

REPUBLIC OF KENYA

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
ELDORET**

APPEAL NO. E030 OF 2023

ESBON KIPTUM

APPELLANT

VERSUS

WILSON MWANGI WAINAINA

T/A MSAFI CLEANING SERVICES RESPONDENT

*(Being an appeal from the Judgment of Honourable B. Kiptoo,
Principal Magistrate delivered on 13th October 2023 in Eldoret
CMEELRC No. 142 of 2019 between Esbon Kiptum v Wilson Mwangi
Wainaina T/A Msafi cleaning Services*

JUDGMENT

1. The Appellant herein sued the Respondent at the lower court seeking the following remedies:
 - a) Declaration that the claimant's termination from employment on account of redundancy was unlawful, unprocedural and unfair
 - b) The sum of Kshs 263,257.68 as set out in the Statement of Claim

c) Certificate of service

d) Cost of this suit and interests on at court rates from time of filing the suit until payment in full and

(a) Any other relief the Honourable Court may deem just and fit to grant.

2. The Respondent filed a Memorandum of Response dated 27th January 2020 denying the claim. It averred that the Claimant deserted duty on 5th November 2017 and never returned to work.

3. Upon hearing the parties, the trial court found that the Appellant did not prove his case on a balance of probabilities and dismissed the suit.

4. The Appellant (Claimant in the lower court) was aggrieved by the said judgment and filed the instant appeal vide the Memorandum of Appeal dated 6th November 2023 on the grounds that:

a) The learned Magistrate trial magistrate erred in law and fact in failing to sufficiently appreciate that it was not open to him to rely upon and/or consider

documents filed by the Respondents that was not produced in court as exhibit.

- b) The learned magistrate erred in law and fact in failing to take into consideration that the Respondent did not participate during trial neither did they call a witness to defend the case against the Respondent and produce the Respondent's documents as exhibit.
- c) The learned magistrate erred in law and fact in dismissing the Appellant's case without factual or legal basis even after the Appellant tendered overwhelming and undisputed evidence against the Respondent
- d) The learned magistrate erred in law in failing to direct his mind properly on the provisions of section 40 of the Employment Act that is upon an employer to prove that redundancy process was adhered to
- e) The learned magistrate erred in law and in fact in holding that the Appellant was given a transfer letter thus not terminated whilst the Appellant did not have

a chance to cross examine the maker of the said letter so as to determine the authenticity of it.

- f) The learned magistrate erred in law and in fact in his judgment that the Appellant was not entitled to remedies sought in his Statement of claim
- g) The learned magistrate erred both in law and in fact in dismissing the Appellant's statement of claim in its entirety citing grounds in his judgment
- h) The learned magistrate erred in fact and in law in failing to consider the Appellant's substantive submissions and authorities thereon to arrive at a reasoned decision.
- i) The Respondent failed to discharge the reasons for termination of the Appellant which rests with the employer under section 10,45,47(5) and 74(q a-m) of the Employment Act and the Respondent failed to discharge this burden
- j) The trial magistrate erred in law and in fact in failing to evaluate, analyze, consider and determine all the

issues that arose during trial therefore arriving at an erroneous judgment

k) The learned trial magistrate erred in law and in fact in misdirecting himself and acted on a wrong principle in reaching the judgment of the court

l) The learned magistrate judgment in the circumstances is misconceived, unfair and unjust

m) The learned trial magistrate exhibited bias in his judgment against the Appellant's case.

5. Consequently, the Appellant seeks the following orders:

a. This appeal be allowed.

b. The Judgment of the Honourable B.K Kiptoo, Principal Magistrate delivered on 13th October 2023 in Eldoret CMELRC Cause No. 142 of 2019 be set aside and/or varied.

c. The costs of this appeal be awarded to the Appellant.

d. This Honourable court makes such and further orders as it deems fit and just to meet the ends of just.

6. The appeal was disposed of by way of written submissions. The Appellant filed his written submissions dated 17th March 2025. I

have perused the record and did not find submissions for the Respondent.

