BACKGROUND TO THE APPEAL

8. The Claimant/Appellant filed claim against the Respondent vide a statement of claim dated the 29th June 2023 seeking the following orders:-

   a. A declaration that the Claimant's termination was unprocedural and amounted to unfair termination;

   b. Kshs. 1,433,359.00 as particularized in paragraph 4 of this statement of claim;

   c. Costs of the suit;

d. Interest on b) and c) above

e. Such further or other reliefs as this Honourable Court may deem fit.

(pages 3-6 of Appellant's ROA dated 10th March 2025).

14. The Claimant filed her witness statement, list of witnesses, and list of documents with the bundle of documents attached, all dated 29th June 2023 (see pages 7-19 of ROA).

15. The claim was opposed by the Respondent who entered appearance and filed a response to statement of claim dated 27th November 2023 (pages 20-22 of ROA). They also filed a list of witnesses dated 19th April 2024, witness statement of RASHID KILONZO dated 24th April 2024, and list of documents dated 19th April 2024 with the bundle of attached (pages 23-52 of ROA).

16. To counter the Respondent's response, the Claimant filed a Response dated 28th November 2023 (page 53 of ROA).

17. The Claimant/Appellant's case was heard on the 23rd October 2024 where the claimant testified in the case, relied on her witness statement as her evidence in chief, produced the documents attached to her list of documents, and was cross-examined by counsel for the Respondent Mr. Otinga (pages 87-91 of ROA).

18. The Respondent's case was heard on the same day with the Respondent calling one (1) witness, Rashid Kilonzo, to testify on its behalf. He relied on his filed witness statement, and

produced the Respondent's documents. He was cross-examined by counsel for the claimant Ms. Kariuki (pages 91-92 of ROA).

19. The parties took directions on filing of written submissions after the hearing. The parties complied.

20. The Trial Magistrate Court delivered its judgment on the 6th February, 2025, partly allowing the Claimant's claim and awarding the claimant/Appellant a sum of Kshs.127,750.00 being two months salary in lieu of notice (judgment at pages 82-84 of Appellant's ROA).

DETERMINATION

21. The appeal was canvassed by way of written submissions. The parties complied**.**

Issues for determination

22. The Appellant submitted generally on the grounds of appeal in her written submissions dated the 15th July, 2025.

23. The Respondent also submitted generally on the grounds of appeal dated 22nd September 2025.

24. The appellant did not seek any specific relief from the court. The court finds the issue for determination in the appeal to be –

a. Whether the Honourable Magistrate erred in law and in fact in not finding that the Respondent did not comply with the requirements of Section 40 of the Employment Act 2007 before terminating the Claimant's employment by way of redundancy.

b. Whether the Honourable Magistrate erred in law and in fact in determination of relief sought

Whether the Honourable Magistrate erred in law and in fact in not finding that the Respondent did not comply with the requirements of Section 40 of the Employment Act 2007 before terminating the Claimant's employment by way of redundancy.

Appellant's submissions

25. First and foremost, we cannot over emphasize the role of this court sitting as a first appellate court. In Abok James Odera t/a AJ Odera Associates v John Patrick Machira t/a Machira e KLR, the Court of Appeal stated as follows with regard to the duty of the first appellate court; "this being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way." A. Whether the trial court erred in not finding that the Respondent breached Section 40 before terminating the Appellant. My Lady, the Appellant's case before the trial court was that she was terminated on account of Redundancy and that her termination was procedurally unfair and in breach of Section 40 of the Employment Act. The trial court however held that redundancy was not proven because the Appellant stated she was not told she was being terminated due to redundancy. The court, however, failed to consider that the Appellant did

testify she was informed her termination was due to restructuring, which in essence constitutes redundancy. At page 86 of the Record of Appeal, the Appellant testified that she was not informed that her termination was due to redundancy but was simply told that her role was being affected by restructuring. It is the Appellant's position that this restructuring, which resulted in the loss of her employment, and which was not her fault, amounted to redundancy, and the Respondent's failure to follow the mandatory procedure rendered the termination unlawful.

26. The Appellant, being a lay person, did not understand that "restructuring" amounted to redundancy in law. Her testimony that she was told she was being terminated due to restructuring should not have been taken to mean that redundancy was not in issue. The legal character of the termination must be assessed based on substance, not the terminology used by the employer. 8. The Employment Act has defined Redundancy as "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;" 9. The Respondent is entitled to restructure its business. However, where such restructuring results in the loss of employment, it amounts to redundancy. In such cases, the Respondent is required to comply with Section 40 of the Employment Act.

