



**Kel Chemicals Limited v Muganda (Appeal E188 of 2024)
[2025] KEELRC 3183 (KLR) (13 November 2025) (Judgment)**

Neutral citation: [2025] KEELRC 3183 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E188 OF 2024
NJ ABUODHA, J
NOVEMBER 13, 2025**

BETWEEN

KEL CHEMICALS LIMITED APPELLANT

AND

ROY NOAH MUGANDA RESPONDENT

(An appeal from the Judgment of Honourable O. Wanyaga Senior Resident Magistrate, Thika delivered on 5th July 2023 in Thika ELRC No. E034 of 2021)

JUDGMENT

1. Through the Memorandum of Appeal dated 4th July 2024, the Appellant appeals against the Judgment of Honourable O. Wanyaga, Senior Resident Magistrate.
2. The Appeal was based on the grounds that:
 - i. The compensation for unfair termination awarded by the Learned Trial Magistrate being twelve (12) month's salary was excessive and unreasonable.
 - ii. The Learned Trial Magistrate erred in law and in fact by disregarding the evidence and testimony of the Appellant's witness adduced during the hearing in its entirety.
 - iii. The Learned Magistrate erred in law in and in fact in failing to consider the written submissions of the Appellant on record and the authorities cited therein in support of the Appellant's case while arriving at the award in damages.
 - iv. The Learned Trial Magistrate erred in law and fact by failing to appreciate the totality of the evidence before the court in particular evidence that due process was followed prior to terminating the Respondent's employment and terminal payments as prescribed under Section 40 of the Employment Act had been made to the Respondent prior to the institution of the suit.



- v. The Learned Trial Magistrate erred in law and fact by finding that the Respondent was a permanent employee from 1994 to 1999 and dismissing the Appellant's evidence of the letter of appointment issued to the Respondent on 5th November, 1999.
 - vi. The Learned Trial Magistrate erred in law and fact by awarding the Respondent house allowance for the period between 1994 to 1998 despite the Respondent failing to tender any evidence that house allowance was payable.
 - vii. The Learned Trial Magistrate erred in law and fact in by failing to consider and appreciate the challenges of Covid-19 pandemic and its impact on the Appellant's business, operations and financial performance.
3. The Appellant prayed that the judgment of the lower court be set aside, the compensation awarded be varied downwards and costs of the Lower court and Appeal be granted to the Appellant.
 4. The Appeal was disposed of by written submissions.

Appellant's Submissions

5. The Appellant's Advocates Mahida & Maina Company Advocates filed written submissions dated 7th April, 2025 and relied on the case of *Selle & Another v Associated Motor Boat Co. Ltd & others* [1968] EA 123 on the role of the first appellate court.
6. On the issue of whether the termination of the Respondent's employment on account of redundancy was unfair and unlawful, counsel relied on section 40 of the *Employment Act* to submit on the conditions an employer must comply with when terminating a contract of service on account of redundancy. Counsel relied on Section 45(2) of the *Employment Act* concerning substantive and procedural fairness before termination of service of an employee.
7. It was further submitted that the Appellant issued a one month Notice of intention to declare redundancy dated 21st June, 2021 to the Labour Office and the National General Secretary of Kenya Chemical Workers Union informing them of the intention to declare 35 positions both managerial and unionisable across various departments and provided reasons. That the notice outlined that the Appellant would be utilizing the selection criteria spelt out under section 40 of the Act and the redundancy would be undertaken in phases with affected employees being notified in writing.
8. Counsel further submitted that on 7th July, 2021 the Appellant issued an internal memo to all staff notifying them of its intention to declare redundancies. That on 31st August, 2021 the Appellant issued a notice of termination on account of redundancy to the Respondent who was notified that he was entitled to salary of up to 11th September 2021, one month's notice pay, severance pay of 15 days for each completed year of service, payment of accrued leave as at 30th September 2021, certificate of service and pension benefits. That the Respondent was paid a redundancy package of Kshs 575,089.81/= after deductions.
9. Counsel submitted that the Respondent claimed leave days earned but not taken in 2018, 2019, 2020 & 2021 but the Appellant despite not having produced the Respondent's leave sheet, claimed that the Respondent had exhausted its leave days for the year 2018, 2019, 2020 and 2021 as it was the company's policy for all employees to exhaust all leave days before March.
10. Counsel submitted that the Respondent in the statement of claim alleged that the decision to declare him redundant was flawed, malicious and discriminatory but has not adduced any evidence to support the claims.