Analysis and Determination

7. This being a first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified. See **Selle & Another v Associated Motor Boat Company Ltd & Others [1968] EA 123.**
8. The Appellant filed his Statement of Claim dated 19th October 2018 seeking to be compensated for the alleged unfair and unlawful termination of his employment on account of redundancy. He averred that he was employed by the Respondent as a cleaner stationed at Nakumatt Holdings Eldo Centre on the 1st December 2015 at a monthly salary of Kshs 8,400 which was later increased to Kshs 9000 and that he served the Respondent until 5th November 2017 when he was unfairly terminated from employment on account of redundancy.

9. It was the Appellant's case that the move by the Respondent to terminate his services on account of redundancy was in total contravention of the procedure under section 40 of the Employment Act.
10. According to the Appellant, upon termination of his employment he was entitled to terminal dues which he tabulated as hereunder:

(i) One month pay in lieu of notice

LN NO. 112 of 2017

Minimum wage for cleaners Ksh.11926.40/=

Section 36 of the Employment Act

Basic salary + House Allowance

11,926.40 + 15% of 11926.40.....Kshs.

13,715.36/=

(ii) Severance pay

Section 40(g) of the Employment Act

15/30 x basic salary x no. of complete years of service

15/30x11926.40 x 1 year.....Kshs. 5,963.20

(iii) Compensation for unfair termination

Section 49 (c) of the Employment Act

- 11,926.40 x12.....Kshs 143,116.80
- (iv) Salary for the 5 days worked in November 2017
 5/30 x 11926.40.....Kshs 1,987.73
- (v) Pro rate leave for 2017
 21/12 x basic salary/30 days x no. of
 months.....Kshs 6,957.07
- (vi) House allowance
 From December 2015 to April 2017
 LN No. 116 of 2015
 15% x 10107 x 17 months.....Kshs 25,773.10
 May 2017 to October 2017
 LN No 112 of 2017
 15% x 11926.40 x 6 monthsKshs 10,733.76
- (vii) Holidays worked without pay
 From December 2015 to April 2017
 LN No. 116 of 2015
 16 public holidays
 16/30 x 10107.10 x 1.4.....Kshs. 7.636.47
 From May 2017 to October 2017
 LN No. 112 of 2017

4 public holidays

4/30 x 11926.40 x 0.5 years.....Kshs 795.09

(viii) Underpayment

From December 2015 to April 2017

LN No. 116 of 2015

(10107.10-8400)x 17 months.....29,020.70

May 2017 to October 2017

LN No. 112 of 2017

(11926.40-9000)x 6 months.....Kshs 17,558.40

TOTAL

KSH.263,257.68/=

11. The Appellant prayed for the following reliefs in his Statement of Claim:

- a) Declaration that the claimant's termination from employment on account of redundancy was unlawful, unprocedural and unfair
- b) The sum of Kshs 263,257.68 as set out in the Statement of Claim
- c) Certificate of service

d) Cost of this suit and interests on at court rates from time of filing the suit until payment in full and

e) Any other relief the Honourable Court may deem just and fit to grant.

12. In its Memorandum of Response dated 27th January 2020, the Respondent denied the averment made by the Claimant that he was unfairly terminated from employment on account of redundancy. The Respondent averred that there was no redundancy in its company as it had secured another contract in Ruiru, Kiambu County. According to the Respondent, the Claimant voluntarily and effectively quit his employment on grounds that that he could not move and work in Ruiru, Kiambu County.

The Evidence adduced

13. The Claimant testified on 17th May 2023 as CW1 and adopted his witness statement recorded on 19th October 2018 as his evidence in chief. He stated that he was terminated from employment by the Respondent on account of redundancy without being given notice.

14. He further contended that he was not issued with a letter transferring him to Ruiru, contrary to the Respondent's assertion.
15. The Claimant thereafter closed his case, and the Respondent also closed its case without calling any witnesses
16. In its judgment, the trial court dismissed the Appellant's case, holding that the Claimant had failed to establish his claim on the balance of probabilities.

The Appeal

17. In his submissions the Appellant framed the following issues for determination in the appeal as follows:
 - i. Whether the learned magistrate erred in law and fact by dismissing the Claimant's claim with no orders as to costs
 - ii. Whether the Appellant was unfairly and unprocedurally terminated on account of redundancy
 - iii. Whether the Appellant is entitled to the prayers sought in the statement of claim
 - iv. Who should pay the cost of the Appeal.