27. The trial court also failed to further consider the fact that the Respondent in their own case admitted that they were doing away with the Respondent's division and that they declared her redundant. However, the Respondent's position was that they had complied with the procedural

requirements set out under Section 40 of the Employment Act. From the evidence on record, the procedure followed by the Respondent was as follows: On 3rd May 2023, the Respondent sent a 'Notice of Mutual Separation' to the Labour office. In this letter, the Respondent informed the Labour Office that they had entered into a Mutual Separation Agreement with the Appellant herein. On 2nd June 2023, the Respondent prepared a; Final Dues Payment' Letter that was received by the Appellant on 3rd June and by the Labour Office on 5th June. On 29th June 2023, the Respondent again wrote to the Labour office informing them that they had employed the Appellant herein and had had a 'mutual separation on June 3rd 2023. The letter was received on the 3rd July 2023. On 30th June 2023, letter confirming payment to Appellant which was for the following dues: Severance pay, salary for days worked up to 2nd June 2023, leave days and notice pay. During the hearing, the Respondent's witness testified that the Appellant was terminated due to redundancy. However, in all its correspondence with the Labour Office, the Respondent consistently referred to the separation as a mutual separation and made no mention of redundancy. This inconsistency raises questions about the true nature of the termination and whether the proper procedure under Section 40 of the Employment Act was followed. Despite these contradictions, the trial court failed to address or consider the discrepancy between the Respondent's testimony and the documentation submitted to the Labour Office. 1t is necessary to draw a distinction between a mutual separation agreement and a redundancy. A mutual separation is a voluntary agreement between the employer and employee to terminate the employment relationship, often initiated by the employee or mutually negotiated. In contrast, a redundancy is an involuntary termination initiated by the employer due to operational or structural changes, where the employee plays no part in the decision.

28. In our case, it is clear that this was a redundancy. Having established that the Appellant's termination amounted to redundancy in substance, the next issue for determination is whether the Respondent complied with the mandatory procedural requirements set out under Section 40 of the Employment Act. Section 40(1) of the Employment Act provides a detailed framework that an employer must follow before terminating an employee on account of redundancy. These include: a. Giving one month's prior notice to both the employee and the Labour Officer; b. Taking into account seniority, skill, ability and reliability in selecting employees to be declared redundant; c. Paying all due terminal benefits, including severance pay; and d. Conducting the process in a manner that respects the principles of fairness and transparency. The procedure as followed by the Respondent fell significantly short of these statutory requirements in that: • There was no proper redundancy notice to either the Appellant or the Labour Office as required under Section 40(1)(a). Instead, the Respondent sent a notice titled "Mutual Separation" to the Labour Office on 3rd May 2023, which mischaracterized the nature of the termination and failed to disclose that it was a redundancy. There was no evidence of any objective criteria having been used in selecting the Appellant for termination such as skill, ability, or reliability as required by Section 40(1)(c). The Court of Appeal in Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR in holding the provisions of Section 40 are not optional and must be strictly complied with stated that: "Justification is one important aspect of redundancy. The other equally important aspect is procedural fairness. As I have pointed out, for any termination of employment under redundancy to be lawful, it must be both substantially justified, and procedurally fair. Both are clearly mandatory requirements ... "

Respondent's submissions

29. In her statement, the Appellant stated that her position was declared redundant due to restructuring of the company. However, in cross-examination she did not agree that the termination was as a result of redundancy but confirmed to have had a talk with 'Latema' who said they were terminating due to restructuring. The trial court held that the Appellant was terminated due to redundancy and dismissed her claim for unfair termination on the ground that she did not prove her case on a balance of probabilities that her termination was unfair. On the other hand, though referred to as a mutual separation, the Respondent terminated the Appellant's employment on account of redundancy by informing the Appellant who confirmed the talk with the Respondent's director (Fatema). As confirmed by the Appellant, her position was declared redundant hence there was no need for a selection process. The labour office was informed of the termination a month prior to the effective date and the Appellant was paid her terminal dues contemplated under Section 40 of the Employment Act which included severance pay, salary for May, 2023, leave days and one month payment in lieu of notice vide cheques number 015516 and 015515 for the sum of Kshs. 108,254/- and Kshs. 159,687/- respectively at page 44, 47 and 48 of the Record of Appeal.

