

REPUBLIC OF KENYA

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

APPEAL NO. E162 OF 2025

EXPORT CONSOLIDATED SERVICES KENYA LIMITED APPELLANT

VERSUS

ISAAC MUKURU GITAU RESPONDENT

**[Being an appeal from the judgment of Hon. J.B. Kalo delivered on 4 August 2025 in
Mombasa CMLRC No. E318 of 2022]**

JUDGMENT

The appeal arises from the judgment delivered on 4 August 2025 in Mombasa CMELRC No. E318 of 2022. The appellant is seeking that the judgment be set aside. The respondent's claim is dismissed with costs.

The background of the appeal is a claim filed by the respondent before the trial court.

The claim was that the appellant employed the respondent on 3 October 2010 as a turn boy [turn man] at a wage of Ksh. 7,000 per month. He worked for 7 years, then was promoted to a truck driver on 1 June 2018 for a salary of Ksh. 19,050 per month. He worked for 4 years. Cumulatively, there were over 11 years of service. He claimed that from 3 October 2010 to 16 December 2021, the respondent worked diligently. However, on 16 December 2021, there was a redundancy and termination of employment without notice or explanation. His terminal dues were not paid. This resulted in unfair termination of employment. The respondent claimed the following:

- a) Notice pay Ksh. 19,050.
- b) Underpayments of salary while a turn man from 3 October 2010 to 1 May 2015 for 55 months, Ksh. 195,955.
- c) Underpayments as a turn man from 1 May 2015 to 1 June 2018 for 73 months Ksh. 177,463.
- d) Underpayments as a truck driver, 1 July 2018 to 15 December 2021, for 73 months, Ksh. 552,000.

- e) Unpaid leave for 11 years, Ksh 169,251.
- f) Two-month termination notice KSh. 38,100.
- g) Severance pay for 24 days for 11 years, KSh. 167,640.
- h) Overtime of 2 hours for 11 years ksh. 514,800.
- i) House allowance for 11 years, KSh. 377,190.
- j) 12 months' compensation KSh. 228,600.
- k) Costs of the suit.

The appellant filed a response, denying the claims. The response also stated that the respondent was employed as a truck assistant in January 2016 under a written contract for renewable terms. Before, the respondent was employed as a casual. Employment was converted to contractual terms. At the end of each contract, all pending leave days were paid by January 2016. In June 2018, the respondent was promoted to the position of truck driver. In his first assignment in July 2018, he was involved in an accident, after which he proceeded on sick leave. He did not report back to work until the application issued notice dated 2 November 2018, but he failed to report back despite payment of wages.

The response also stated that in May 2016, the appellant's doctor certified the respondent fit to work, but the respondent remained adamant that he was unwell. He absconded from work until January 2021, when he returned with a certificate of fitness. The claims made are not justified.

The appellant responded that, due to the SGR cargo services, the core transport business was affected. It faced economic challenges due to the mass exodus of clients who started using the SGR cargo services. This was made worse by the COVID pandemic. The appellant decided to downsize its employees, including the respondent. On 2 March 2020, a notice was issued to all employees that there would be a reduction in employees as per the indicated criteria. The notice was copied to the labour officer as required under the Employment Act (the Act). On 15 October 2021, the appellant held a meeting with the drivers, followed by a meeting with the representative regarding the ensuing redundancy. On 16 December 2021, a one-month notice was issued, and he was asked to proceed on annual leave and try to look for new employment. Efforts to recall him for the tabulation of terminal dues were fruitless. He refused to cooperate. Notice pay is not due. The claims for alleged underpayment are time-barred. Leave was fully taken or paid. Severance pay is not due, as the application has paid its NSSF dues. The respondent was working for flexible hours, and hence no overtime was

owing. The wage paid included the house allowance, and termination was lawful; therefore, no compensation is due.

The learned magistrate heard the parties and held that employment was terminated unfairly. The following awards were issued:

- a) Notice pay Ksh. 19,050.
- b) Underpayments from June 2019 to 15 December 2021, Ksh. 360,000.
- c) House allowance Ksh. 102,870.
- d) 8 months' compensation.
- e) Costs of the suit.

Aggrieved by the judgment, the appellant filed four grounds of appeal. The appeal is that the learned magistrate erred in law in finding that there was no compliance with the redundancy procedures where notice was issued, and due process followed. The awards of underpayment and house allowances for 3 years are not justified. These continuing injuries were not adequately assessed. The wage paid was within the allowed minimum, hence lawful. The compensation awarded at 8 months was excessive and unjustified.