18. On the first issue, the Appellant submitted that the Respondent unlawfully, unfairly and unprocedurally terminated his services orally on 5th November 2017 in total disregard of the procedure established in law. The Appellant relied on the case of ***Julie Tupiran Njeru v Kenya Tourist Board (Industrial Cause No. 886 of 2010)***, where the Court outlined the proper procedure to be followed by an employer contemplating the termination of employment on account of redundancy.
19. According to the Appellant, the Respondent in terminating his employment did not give him notice of the intended redundancy and neither was the Labour office notified one month prior of the intention to terminate him from employment. In support of this submission, the Appellant cited the case of ***Francis Maina Kamau v Lee Construction [2014] eKLR; Gerrishom Mukhutsi Obayo v DSV Air and Sea Limited [2018] eKLR; Addah Adhiambo Obiero v Ard Inc [2014] eKLR; and David Kinyua Nthumbi & Emmanuel***

**Nato Wakhungu v Travellers Petrol Point Limited
(Nairobi Cause No. 2043 of 2014).**

20. In response to the Respondent's defence that the Appellant was transferred to Ruiru following the termination of its contract with Nakumatt Holdings Limited, the Appellant submitted that the Respondent failed to call the Human Resource Officer, who was indicated as the signatory of the letter dated 5th October 2017 to confirm whether the letter had indeed been served on him.
21. Additionally, the Appellant asserted that the termination decision was made without prior consultation, as required under Section 40(1)(c) of the Employment Act. According to the Appellant, no minutes of any meetings were produced to demonstrate that consultations were held or to show the criteria used in declaring him redundant.
22. It is therefore the Appellant's submission that the Respondent willfully and entirely disregarded Section 40 of the Act, rendering the termination of his employment unlawful.

23. On the issue whether the Appellant is entitled to the reliefs sought in his statement of claim, the Appellant submitted that the trial court erred in dismissing his case and prayed that the appeal be allowed and the judgment set aside.
24. The Appellant urged the Court to enter judgment in his favour and to grant the reliefs sought in his Statement of Claim. He submitted that the termination of his employment was unlawful and that he was entitled to payment of terminal dues totaling Kshs. 263,257.68, issuance of a certificate of service, and costs and interest.

DETERMINATION

25. Having carefully considered the record, the pleadings, and the written submissions on record, the issues that emerge for determination are: -
 - i. Whether the Appellant's termination was on account of redundancy or he deserted duty
 - ii. Whether the termination was lawful and procedurally fair

iii. Whether the Appellant is entitled to the remedies sought

Whether the Appellant's termination was on account of redundancy or he deserted duty

26. The Appellant averred that his termination on account of redundancy was unlawful and unfair, as no notice was issued to him, there was no consultation and he was not accorded an alternative placement in accordance with Section 40 of the Employment Act. He maintained that the Respondent failed to follow the prescribed statutory procedure, thereby rendering the termination procedurally and substantively improper.
27. The Respondent on the other hand, filed a response in which it contended that the Appellant deserted duty on 5th November 2017 and never returned to work. According to the Respondent, following the termination of its cleaning contract with Nakumatt Holdings on 1st September 2017, it redeployed the Appellant to its new client, Bidcoro Africa Limited at Ruiru, Kiambu County. To support this assertion, the Respondent produced a letter of transfer dated 5th October 2017 and a contract allegedly entered into with Bidcoro on 1st February

2016. The Appellant, however, denied ever receiving such a letter.

28. It is noteworthy that the Respondent did not call any witness at the trial court. The court record shows at page 10 of the Supplementary Record of Appeal that Counsel for the Respondent did not cross examine the Appellant even though Mr. Mwangi Kamau for the Respondent was present in court on the hearing date. The Respondent further did not call any witness. Its application dated 22nd August 2023 seeking to reopen the Claimant's case and recall the Claimant or to start the case de novo was dismissed for want of prosecution on 6th September, 2023.

29. The Appellant denied that he was served with the transfer letter dated 5th October 2017 at page 68 of the Record of Appeal. This evidence was not controverted by the Respondent who did not cross examine the Appellant on the assertion or call any witness. There is no evidence on record showing that the letter of transfer was sent to the Appellant or that he received the same.