11. Counsel submitted that pursuant to the initial notice to declare redundancy dated 21st June, 2021 and subsequent notices, the Appellant advised that the Appellant would be utilizing the criteria on Section 40 (1) (c) which was applied in selecting the employees affected by the redundancy. That the Appellant complied with this provision as shown above and the reason brought forth by the Appellant for declaring redundancies were provided for in the notices as challenges brought by Covid-19, need to realign the organization due to challenges of Covid-19, financial losses incurred and reduction in demand of products.
12. Counsel relied on the case of Kenya Airways Limited v Aviation Allied Workers Union Kenya & 3 others [2014] KECA 404 (KLR) on how redundancy arises which is at no fault of the employee and due to circumstances beyond the employer's control. The Appellant was faced with economic hardships brought about by the Covid-19 pandemic which was a factor beyond the Appellant's control and led to the declaration of redundancies. The Respondent's job/office became superfluous as a result of the re-organization which the Appellant had to undertake in order to stay afloat due to the Covid-19 challenges.
13. Counsel relied on the case of Kigomo v Lewa Wildlife Conservancy (Cause E345 of 2022) [2024] KEELRC 1588 (KLR) to submit that the trial court failed to take judicial notice and appreciate the economic effects of the Covid-19 pandemic on business including that of the Appellant.
14. Counsel relied on section 47 (5) of the Employment Act to submit that the burden of proving unfair dismissal rests on the employee while the burden of justifying the grounds of termination rests on the employer. The Respondent alleged that the Appellant had unfairly/unlawfully terminated his employment for the reason that the Respondent was making good sales and not losses that he was unfairly targeted as his position was still in existence. No evidence was presented by the Respondent to support the claims thus he failed to discharge the burden of proof however the trial magistrate relied on those unproven facts.
15. Counsel further submitted that the Respondent's position had been abolished due to the redundancy and no one else was employed on that position to replace him. That the Appellant was manufacturing water sanitation chemicals and not sanitizers as alleged by the Respondent.
16. Counsel relied on the case of Kenya Airways (supra) to submit on the test courts ought to apply in determining the validity and fairness of the reasons put forth by the employer for declaring redundancies. That is to say, as long as the employer genuinely believed that there was a redundancy situation, any termination was justified and it was not for the court to substitute its business decision with what was reasonable. That the trial court ought to have evaluated the reasons given by the Appellant from the position of a reasonable business person in the circumstances.
17. Counsel submitted that the trial court would have arrived at a different decision regarding the Appellant's liability and quantum of damages. That the Appellant's reasons for termination were both valid and fair based on the operational requirements of the Appellant and the procedure employed in termination was proper and compliant with section 40 of the Act.
18. On the issue of whether compensation for unfair termination awarded by the Magistrates court was reasonable and justifiable, counsel submitted that the trial court awarded the Respondent 12 months compensation for wrongful/unlawful termination but did not provide any justification or factors considered in arriving at the award. Counsel relied on the case of Ol Pejeta Ranching Limited v David Wanjau Muhoro (2017) KECA 329(KLR) on the need for the court to justify the awarding of maximum compensation of 12 months' salary. Counsel further relied on among other cases, the case of Cargill Kenya Limited v Mwaka & 3 others (civil Appeal 54 of 2019) KECA 115 (KLR) and



section 50 of the Employment Act to submit that the courts are guided by the provisions of section 49 in determining a suit for unfair termination and that the 12 months award was excessive based on the circumstances of the case.