On appeal, the appellant submitted that a redundancy was declared, notice was issued to all employees, and a meeting was held with the respondent, during which he was informed of the termination criteria. The redundancy arose due to economic challenges, with the appellant's core work being affected by the SGR transportation system. The reason for consideration to terminate employment was justified in accordance with section 45(2) (b) (ii) of the Employment Act (the Act).

The appellant submitted that it adhered to the provisions of section 40 of the Act. A general notice was issued to all employees. Through a notice dated 15 December 2021, the respondent was informed that his employment would terminate on 15 January 2022. He was also paid for the notice period through M-Pesa, which he confirmed.

The respondent was allowed to take his annual leave. Notice issued to the labour officer about the redundancy and the affected employees. A set of criteria was used to determine which employees were affected. The application produced memos to employees stating that seniority, skill, and ability would be used in the order listed.

The appellant submitted that the award of underpayments was outside the limitation period. For underpayments arising from continuing injuries, such claims should be made within 12 months, as held in **Kenya Railways Corporation v Ododa & 216 others [2024] KECA**.

The award of 8 months' compensation was excessive and unjustified, as there was no justification for the loss of employment. In the judgment, the award is not justified as required in the principles outlined in the case of **Freight In Time Limited v Rosebell Wambui Munene [2018] eKLR**. The appeal has merit and should be allowed; the respondent's claims should be dismissed.

The respondent submitted that the appellant has not established a reasonable basis for the setting aside of the judgment of the trial court. The appeal is without merit and should be dismissed with costs.

The respondent submitted that the appellant did not adhere to the procedures necessary in a redundancy. Through a notice dated 16 December 2021, the employment was terminated without notice. No meeting was held to discuss the alleged termination of employment. The appellant alleged that the respondent signed minutes on 19 September 2020, which was not true. The due process was not followed as required under section 40 of the Act.

In the case of **Omondi v Medisel (Kenya) Limited & another, Cause No. E038 of 2023**, the court held that where the employee is away from the employer's workplace, the employer must demonstrate how the notice issued reached the employee. Before a redundancy is declared, consultations must be held with the employee, as held in **The German School Society & another v Ohany & another [2023] eKLR**.

The learned magistrate was correct in assessing the underpayments. This was justified since employment was continuous. The appellant did not deny that the respondent was employed as a turn man and then a truck driver. Such claims cannot be negated under section 90 of the Act.

There was no provision of housing under section 31 of the Act. The awarded house allowance is justified. Upon the unfair termination of employment devoid of due process, the compensation awarded is warranted, as held in **Daniel Mburu Muriu v Hydrtech East Africa Limited [2021] eKLR**.

Determination

This being a first appeal, the court is required to reassess the record, review the findings and make its conclusions. However, keep in mind that the trial court had the opportunity to observe the witnesses testify.

The respondent's case was that upon the declaration of redundancy by the appellant, the due process leading to the termination of his employment was not adhered to. He was not paid his terminal dues from 3 October 2013, when he was employed as a turn man, until 15 December 2021, when he was employed as a truck driver.

The appellant's case is that upon facing economic challenges, they declared a redundancy and issued a general notice to all employees. They issued a personal notice to the respondent dated 15 December 2021, ending on 15 January 2022. They paid the respondent his terminal dues, but he has refused to attend and be cleared.

The respondent filed his claim on 14 June 2022. He attached the notice of termination of employment dated 16 December 2021. The appellant notified him that, due to the entire logistics/transport industry being heavily hit by the commissioning of the SGR, the global economic crisis, and the impact of the coronavirus, there was a reduction in business. It was forced to declare a redundancy. The respondent was thus affected, and his employment would terminate on 15 January 2022.

In reply, the appellant filed its response and attached an internal memo dated 19 December 2020. It declared a redundancy due to reduced business following the SGR taking up most transportation work, and the impact of COVID. The notice indicated that the affected employees:

- a) They would be assessed in order of seniority, ability, and reliability.
- b) Those with pending leave days would be paid in cash.
- c) There would be notice pay of one month.
- d) Severance pay would be at the rate of 15 days for each completed year worked.

The appellant also filed minutes for the meeting held on 27 February 2020. The management addressed the redundancy issue. It was resolved to have discussions with the employees.

Thus, through an internal memo dated 15 October 2021, a general notice was issued to all employees on the redundancy and the reasons thereof.

The claimant has not challenged these notices.

Under section 40 of the Act, the employer may terminate employment for operational reasons. A general notice should be issued to the employees, followed by a personal notice, as held in **Kenya Airways Ltd v Aviation & Allied Workers Union Kenya & 3 others [2014] KECA 404 (KLR)**. The notices issued may be written or oral, provided the employee has been notified of the reasons leading to the termination of employment, as held in **Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers Union (KUDHEIHA) v Aga-Khan University Hospital, Nairobi, [2025] KEELRC 468 (KLR)**.

