

REPUBLIC OF KENYA

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT
MOMBASA**

APPEAL NO. E134 OF 2025

AL-BARAKAT AGENCY LIMITED..... APPELLANT

VERSUS

HASSAN MWALIM BWETTA RESPONDENT

**[Being an appeal from the judgment of Hon. R. Akee delivered on 1 July 2025 in
Mombasa CMELRC No. E494 of 2022]**

JUDGMENT

The appeal arises from the judgment delivered on 1 July 2025 in Mombasa CMELRC No. 494 of 2022. The appellant seeks that the trial court's judgment be set aside and, instead, a judgment dismissing the claim with costs be entered.

The background to the appeal is a claim filed by the respondent, alleging that the appellant employed him as a mechanic in June 2015. He was paid Ksh. 17,000 per month without a house allowance. On 4 November 2021, his employment was terminated without notice or due process, in violation of sections 35, 40, 45, and 49 of the Employment Act (the Act). He claimed the following Dues:

- a) One month's notice pay Ksh. 17,000.
- b) 12 months' compensation Ksh. 204,000.
- c) House allowance for 6 years Ksh. 183,600.
- d) Accrued leave for 6 years Ksh. 88,399.99.
- e) Severance pay Ksh. 50,399.99.
- f) Costs of the suit.

In response, the appellant admitted that the respondent was employed as a mechanic in June 2015. He worked until his employment was terminated following a redundancy. He was earning a consolidated wage of Ksh. 19,846. During his employment, the respondent was paid as stipulated by the Minister, was allowed weekly rest days, was permitted to proceed on annual leave, observed public holidays, and was paid for any overtime work. The house allowance was included in his consolidated wage.

Owing to the Respondent Company's inability to sustain its employees' Wages and salaries due to Low Business, a redundancy was declared and affected 32 employees:

- i) Drivers Department, 14 employees.
- ii) Workshop Department 14 Employees;
- iii) Administration Department 4 Employees.

The respondent was personally informed of the redundancy upon the general notice to all employees. He was paid his lawful terminal dues and signed the Discharge Agreement. This

led to mutual separation in the employment relationship, and the claims made should be dismissed.

The learned magistrate heard the parties and held that the Respondent's termination of employment was unlawful and unfair and awarded: one month's notice, house allowance, accrued leave, severance, and 12 months' compensation (KSh 17,000 × 12), with costs and interest. The basis was that the employer failed to adhere to the law, and the court could infer constructive termination of employment.

The appeal is based on the fact that the learned magistrate erred in both law and fact in finding that the procedure adopted by the appellant in terminating employment through redundancy was procedurally not correct. This was contrary to the evidence submitted. Such judgment and orders should be set aside, with an award of notice pay, compensation for unfair termination of employment, house allowances, accrued leave pay, severance pay, and costs of the suit.

The appellant submitted that the respondent was never unlawfully terminated in his employment as alleged. Employment terminated on grounds of redundancy, and he willfully executed a Discharge Agreement, upon which his terminal dues were paid. There was a mutual separation of the parties.

The learned magistrate failed to appreciate the entirety of the evidence and held that there was both summary termination and constructive termination of employment, which was not the case. On 31 October 2021, employment was terminated following a declaration of redundancy, and terminal dues were paid. A Discharge Agreement was subsequently executed.

The appellant submitted that on 31 January 2022, 32 employees in the drivers, workshop, and administration departments were terminated due to low business. This included the respondent whose terminal dues were assessed and paid in full. The appellant complied with Section 40 of the Employment Act (the Act) by setting out criteria for laying off the selected employees, taking into account seniority, skill, ability, and reliability. The respondent at the shop floor presented no grievance, and having signed the Discharge Agreement, he cannot claim more dues.

The learned magistrate erred in law and fact in finding that there was an unlawful summary dismissal and constructive termination of employment, whereas this was a case of redundancy. The award of notice pay was not justified, as a redundancy notice had already been issued.