19. Counsel submitted that the Appellant complied with the provisions of Section 40(1) of the Employment Act on redundancy by paying one month's salary in lieu of notice, leave earned but not taken, service pay at the rate of 15 days for every year served, provided for the criteria for selection of employees affected by redundancy, issued a certificate of service and notices and the reasons for termination were valid, procedurally and substantively fair. Further that the pension payments referred to in the notice of termination issued to the Respondent were tabulated at the rate of 15 days for every year worked up to the year 2018 when the Appellant introduced its employee pension scheme.
20. Counsel submitted that courts have made awards for compensation not exceeding 6 months pay and provided considerations/reasons they took in to account in arriving at the quantum awarded.
21. On the issue of whether the Respondent was an employee of the Appellant between 1994 to 1999 and if he was entitled to housing allowance and service pay for the period between 1994 to 1999, counsel submitted that the Respondent alleged that he was employed by the Appellant on 1st January, 1994 as a shift in charge on a gross salary of Kshs 4,800/=. He produced several warning letters issued by the Appellant as evidence however he could not corroborate his evidence during cross-examination as the first warning letter was issued on 11th October, 1994. The Respondent could not produce any pay slips or bank statements showing his salary payments by the Appellant.
22. Counsel submitted that the Appellant refuted the allegations and produced the letter of Appointment dated 1st November 1999 which indicated that the Respondent had applied for a position and interviewed successfully for the same. The witness confirmed that the Respondent had been retained as a casual labourer prior to his employment in 1999. That the warning letters were not in the Appellant's letter head as seen in the appointment letter. The Respondent allegations that he was promoted were not true as the appointment letter referred to appointment and not promotion.
23. Counsel submitted that the trial court held that the Appellant's position that the Respondent was a casual labourer between 1st January 1994 to 30th October 1999 was misleading because the letters had been copied to the union yet casual laborers are not unionisable. The court held that the Respondent was a permanent employee and awarded him Kshs. 202,050 as service pay and kshs.21,596.26 as house allowance.
24. Counsel relied on among other cases, the case of Casmur Nyankuru Nyaberi v Mwakikar Agencies limited (2016) eKLR to submit that despite it being the responsibility of an employer to document the employment relationship, the Claimant is not released from the burden of proving their case.
25. Counsel submitted that the trial court did not consider the Respondent's evidence in determining whether there was an employment relationship between the parties and did not evaluate the same against the Appellant's evidence.
26. Counsel relied on among others the case of Samuel Wambugu Ndirangu v 2NK Sacco Society Limited [2019] eKLR to submit on the ingredients necessary to determine existence of an employer employee relationship to include selection and engagement of the employee, proof of payment of wages, power of dismissal and power to control the employee's conduct.
27. Counsel submitted that the Respondent did not produce any evidence to support his claim that he was employed by the Appellant on the 1st January 1994 at a gross salary of Kshs.4,800.



28. Counsel submitted that the facts and evidence adduced by the Respondent at the trial did not prove the existence of an employment relationship between 1st January 1994 to 30th October 1999 and in the absence of an employment relationship no remedies can attach against the appellant regarding the service pay and housing allowance.

Respondent's Submissions

29. The Respondent's Advocates Opundo & Associates Advocates filed written submissions dated 2nd April, 2025 and on the issue of whether the Learned Magistrate erred in law in and in fact in finding that the Respondent was not employed on a casual basis for the period between 1st January 1994 and 30th October 1999, counsel relied on section 2 of the *Employment Act* 2007 on the definition of a casual employee. According to Counsel, the Respondent was employed by the Appellant on the 1st of January 1994 in the position of Shift in Charge. The Respondent tendered documentary evidence which were warning letters issued to him by the Appellant.
30. Counsel further submitted that the content, import and purport of the letters were not compatible with the Appellant's position that the Respondent was a casual employee. That the Appellant's witness confirmed that he had not been employed by the Appellant during the period in question.
31. Counsel submitted that the Appellant did not submit any records by way of a muster roll or daily wage sheet for the subject period confirming its position that the Respondent was a casual worker during the period. That the explanation given was that the documents were archived.
32. Counsel relied on the case of Kenya building, Construction, Timber, Furniture & Allied Industries Employees Union v Imara Enterprises [2017] eKLR to submit that in absence of producing the muster roll, the employer should prove the allegation that the employees were casuals as opposed to permanent employees.
33. Counsel submitted that the Appellant did not present the company's human resource manual/hand book/catalogue describing various job profiles in order to determine whether a shift-in-charge was a casual worker.
34. On the issue of whether the Learned Trial Magistrate in awarding the Claimant house allowance for the period between 1994 to 1999 counsel submitted that trial court having sufficiently considered the evidence and found that the Respondent had not been employed as a casual labourer and the lack of evidence that the Respondent was housed by the Appellant during the material period, the Respondent was therefore entitled to a house allowance as per section 31 of the *Employment Act*.
35. Counsel relied on among other cases, the case of Mtawali Kedenge Mramba v Nyati Auto Spares [2017] eKLR on entitlement of an employee to housing allowance as per above section and that at the date of termination, the employee should be accorded all benefits arising under the contract of employment.
36. Counsel further relied on the case of Ol Pejeta Ranching Limited v David Wanjau Muhoro(2017) eKLR on the period of employment being continuous with employment benefits vesting in the employee and obligations of employer attaching over time.
37. On the issue of whether the Learned Trial Magistrate in failing to find that the terminal dues paid to the Respondent under the Discharge Voucher adequately compensated the Respondent, counsel relied on the case of Thomas De Rue (K) Limited v David Opondo Omutelema [2013] eKLR to submit that a discharge Voucher does not absolve an employer from its statutory obligations.