Where the employee is not issued with the necessary notice, payment in lieu of notice is allowed under section 40(1) (f) of the Act as held in **Cargill Kenya Limited v Mwaka & 3 others [2021] KECA 115 (KLR)**.

Upon adherence to the procedures under section 40 of the Act, the employer is justified in terminating employment.

In this case, the learned magistrate, analysing the evidence, held that the appellant's witness testified that the respondent was issued a redundancy notice but could not explain the criteria used to select him for termination of his employment. The procedures followed were not demonstrated.

However, the notice dated 19 December 2020 set out the criteria of seniority, skills, abilities, and reliability.

In his evidence-in-chief, the respondent testified that he was not invited to the meeting held on 15 October 2021. He was only served with a termination notice.

As set out above, the appellant filed its response and attached various records and internal memos. The respondent did not challenge these documents.

Upon the general notice to all employees on 15 October 2021 and the personal notice dated 16 November 2021, the appellant complied with the mandatory procedures under section 40 of the Act. The notices set the criteria for identifying the affected employees. The respondent did not challenge the application of that criterion to him, save to urge that he was not served with the general notice.

The evidence presented before the court demonstrates adherence to the law in the redundancy process.

The finding of unfair termination of employment is not supported by the evidence and records before the trial court.

The awards of compensation and notice pay are not justified.

On the terminal dues claimed, underpayments are defined as a continuing injury under section 90 of the Act. This should be claimed within 12 months upon cessation of the injury, as held in **Vipingo Ridge Limited v Swalehe Ngonge Mpitta [2022] KEELRC 309 (KLR)**. The court emphasised that any employment benefit that accrues monthly must be addressed within the meaning of section 90 of the Act. See **The German School Society & another v Ohany & another [2023] KECA 894 (KLR)**.

The underpayments sought by the respondent are for wages paid from 3 October 2010 to 1 June 2018 as a turn man. He further claims underpayments from 1 July 2018 to 12 December 2021 when employed as a truck driver.

The appellant employed the respondent through a letter dated 4 January 2016. The response that he was previously employed as a casual employee stands in view of this letter of appointment. Under sections 8, 9, and 10 of the Act, the employer may convert casual/oral employment into a written contract.

The court is guided by the contract letter dated 4 January 2016. Any previous claims over alleged underpayments should have been addressed within the context of this letter and within the provisions of section 90 of the Act.

Further, upon the cessation of employment due to redundancy taking effect on 15 January 2022, any alleged underpayments were due for only 12 months.

The appellant was earning Ksh. 19,050 as a truck driver, his case is that he was underpaid by Ksh. 12,000 for 46 months.

A truck driver working in Mombasa in January 2022 had a minimum wage of KSh. 17,561. The additional benefit of 15% house allowance is KSh. 2,634.15 with gross wage ksh. 20,195.15.

There was an underpayment of Ksh. 1,145.15.

For the due wage plus house allowance, for 12 months, the underpayment is Ksh. 13,741.80 only.

The respondent claimed severance pay. The trial court did not address this. Upon the declaration of a redundancy, severance pay is due under section 40 of the Act. This relates to the number of years served at the minimum rate of 15 days for each year.

From 4 January 2016 to 15 January 2022, the respondent served for 6 full years. The last due wage is at Ksh. 20,195.15 gives the severance pay of 15 days for 6 years at Ksh. 60,585.45.

On the claim for overtime pay, indeed, as observed by the learned magistrate, this was a general claim. The overtime claimed over 11 years is not honest, given that this was a continuing injury. For the better part of his employment, the respondent was absent on sick leave, he had extended sick-off days and enjoyed his annual leave days. Claiming overtime without taking such matters into account is unjust enrichment. The general claim cannot suffice.

Regarding the claim for leave days, there is evidence that leave was taken or paid in cash. The appellant filed the records as required under sections 10(6) and (7) of the Act.

In employment claims, costs do not follow the cause. These must be justified under section 12(4) of the Employment and Labour Relations Court Act and Rule 73 of the Employment and Labour Relations Court (Procedure) Rules. In this regard, without any justification, costs are not justified.

The appeal assessed above, judgment in Mombasa CMELRC No. E318 of 2022 is hereby reviewed in the following terms;

- a) Employment of the respondent was lawfully terminated.**
- b) Underpayments, including house allowance, Ksh. 13,741.80**
- c) Severance pay for 6 years Ksh. 60,585.45**
- d) For the appeal and trial court, each party to bear its costs.**

Delivered in open court at Nairobi, this 18th day of December 2025.

M. MBARŪ
JUDGE

In the presence of:

Court Assistant: Marion

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