Decision

30. The relevant grounds of appeal were –

    a. *THAT the Honourable Magistrate misdirected himself in finding that the Respondent explained to the Claimant the reasons for declaring her position redundant in the absence of any evidence to support this.*

b. *THAT the Honourable Magistrate erred in law and in fact in not finding that the Respondent did not comply with the requirements of Section 40 of the Employment Act 2007 before terminating the Claimant's employment by way of redundancy.*

c. *AT the Honourable Magistrate erred in law and in fact in finding that the Claimant did not prove her case on a balance of probabilities that her termination was unfair.*

31. Redundancy is defined under section 2 of the Employment 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;''* The appellant, in the statement of claim, stated in paragraph 6 that the respondent's chief executive officer, Ms. Fatema, summoned her to the office and informed her that, due to company restructuring, her position was declared redundant and her employment was terminated immediately. The claimant further contended that, for failure to comply with the provisions of section 40 of the Employment Act, the termination was unfair. The appellant, in paragraph 9 of the claim, stated she reported the matter to the labour officer and the respondent ignored the same.

32. The respondent entered an appearance and filed a response to the claim. In response to paragraph 6, the respondent stated that the employment of the appellant was governed by contract and law, and that the termination was carried out in accordance with the law. The appellant was fully paid all terminal dues. In the witness statement of Kilonzo dated April 24, 2024, the respondent stated that the termination was due to redundancy, as the appellant had

worked from August 7, 2017, to June 2, 2023. Upon termination of service, the claimant received all her terminal dues, including severance pay, notice pay, pending leave days, and salary, and was issued a certificate of service. The labour office was aware of the termination, and they responded to their letter (page 24-25 of ROA is the witness statement of Kilonzo).

33. During cross-examination, the appellant told the court that there were three persons working in a division as a tendering assistant. She told the court she did not agree the termination was redundancy. That she had talked to Latema (In the claim, reference was to Fatema, which the court concluded was the same person), who said they were terminating her contract due to restructuring. The appellant told the trial court that the letter of 3rd May 2023 produced in court was not given to her and did not indicate termination on account of redundancy (pages 89-90 of ROA).

34. During cross-examination of DW1, Kilonzo, he told the court the termination was on account of redundancy and the appellant had been notified. He did not give notice, and admitted the letter dated 3rd May 2023 referred to mutual separation and not redundancy. On re-examination DW1 said the letter was headed mutual separation but the body indicated redundancy. He admitted there were 3 people in the division and the issue concerned the salary section/account section. The trial court held that the claimant admitted to have been terminated on account of redundancy in pleadings.

35. This court established that, in paragraph 6 of the claim, the appellant was informed of the restructuring as the reason for termination. It was a case of redundancy, as the same includes restructuring of the office, which is a prerogative of the employer. While it is the prerogative of

the employer to restructure the office and terminate redundant employees, the procedure for doing so is outlined in section 40 of the Employment Act, to wit—'40. *Termination on account of redundancy'*.

(1)An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—(a)where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;(b)where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;(c)the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;(d)where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;(e)the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;(f)the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and(g)the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.'' To meet the fairness test the redundancy procedure must be complied with. I uphold the decision cited by the appellant of the Court of Appeal in Kenya Airways

Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR in holding the provisions of Section 40 are not optional and must be strictly complied with stated that: "Justification is one important aspect of redundancy. The other equally important aspect is procedural fairness. As I have pointed out, for any termination of employment under redundancy to be lawful, it must be both substantially justified, and procedurally fair. Both are clearly mandatory requirements ... "

36. While the appellant was informed of the restructuring the court found non compliance with issuance of notice of redundancy to the labour office. The letter of 3rd May 2023 informed the labour office of mutual separation both in title and in body contrary to testimony of DW1(page 47 of ROA). Mutual separation is not equal to redundancy. It is a special process of termination and is involuntary as defined under section 2 of the employment act to wit- ***Redundancy is defined under section 2 of the Employment 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;’’

37. The court agreed that restructuring is a valid reason to declare redundancy. The appellant was paid notice pay for one month, accrued leave days, and severance pay for each 15 days worked, which the court finds was in partial compliance with the provisions of section 40 of the Employment Act. The termination is declared as unfair for failure to comply with the provisions of section 40 of the Employment Act. The respondent did not demonstrate to the

court that, in the restructured organization, they could not accommodate the appellant. The trial court erred in failing to declare the termination unfair, as required by section 40 of the Employment Act, for failure to comply with its provisions.