38. Concerning whether the termination of the Respondent's employment on account of redundancy was fair and lawful and whether the compensation for unfair termination awarded of 12 months' salary was excessive, counsel relied on section 2 of the Act on definition of redundancy and sections 40, 43 and 45 of the *Employment Act* to submit that both substantive and procedural fairness apply and an employer who fails either test stands to be held liable for unfair or wrongful termination.
39. Counsel relied on the case of Nakuru ELRC Cause No. 21 of 2020-Daniel Mburu v Hygrotech East Africa Limited on the need for both substantial and procedural fairness. That section 40 conditions must apply thereafter in redundancies. The Respondent refuted the reasons given in the notices and stated that the Respondent made increased sales not losses as alleged during the material time of the pandemic as its products were associated with sanitation which were in high demand.
40. Counsel submitted that the Appellant did not present any audited statements of accounts or financial records in respect of the material period to prove that it was experiencing financial challenges, losses and/or build up in its stocks due to poor sales. Counsel relied on the above case of Daniel Mburu to submit that the employer needs to prove financial difficulties by producing audited financial statements. That the trial court rightfully found the termination to be unfair and unlawful.
41. On the procedural fairness counsel relied on section 40 of the Act which provided for the procedure to be followed by the employer who intended to terminate an employee on account of redundancy and the also relied on the case of Kenya Airways Limited v Aviation & Allied Workers Union of Kenya and 3 others [2013] eKLR to submit that an employer must show that termination of an employee is attributable to redundancy, that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment.
42. Counsel submitted that there was no evidence of the criteria the Appellant applied in selecting the Respondent for the termination. That the substance and procedure applied by the Appellant in terminating the Claimant on account of redundancy was unfair, unjust and unlawful.
43. Counsel relied on section 49 (1) (c) to submit that the maximum sum payable under such circumstances is up to 12 months' gross pay which was rightfully granted by the trial court.

Determination

44. The court has considered this Appeal, the record of appeal and submissions filed by the both parties herein and became of the view that the issues for determination in this appeal are:
 - a. Whether the trial court erred by finding that Respondent's termination of employment on account of redundancy was unfair and unlawful.
 - b. Whether the trial court erred in finding that the Respondent was a permanent employee between 1994 and 1999
 - c. Whether the trial court erred in awarding the Respondent his terminal dues and 12 months' pay as compensation for unfair termination
45. Whether court is aware that the burden of proof in employment matters is as provided for under section 47(5) of the *Employment Act*. The employee must prove that an unfair termination has occurred and for the employer justify the reasons for termination.
46. It was not in dispute that the Respondent was terminated by the Appellant on account of redundancy and it was upon the Appellant to justify the reasons for redundancy. The termination letter dated 31st August, 2021 alludes to termination due to redundancy with the main reasons being the effects



- of Covid-19 on the Appellant's business due to drastic reduction of sales and financial losses. The termination letter offered him pay up to 11th September, 2021, one-month notice pay, severance pay at 15 days for each completed year, accrued and unpaid annual leave pay as at 30th September, 2021 with a certificate of service and pension benefits.
47. The Respondent challenged the issue of his termination and contended that it was not on account of redundancy but unfair termination. The trial court agreed with him. The Court is therefore required to interrogate the circumstances of the termination in order to determine if it was on account of redundancy or not.
48. Section 2 of the [Employment Act](#) provides as follows on the meaning of 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...”
49. The appellant contends that the redundancy was occasioned by the Covid-19 pandemic which the court readily takes judicial notice of as having adversely affected most businesses across the world. For a redundancy to be upheld by the Court, the employer ought to demonstrate reasonable grounds for the declaration and further show as much as possible that it complied with the provisions of section 40 of the Act.
50. The Appellant alleged that the sales had gone low due to high cost of raw materials for production and it was experiencing financial difficulties. The Respondent refuted this assertion stating that since the Appellant was dealing with sanitizers, the Appellant was making much sales due to the pandemic. That his position was never abolished. The Appellant however alleged that it was dealing with water sanitization chemicals and not sanitizers as alleged by the Respondent. The trial court agreed with the Respondent.
51. It was on record that the appellant informed the respondent's union and Thika Labour Office about the intended redundancy and further as will be discussed later, the Appellant endeavoured as much as possible to meet the requirements of section 40. To insist as submitted by counsel for the respondent that the appellant had to produce financial statements to demonstrate that it was making losses, would be imposing unreasonable conditions on the appellant as an employer making a business decision yet it was a matter of judicial notice that Covid-19 adversely affected most businesses across the world. Further, it would not be unreasonable to assume that the issue of financial difficulties occasioned by the pandemic must have been discussed among the appellant, the Labour Office and the respondent's union.
52. It is curious that whereas the respondent did not dispute the redundancy package, he commenced proceedings claiming the redundancy was unlawful after receipt of the package. It is further curious that the respondent directly disputed the redundancy and not through his union yet the latter was notified of the intended redundancy and there was no indication that the union objected to the redundancy. The Court is therefore of the view that the appellant had reasonable grounds to declare redundancy and the trial court erred in finding that the respondent was unlawfully terminated.
53. Regarding procedural fairness section 40 of the [Employment Act](#) guides any employer who intends to terminate employee on account of redundancy. In addition, in *Kenya Airways Limited vs. Aviation*