30. The Court has further noted that there are two cleaning contracts between the Respondent and Bidcoro Africa Limited. One is dated 1st February, 2016 and is indicated at paragraph 3 thereof that it was for a term of two years to commence on 1st February, 2017 and expire on 31st February, 2018. It is a matter of common sense that the period expressed in the contract is not two years and the date expressed therein for its expiry does not exist as February 2018 had 28 days. The contract is at page 70 of the Record of Appeal.
31. There is another contract at page 33 of the Record of Appeal between Bidcoro Africa Limited and Msafi Cleaning, the Respondent herein dated 25th September, 2017 which is expressed at paragraph 3 thereof to be for a term of one year commencing 26th October, 2017 and expiring on 25th October, 2018.
32. Both contracts were adduced as evidence by the Respondent as the contract the Appellant was transferred to work in but absconded. The contracts both refer to the premises that were the subject thereof as “All shop floors within Bidcoro Africa

Plant. It is not clear which of the two contracts the Appellant was posted to work in.

33. The letter of transfer states that the Appellant was supposed to report in Nairobi Office. It states that the Appellant should indicate acceptance by signing the duplicate copy and return to Human Resource Department. The Respondent did not adduce any evidence as to how and when the letter was issued to the Appellant.
34. From the foregoing, it is my considered opinion that there is no proof that the letter of transfer, if any, was ever issued to the Appellant.
35. Further, this court has held time and again that where an employer alleges absconding of duty by an employee, it must demonstrate what action it took to get in touch with the employee. It is not enough for an employer to allege that an employee absconded duty without demonstrating that the employer took some action in respect thereof. See *Okode v Tejani* (Cause 980 of 2018) [2025] KEELRC 280 (KLR) (6 February 2025) (Judgment) Neutral citation:

[2025] KEELRC 280 (KLR) Joseph Nzioka v Smart Coatings Limited [2017] eKLR Owudu v Digital Sanitation Services Limited (Appeal E109 of 2023) [2024] KEELRC 917 (KLR) (18 April 2024) (Judgment) to mention but just a few.

36. In the absence of credible evidence to the contrary, the Court finds that the Appellant's employment came to an end following the closure of Nakumatt Eldo Centre, and not due to desertion as alleged.
37. Redundancy is defined in section 2 of the Employment Act 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.
38. The Appellant was thus declared redundant.

Whether the termination was lawful and procedurally fair

39. Having found that the termination was on account of redundancy, I now turn to examine whether the procedure under Section 40 of the Employment Act was followed.

40. Section 40(1) of the Employment Act, 2007, sets out the procedural safeguards that an employer must observe before terminating employment on account of redundancy. It provides: -

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.

41. In the case of ***Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] KECA 404 (KLR)*** the Court of Appeal emphasized that redundancy must be founded on a genuine operational need and implemented through a transparent and fair process involving proper notice and consultation.
42. Similarly, in ***Jane I Khalechi v Oxford University Press E.A. Ltd[2013] KEELRC 578 (KLR)***, the Court held that redundancy is not merely a right of the employer but must be exercised in strict compliance with the law and fairness to the affected employee
43. In the present case, the Respondent produced no evidence of a redundancy notice to the Appellant or to the Labour Officer, no consultation records, and no evidence of payment of severance.
44. The court acknowledges that not all redundancies can follow the patterns in section 40 of the Employment Act. however, the

Respondent was still expected to adduce evidence on the manner in which it notified all staff about the termination of its contract with Nakumatt and the manner in which it intended to handle their employment. None was produced by the Respondent. the redundancy was therefore unprocedural.

45. The Respondent's having failed to comply with redundancy procedure, the redundancy amounted to an unfair termination of employment both procedurally and substantively unfair.

Whether the Appellant is entitled to the reliefs he sought in his Statement of Claim

46. Having found that the termination of the Appellant's employment was procedurally and substantively unfair, the Court now turns to consider whether the Appellant is entitled to the reliefs he is seeking.