Whether the Honourable Magistrate erred in law and in fact in the determination of relief sought

The Appellant submission

38. Whether the trial magistrate misdirected himself on the award made in the said Judgement- The Appellant, in her Statement of Claim, sought a declaration that her termination was unlawful, compensation for unfair termination as provided under Section 49 of the Employment Act, and payment of house allowance, which she contended had not been paid during her employment. Despite these clear prayers, the trial court, in its judgment, awarded the Appellant two months' salary in lieu of notice. This relief had neither been pleaded nor sought by the Appellant. The trial court thus clearly erred in law and fact by granting relief outside the pleadings. The court's decision disregarded the settled principle that a party is bound by their pleadings, and that a court should only pronounce itself on the issues properly before it. .ln conclusion, the trial magistrate did err in fact and law by awarding a prayer that was not pleaded.

39. Whether the trial court erred in law and fact in finding that the claim on House Allowance was not proved by the Appellant-. One of the Appellant's prayers at the trial court was a claim for House Allowance. The trial court disallowed this prayer on the grounds that it was not proven.

During the proceedings at the lower court, the Appellant produced copies of her payslips as key evidence. These payslips consistently show that her Basic Salary was recorded as equivalent to her Gross Salary, with no separate entry for house allowance or any other allowances. This documentation directly contradicts the usual assumption that gross salary includes all allowances. 1t is generally accepted, and often legally presumed, that gross salary encompasses basic pay plus allowances such as house allowance. However, the payslips issued to the Appellant by the Respondent reveal a contrary position in this case, where the house allowance was neither reflected nor paid as part of the gross salary. This suggests that the house allowance was treated as a separate entitlement, which the Appellant did not receive. This evidence clearly supports the Appellant's claim that the house allowance was outstanding and unpaid. The Respondent's failure to include or pay the house allowance despite it being a legal entitlement is a material breach of the Appellant's terms of employment. In conclusion, the trial court erred in dismissing this claim without properly considering the evidence on record. This Honourable Court should therefore find in favour of the Appellant on this issue.

40. The Appellant prays that this Honourable court substitutes the trial courts Judgement as follows: a. House Allowance -Having demonstrated that the trial court misdirected itself in dismissing the claim for house allowance, the Appellant respectfully prays that this Honourable Court awards the same as was pleaded in the Statement of Claim. Compensation for unfair termination. Section 49 (1) (c) of the Employment Act provides that where termination is deemed to have been unfair, an employee can be awarded the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal. The Court of Appeal in the Kenya Airways

Case (Supra), after finding that the redundancy process was unprocedural awarded the affected employees compensation equivalent to 6 months salary as compensation for unfair termination. The Appellant prays that this Honourable Court grant the maximum award of twelve months compensation for unfair termination, as provided under Section 49 of the Employment Act. She had served the Respondent faithfully for seven uninterrupted years, with no record of misconduct. The sudden and procedurally flawed termination not only disregarded her service but also deprived her of the protections guaranteed by law, justifying the highest award.

The Respondent's submission

41. Whether the learned trial magistrate erred in law and in fact in finding that the claim for house allowance was not proved - The Appellant prayed for house allowance of Kshs. 666,855/- on the basis that she was not paid the same during the period of her employment with the Respondent. The Appellant relied on the payslips at page 13-15 of the Record of Appeal in support of the claim. The said pay-slips show the basic pay of Kshs. 63,875.00 to be same as the gross pay. The Appellant's claim was disputed by the Respondent who stated that the Appellant's salary was always consolidated and as such inclusive of house allowance. The Respondent relied on the Employment Contract dated 07/08/2017 at page 27-33 of the Record of Appeal and Salary Adjustments Notices dated 31/08/2020, 30/09/2020, 01/08/2019, 31/05/2020 and 01/04/2018 at page 34, 35, 36, 37 and 39 respectively of the Record of Appeal. The Appellant made allegations that on the 02/06/2023, she was forced/compelled by the Respondent's Human Resource Manager (Rashid Kilonzo) to sign the said Employment Contract, an allegation disputed by Rashid who was the Respondent's witness. On the issue of being forced/compelled to sign the Employment Contract, the learned trial magistrate held as