The compensation awarded was not justified, as the employment was terminated lawfully and in accordance with the provisions of section 40 of the Act. No evidence of any unfairness or procedural lapse was submitted.

In **Julie Topiran Njeru v Kenya Tourist Board, Cause No. 886 of 2010**, the court held that redundancy termination of employment is involuntary and permitted under section 40 of the Act. In **Roadtainers Mombasa Limited v Choga Tsuma, ELRCA No. In E078 of 2024 (Mombasa)**, the court held that termination of employment due to redundancy is not

attributable to any misconduct that would require the application of Section 41 of the Act. This arises for operational reasons, as addressed under section 40 of the Act.

The respondent was paid a gross consolidated wage, inclusive of house allowance. The award of house allowance is not justified, from June 2018 to 31 October 2021.

The appellant presented evidence on the leave days taken by the respondent. This was not considered, hence the award in this regard is not justified.

Severance pay was included in the terminal dues paid and acknowledged by the respondent in the Discharge Agreement. This took into account the period of employment from June 2015 to 31 October 2021.

The finding of summary dismissal and constructive termination of employment, and the consequent award of compensation, had no legal basis and should be set aside, as held in **Irene Maserian Karbolo v Kenya Aids NGO Consortium, Cause No. 1937 of 2011.**

The trial court's judgment contains an error. The finding of a summary dismissal was incorrect. There was no pleading of constructive dismissal. The appeal has merit and should be allowed with costs.

The respondent submitted that the appeal is without merit and should be dismissed with costs. The Magistrate correctly approached Sections 43, 45(2) and 47(5) of the Act and held that an employer must prove valid reasons and fair procedure. On procedure, there was no notice, save for a single omnibus letter issued on the very day termination took effect. Two distinct notices are required for a valid redundancy, as held in **Nation Media Group Limited v Munene (Civil Appeal E603 of 2021) 2025KECA114(KLR) & British Leyland UK Ltd v Swift (1981) I.R.L.R 91.** On selection criteria and consultation, none were conducted.

The appellant alleged that neither a discharge agreement nor a payment statement confirming the payment of terminal dues was produced.

The respondent submitted that the trial court found no notice was served, hence one month's salary in lieu was awarded. House Allowance had no proof of a consolidated wage that included a house allowance.

Severance pay is mandatory under Section 40 of the Act, entitling employees to 15 days of severance pay for each completed year of service.

Accrued Leave was pleaded in error and should be removed.

Twelve months' compensation is justified, and the trial explains why the court reached the statutory maximum, given the manner of dismissal and longevity.

Determination

This is a first appeal. Accordingly, I will keep in mind my duty to re-evaluate the evidence on record and reach my own conclusions on the dispute. However, even as I do so, keep in mind the fact that I neither saw nor heard the witnesses in the cause testify and must therefore give due consideration to this fact.

The respondent has admitted that the claim for accrued leave days was made in error. This should be removed.

The appellant asserts that it declared a redundancy leading to the termination of the respondent's employment and payment of his terminal dues. He was issued notice, and terminal dues were mutually agreed upon under the Discharge Agreement.

The respondent asserts that there was no due process in the termination of his employment; he received no notice, and the motions under sections 35, 40, and 45 of the Act were not complied with, resulting in an unlawful and unfair termination. The trial's awards were justified.

There is the Discharge Agreement, which acknowledged that the respondent worked for the appellant from July 2015 to October 2021. His last gross wage was Ksh. 19,846 per month.

His terminal dues were tabulated to include:

- a) Severance pay for 6 years Ksh. 50,607.
 - b) 10 days worked Ksh. 6,615.
- Total paid Ksh. 57,222.

On 14 March 2023, the respondent testified under oath that his employment was terminated following a redundancy. The appellant issued him a one-month notice.

He admitted that he had signed a Discharge Agreement and received his terminal dues.

In the judgment, the learned magistrate observed that the respondent was not given a hearing nor any reasons for the termination of employment. He was not invited to a disciplinary hearing with another employee of his choice, which was contrary to sections 35, 41, 43, and 45 of the Act.