47. In his Statement of Claim, the Appellant prayed for various reliefs, which I address as hereunder in separate heads.

i. A declaration that the Claimant's termination from employment on account of redundancy was unlawful, unprocedural and unfair.

In view of the finding above that the termination of the Appellant's employment was affected without compliance with the procedural requirements of Section 40 of the Employment Act, I make a declaration that the dismissal was unfair, unprocedural and therefore unlawful.

ii. Compensation for unlawful termination

As stated at paragraph 11 of this judgment, the Appellant sought one month's pay in lieu of notice, severance pay, twelve (12) months' salary as compensation for unfair termination, salary for five (5) days worked in November 2017, pro-rata leave for 2017, house allowance, payment for public holidays worked, and underpayment.

a. One month's pay in lieu of notice

Having found that the Respondent did not follow due process in terminating the Appellant's employment, the Appellant is entitled to one month's pay in lieu of notice. Based on the applicable minimum wage for a cleaner under Legal Notice No. 112 of 2017 was Kshs. 11,926.40 per month. I therefore award Kshs.

13,715.36 as notice pay inclusive of the 15% house allowance component.

b. Severance pay

Under Section 40(1)(g) of the Employment Act, an employee declared redundant is entitled to severance pay at the rate of not less than fifteen (15) days' pay for each completed year of service. The Appellant served for less than two (2) years and is therefore entitled to Kshs. 5,963.20.

c. 12 months' salary as compensation for unfair termination

Section 49(1)(c) of the Employment Act provides that an employee whose employment has been unfairly terminated may be awarded compensation not exceeding twelve months' gross salary. Considering that the Appellant worked for the Respondent for two years and the Respondent's failure to adhere to the statutory redundancy procedure, I find that an award equivalent to two (2) months' salary is fair and just. Accordingly, I award Kshs.23,852.8.

d. Salary for the 5 days worked in November 2017

The Appellant's uncontroverted evidence is that he worked for five (5) days in November 2017 before being informed of the redundancy. He is therefore entitled to Kshs. 1,987.73.

e. Pro rata leave for 2017

The Appellant had served ten (10) months into 2017 without going on leave. He is accordingly entitled to Kshs. 6,957.07 as pro-rata leave pay.

f. House allowance

The Appellant sought payment of unpaid house allowance. However, he did not produce any pay slips or documents to demonstrate that his salary was exclusive of house allowance. Accordingly, the claim for house allowance is declined.

g. Holidays worked without pay

The Appellant did not produce evidence to substantiate the claim for unpaid public holidays. In the absence of duty rosters and attendance sheets the claim is unproven and is therefore dismissed.

h. Underpayment

The Respondent admitted that the Appellant was paid a gross salary of Kshs. 8,400 from 1st December, 2015 when he started working and the same was increased to Kshs. 9000 from February, 2016 which he earned to the last day of his employment. The Appellant is thus entitled to underpayment of Kshs. 46,578.40 which I award him.

iii. Certificate of service

The Appellant is also entitled to a certificate of service in accordance with Section 51 of the Employment Act.

48. In light of the foregoing, the appeal succeeds. The judgment of Hon. B.K. Kiptoo (PM) delivered on 13th October 2023 in Eldoret CMEELRC Cause No. 142 of 2019 is hereby set aside and substituted with the following orders:

- i. A declaration that the Appellant's termination from employment was unfair and therefore unlawful
- ii. The Appellant is awarded: -

- a. One month's pay in lieu of notice..... Kshs.
13,715.36
- b. Severance pay..... Kshs. 5,963.20.
- c. Compensation for unfair termination...Kshs.23,852.8.
- d. Salary for the 5 days worked in November
2017.....Kshs. 1,987.73.
- e. Pro rate leave for 2017.....Kshs. 6,957.07
- f. Underpayment Kshs. 46,578.40

- Total.....Kshs. 99,054.56

- iii. The Respondent shall issue the Appellant with a certificate of service forthwith.
- iv. The Appellant is awarded the costs of this appeal and in the lower court.
- v. The decretal amount shall attract interest at court rates from the date of this judgment until payment in full.

49. Orders accordingly.

**DATED, DELIVERED AND SIGNED
THIS 14TH DAY OF NOVEMBER, 2025.**

M. ONYANGO
JUDGE