follows: - “I have considered the contract of employment and the letter of termination, though the claimant stated that she was forced to sign the contract, there was no proof of the same.” Apart from stating in her statement that she was forced/compelled to sign the contract, the Appellant, and as rightly held by the trial court, failed to demonstrate how she was forced into signing the contract. In cross-examination, the Appellant stated that she had a WhatsApp message with the Respondent’s director and assistant director but failed to avail the same in court. The Appellant further stated that there was someone who witnessed the process but failed to disclose the identity of the said person or call him as a witness in court. Before the trial court the Respondent relied on the case of Wenslaus Oduki Odinga -vs- Kenyatta National Hospital Board [2013] eKLR, where the court held as follows: - “Apart from the general claim of duress, the Claimant did not adduce any particulars. An employee alleging duress or inducement to sign a document in a non-custodial environment must provide details of such duress or inducement. It is not enough to say “I was forced or I was confused.” The Claimant failed to provide any such details and his claim that he was forced to sign the admission is therefore rejected. This in effect mean the Respondent had a substantive justification for terminating the Claimant's employment.” The said Employment Contract was the primary contractual document regulating the parties’ employment relationship. Clause 8 thereof on remuneration provided for payment of monthly gross salary of Kshs. 30,000.00. The Salary Adjustment Notices which varied the Employment Contract in terms of remuneration expressly referred to adjustment of gross salary. The contents of these notices were never controverted by the Appellant before the trial court. As submitted by the Respondent before the trial court, having testified that the salaries paid to the Appellant was consolidated, the burden shifted to the Appellant to prove that in deed the gross salary was exclusive of the housing allowance.

Before the trial court the Respondent relied on the case of Evans Gato Orina -vs- Aggreko International Project Limited [2019] eKLR where the court stated thus: - ‘’In my view, the description of the salary as consolidated meant that it was the claimant’s constant gross salary and the burden of proving otherwise rests on the employee who has any other interpretation of the said written term of the contract.’’ Emphasis added. The pay-slips relied upon by the Appellant did not supersede clear and express provisions of the Employment Contract and the Variations done by the Salary Adjustments Notices on payment of gross salary. In any event, the Respondent’s witness stated in re-examination that it was an issue with the salary section or account section. The Court of Appeal in case of Grain Pro Kenya Inc. Limited -vs- Andrew Waithaka Kiragu [2019] KECA 563 (KLR), noted as follows: - “We hold the primary document of contract here was the letter of appointment as the pay slip does not constitute a contract.” In Raksha International Medical Services Meditirina Hospital Rai International Medical Services -vs Ogetange [2025] KEELRC 1805 (KLR), Justice Nzioki Wa Makau noted as follows: - “The Appellant raised the ground of consolidated salary without leave and also the Respondent did not have a chance to properly address the Court on the same save for reprise in her submissions. Be that as it may, the issue of a consolidated salary ……. The contract exhibited provided for a consolidated salary and as such, the Learned Trial Magistrate was incorrect in not upholding it. As such the award of Kshs. 63,000/- on this head is reversed.” The Appellant failed to demonstrate any other agreed allowances payable together with the basic pay. As provided under Section 31(2)(a) of the Employment Act, the gross salary herein as provided in the Employment Contract included reasonable housing allowance. The trial court cannot therefore be faulted in finding that the Appellant failed to prove the claim for house allowance.

42. Whether the learned trial magistrate misdirected himself on the award made in the said judgement- As rightly submitted by the Appellant, the trial magistrate erroneously proceeded to award the Appellant two months' salary in lieu of notice of Kshs. 127,750.00 despite the said relief not been pleaded or sought by the Appellant. Further to the said relief not been pleaded or sought, Clause 13 of the Employment Contract on termination of the contract provided for giving of one month notice or payment of one month salary in lieu of notice. Termination on account redundancy requires payment in lieu of notice which was in fact paid to the Appellant in the sum of Kshs. 63,875.00 in addition to other dues herein before which included severance pay, salary for May, 2023 and leave days. We therefore agree with the Appellant that the trial court erred in law and fact by granting the relief outside the pleadings and pray the court to exercise its powers under Section 78 of the Civil Procedure Act and set aside the erroneous award.