The learned magistrate further held that:

... I am alive to the fact that constructive dismissal can be inferred from the conduct of an employer. I would also like to associate myself with the Court of Appeal's decision in Coca Cola East & Central Africa Limited ...

On this basis, the termination of employment was held to be unlawful and unfair, constituting constructive dismissal.

The respondent admits a redundancy. Notice issued.

Under section 40 of the Act, an employer may terminate employment due to redundancy. Upon notice to the affected employee or payment in lieu thereof, the employer should pay severance, accrued leave days and for days worked. Such would lawfully terminate the employment relationship as held in **Cargill Kenya Limited v Mwaka & 3 others (Civil Appeal 54 of 2019) [2021] KECA**, the Court of Appeal held that;

While the requirement of consultation was not expressly provided in section 40 of the Employment Act, that requirement was implied, as the main reason and rationale for giving the notices in section 40(1)(a) and (b) to the unions and employees of an impending redundancy. Section 40(1) of the Act did not expressly state the purpose of the notice. Although it also did not expressly provide for consultation between the employer and the employees or their trade unions before the final decision on redundancy was made, the requirement for consultation was provided for in the Kenyan law and implicit in the Employment Act itself.

Upon receiving the general notice to all employees regarding redundancy, and after issuing the personal notice to the respondent, the appellant satisfied the requirements of section 40 of the Act.

The finding that there was an unlawful termination of employment on the given background of general and personal notice to the respondent is in error. In **Keen Kleeners Limited v Kenya Plantation and Agricultural Workers' Union [2021] KECA 352 (KLR)**, upon a redundancy, the employer may opt to issue notice or make payment in lieu of notice under section 40(1) (f) of the Act.

In this case, the appellant adhered to due process.

Given the finding of constructive dismissal, the respondent did not plead such a claim. The trial court's introduction of such a case lacked legal basis. Despite quoting the case of **Coca Cola East & Central Africa Limited v Maria Kagai Liganga [2015] eKLR** at length, the learned magistrate departed from its core application. Constructive dismissal arises when the employer's conduct subjects the employee to intolerable working conditions and forces the employee to resign. In this case, the respondent testified that there was a redundancy, and he was issued notice. In **Africa Nazarene University v David Mutevu & 103 others [2017] KECA 381 (KLR)**, the Court of Appeal held that employee notice about a redundancy can be oral or written. On his own admission of having been issued a redundancy notice, the trial court erred in inferring constructive termination of employment or unlawful termination of employment.

The award of notice pay and compensation is not justified.

Regarding the claim for payment of house allowances, the respondent was a mechanic. He was paid a gross wage of Ksh. 19,846, which included a house allowance. The appellant filed work records for the years worked, which include a monthly allowance for a house.

The double award of house allowance was unnecessary, as it would result in a double payment.

On the claim for severance pay, in the Discharge Agreement, the pay is tabulated and assessed for 6 years at Ksh. 50,607. This was paid to the respondent as part of his terminal dues.

The respondent challenged the Discharge Agreement. Indeed, under Section 35(4) of the Act, a Discharge Agreement cannot waive or negate lawful dues of an employee. However, to challenge such an agreement, one must demonstrate that it was executed under circumstances of fraud, misrepresentation, or on principles that would render it unenforceable as a binding agreement, as held in **Coastal Bottlers Limited v Kimathi Mithika (2018) eKLR**, which states that a discharge voucher constitutes a binding contract.

On costs, the respondent has since been paid his terminal dues. His claim had no merit. Costs are due to the appellant for the trial court and the appeal.

Accordingly, the appeal is hereby allowed. Judgment in Mombasa CMELRC No. E494 of 2022 is hereby set aside. The appellant is awarded costs for the trial court and the appeal.

Delivered in open court at Mombasa, this 4th day of December 2025.

M. MBARŪ
JUDGE

In the presence of:

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and

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