and Allied Workers Union of Kenya and 3 Others (2014) eKLR, the Court of Appeal pronounced itself as follows:

“Thus, redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. As Section 43(2) provides, the test of what is fair reason is subjective. The phrase “based on operational requirements of the employer” must be construed in the context of the statutory definition of redundancy.

What the phrase means, in my view, is that while there be underlying causes leading to a time redundancy situation such as reorganization, the employer must nevertheless show that the termination is attributable to redundancy – that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment.”

54. It is a statutory requirement that section 40 of the *Employment Act* has to be observed in the process of declaring redundancy. The Appellant notified all staff of the intended redundancy vide an internal memo dated 7th July, 2021. The Appellant also notified the Labour officer at Thika and the Union vide the letter dated 21st June, 2021. The Respondent was then declared redundant on 31st August, 2021. The court further notes that the termination letter offered the Respondent salary up to 11th September, 2021, one-month notice pay, severance pay at 15 days of each completed year, accrued leave, certificate of service and pension benefits. From the foregoing the appellant complied with the requirements of section 40 of the Act.

Whether the trial court erred in finding that the Respondent was a permanent employee between 1994 and 1999.

55. The Appellant alleged that the Respondent was a casual employee between 1994 to 1999 which was a clear 6 years’ service and he was only employed officially vide the employment letter dated 1st November, 1999. The Respondent on the other claimed that the said letter was merely a promotion as he was working for the Appellant since 1994 and he produced warning letters with the first one dating back to October, 1994.
56. The court after scrutinizing the appointment letter has noted that the letter indicated to offer the Respondent employment without specifying which role the Respondent was undertaking at the Appellant’s organization. The warning letters referred to him as shift in charge and at the time of termination the Respondent was working as Alum/GSSP Supervisor Production Department.
57. The Court therefore court agrees with the trial court that the Respondent was a permanent employee between that period since nothing prevented the Appellant from producing the application letter by the Respondent to prove that the Respondent applied and was interviewed for the new role. The Respondent relied on section 37 of the *Employment Act* which provided for conversion of casual employees to term employees but since this happened between 1994 to 1999 before the enactment of the act in 2007 it is clear the law does not act retrospectively.
58. This notwithstanding the Respondent was a term employee for the reasons that the warning letters were sent to his union hence there was no way he would be a casual employee. The Appellant’s allegations of the warning letters not being authentic does not help since they had the Appellant’s name which the Respondent could not manufacture. The said warning letters were signed by same officers who signed the termination letters.



Whether the trial court erred in awarding the Respondent his terminal dues and 12 months' pay as compensation for unfair termination.

59. The Court having found that the respondent was lawfully declared redundant, the issue of compensation for unfair termination does not arise. The award by the trial court in this regard is therefore set aside.
60. In the upshot the Appeal is found merited is hereby allowed and the judgment of the trial court that the respondent was unfairly terminated is hereby set aside and substituted with an order that the respondent was lawfully declared redundant with the consequence that the suit in the lower is dismissed but with no order as to costs in the lower court and in the appeal considering the working relationship between the appellant and the respondent and the circumstances under which the respondent was declared redundant.
61. It is so ordered.

DATED AT NAIROBI THIS 13TH DAY OF NOVEMBER, 2025

DELIVERED VIRTUALLY THIS 13TH DAY OF NOVEMBER 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