Decision

43. On the award for the compensation for unfair termination – The appellant submitted that the Court of Appeal in the Kenya Airways Case (Supra), after finding that the redundancy process was unprocedural, awarded the affected employees compensation equivalent to 6 months' salary as compensation for unfair termination.

44. Conversely, the respondent submitted that, as rightly submitted by the Appellant, the trial magistrate erroneously proceeded to award the Appellant two months' salary in lieu of notice of Kshs. 127,750.00 despite the said relief not been pleaded or sought by the Appellant. Further

to the said relief not been pleaded or sought, Clause 13 of the Employment Contract on termination of the contract provided for giving of one month notice or payment of one month salary in lieu of notice. Termination on account redundancy requires payment in lieu of notice which was in fact paid to the Appellant in the sum of Kshs. 63,875.00 in addition to other dues herein before which included severance pay, salary for May, 2023 and leave days. The court finds that, on finding unfair termination, the trial court was obliged to consider section 49 of the Employment Act. The claimant had worked for approximately 6 years. She had no negative disciplinary record. This being a case of redundancy she had not contributed to the termination. The court is further guided by the Court of appeal decision in Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR where the court (Maraga, JA as then was with Murgor, JA concurring) held - *'Termination of employment on account of redundancy is justified if there is substantive justification for declaring redundancy and there is procedural fairness in the consequent retrenchment. Given the fact that for a period of about five years the appellant's profits had continually dipped, I find that the appellant was justified in declaring redundancy. The appellant, however, failed to meet that statutory threshold of procedural fairness in the implementation of its redundancy decision in that it failed to give notice to the labour officer and a proper and adequate notice to the affected employees or their union; it failed to hold meaningful consultations with the affected employees or their union; and its selection of the affected employees was not based on an objective and open criteria.*

76. *However, having found that redundancy was justified, I hold that the remedy of reinstatement with back wages was, in the circumstances, not efficacious and I accordingly set aside the learned Judge's order of reinstatement in its entirety and substitute it with an award of*

damages equivalent to six months' salary to each of the 447 retrenched employees. This award will be in addition to the payments the appellant has offered to make to those retrenched employees. As stated in ***Section 49(2)*** *of the Employment Act, these payments shall be subject to the relevant statutory deductions.''* I uphold the decision. Having held that the redundancy process failed to meet the statutory requirement of notice and selection criteria, as there were 3 employees in the division , the court found that the award of compensation of 6 months' salary was justified and awards the same. The award of 2 months notice pay is set aside and substituted with award for unfair termination , thus Kshs. 63875 (see page 46 of ROA)x 6 award of **Kshs. 383,250/-**

45. Housing allowance – The ground of appeal was - THAT the Honourable Magistrate erred in law and in fact in finding that the claim for house allowance was not proved by the Claimant. The appellant said she was not provided or paid a housing allowance and relied on the payslip, which indicated basic (see page 15 of ROA). The appellant only produced payslips. The Respondent produced an employment contract of 7th August 2017. At page 3 of the contract, clause 8 on remuneration, was gross salary of Kshs. 30,000(page 29 of ROA). Salary adjustments were done on same contract and all referred to gross-salary. The court finds that parties are bound by their contracts and that the payslip is equivalent to the contract. The payslip referred to word ''Basic'' and not basic salary. I find that the appellant is being mischievous as her contract of employment referred to gross salary and the same was adjusted vide document all referring to gross salary. The claim for housing had no merit and is disallowed. The decision of the trial court on housing is upheld.

Conclusion

46. The appeal was successful on issue of compensation for unfair termination only. The Judgment and Decree of the Hon. T.M. Orlando (PM) delivered on 6th February 2025, Nairobi in MCELRC E1198 of 2023 is set aside and substituted as follows-

    Judgment is entered for the claimant against the respondent as follows-

    a. The termination based on redundancy was unfair.

    b. Compensation equivalent of 6 months salary for total sum of **Kshs. 383,250/-** with interest at court rates from judgment date.

    c. Costs of the suit

    d. Certificate of service to issue within 30 days of judgment

47. The Costs of the appeal are awarded to the appellant.

48. 30 days stay granted,

49. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 13TH DAY OF NOVEMBER, 2025.

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant – ABSENT

Respondent- Mr. Otinga