

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

APPEAL NO. E140 OF 2025

RADAR LIMITED APPELLANT

VERSUS

BENERD OCHANA ATURA RESPONDENT

[Being an appeal from the judgment of Hon. T. N. Shinkiyani delivered on 7 July 2025 in Voi CMELRC No. E006 of 2022]

JUDGMENT

The appeal arises from the judgment delivered on 7 July 2025 in Voi CMELRC No. E006 of 2022.

The background of the appeal is a claim filed by the respondent before the trial court. His case was that the appellant employed him as a night guard on 1 October 2016. He was issued a written contract, and his wage was KSh. 16,683 per month. He worked until 11 December 2020, when he was summoned and served with a notice of termination of employment dated 1 December 2020, effective from 31 March 2021. On 30 January 2021, the respondent was served with notice extending his contract and resumed work at the Voi SGR station until 31 March 2021. The working hours were 6 am to 6 pm, 7 days a week, without rest or leave. There was no disciplinary matter, and the termination of employment was unfair. The respondent claimed the following terminal dues:

- a) Unpaid leave from 19 October 2016 to 19 October 2020 for 21 days x 4 years ksh. 50,400.
- b) Severance pay for 4 years ksh. 36,000.
- c) 12 months' compensation Ksh. 200,196.
- d) Costs of the suit.

The appellant denied the claims and asserted that the wages paid complied with the Wages (General) (Amendment) Orders. Most employees were placed on compulsory leave due to the COVID-19 pandemic, resulting in the appellant losing most of the cork tenders. The government had banned rail travel, and SGR operations were minimal; there was no need for guards at the SGR. The respondent had signed a contract that was automatically renewed in accordance with the appellant's contract with third parties. A notice was issued before the termination of employment, and the claims made are not justified.

The learned magistrate heard the parties and held that the employment was terminated unfairly, that the claims made were justified, and that they were hence allowed with costs.

Aggrieved, the appeal is that the learned magistrate erred in law and fact by failing to find that the claims made were time-barred and the claim for leave not justified. The finding that there was a declaration of redundancy, hence unfair termination of employment, was not warranted, and the award for severance and compensation should be set aside.

The application submitted that the respondent was employed from 1 October 2016 until 31 March 2021. Termination of employment was due to the stoppage of work following the COVID-19 pandemic, the stoppage of rail travel, and the loss of the contract. There was notice to the respondent (the trade union) and the labour office.

The appellant submitted that the claim for leave pay is time-barred. The respondent did not apply for annual leave and cannot claim it post-employment, as held in **Togom v Radar Limited ELRCA E003 of 2023**. Under section 28 of the Employment Act (the Act), an employee cannot claim for annual leave beyond 18 months, as held in **Luka Mbuvi v Economic Industries Limited [2020] eKLR**.

The claim for severance pay was not justified since notice was issued. There was a justified reason for termination due to COVID and the loss of the contract.

The finding that there was unfair termination of employment and an award of both severance pay and compensation was not warranted, as held in **Miwanda v Radar Security Limited, Cause No. 263 of 2018**. The respondent had a written contract, and clause 8.3 provided that it was tied to a third-party contract. This was a lawful contract that regulated the parties' relations.

The trial court failed to apply the case's context and thus adequately erred in its findings. The judgment should be set aside with costs.

The respondent submitted that the trial court had well addressed the matter and the judgment should be confirmed with costs. The respondent was employed by the appellant in January 2009 as a night guard and was issued a written contract on 8 November 2014 at a wage of KSh. 19,006. On 12 December 2020, the appellant issued a redundancy termination notice, effective on 31 January 2021.

On 3 February 2021, the appellant extended the contract to take effect on 31 March 2021. Through a letter dated 30 January 2021, the appellant informed the respondent that the notice dated 1 December 2020, stating that the employment would terminate due to redundancy, remained valid.

The respondent submitted that employment was terminated by redundancy. There was no notice of intention to declare a redundancy or serve the local labour officer at Voi with notice. There was no notice of, or evidence of, loss of contract with the SGR as alleged.

The award of notice, service and compensation is justified as held in **Radar Limited v Amos Ogachi Nyaata ELRCA No. E091 of 2022**. Under section 40 of the Act, upon a redundancy, notice should be issued to the employees to be affected and to the labour officer. The employee should be paid terminal dues, including leave pay, service and, where the due process is not followed, compensation.

Determination

This is a first appeal. The court is allowed to review the record, to reassess the findings and make its conclusions.

By a notice dated 11 December 2020, the appellant notified the respondent of the termination of the employment relationship by redundancy. The appellant noted that on 18 November 2020, its ongoing assignment at SGR reverted to the government and that it was therefore forced to terminate its employment. The redundancy notice was to take effect on 31 January 2020 [2021]. Terminal dues would be paid in January 2021.

Through a notice dated 3 January 2021, the appellant extended the respondent's contract to 31 March 2021.

In reply, the appellant filed a letter dated 18 November 2020. It was a notice of intended redundancy sent to the trade union and the labour officer.

Under section 40 of the Act, the employer is allowed to terminate employment due to operational reasons such as loss of contract, finances or for other sufficient cause as held in **Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013] KECA 492 (KLR)**. The employer facing redundancy should issue the general notice. Such is lawful and valid.

In this case, there is evidence of the general notice issued to the trade union and the labour officer.

Upon the notice of redundancy, the employee was issued with proper notice. A claim for notice pay is not justified, as held in **Cargill Kenya Limited v Mwaka & 3 others [2021] KECA 115 (KLR)**.

However, upon redundancy, the employee is entitled to claim severance pay. This is due under section 40(1) (g) of the Act. The respondent worked for the appellant from 19 October 2016 to 31 January 2021. This is 5 full years. Severance pay is due at 15 days' pay for each full year worked, Ksh. $16,683/30 \times 15 \times 5 =$ Ksh. 41,707.50.

The other claim is that, by a notice dated 30 January 2021, the appellant extended the respondent's employment contract. However, this extension was cancelled. This created another error on the part of the appellant.

The extension of the contract was not withdrawn, save to tell the respondent that the redundancy notice remained valid. Whereas the appellant was justified in declaring a redundancy and in issuing proper notice, the notice extending the employment contract to end on 31 March 2021 was not lawfully addressed.

Employment must terminate for good cause. None was issued in this case, resulting in an unfair termination of employment.

The respondent did not offer his labour to the appellant after 31 January 2021. For the extension of the contract to 31 March 2021 that was not lawfully terminated, compensation of one month's pay at KSh. 16,683 is justified.

The learned magistrate gave a maximum award of 12 months in compensation without taking into account the circumstances leading to the loss of employment and the fact that the respondent did not serve under the extended employment term. Equally, there's no justification for the maximum award of 12 months as required under the court jurisprudence as held in **Aga Khan Hospital Kisumu v Erick Wanjohi [2020] KECA 829 (KLR)**.

On the award for annual leave, indeed, under section 28 of the Act, an employee who fails to apply for annual leave should not be punished. The employer has the duty to ensure that the employee takes their annual leave when due. However, such yearly leave should not be accumulated for more than 18 months pursuant to section 28(4) of the Act.

In this case, without evidence that the appellant allocated responsibility for annual leave, he is entitled to 33 days. On the basic wage of KSh. 15,141 the annual leave due is Ksh. 16,655.10.

On costs, the appeal being partially successful, each party should bear its own costs for the appeal and the trial court costs as awarded.

Accordingly, the judgment is Voi CMELRC No. E005 of 2022 is hereby reviewed in the following terms:

- a) There was a redundancy, and the employee was terminated unfairly.**
- b) Severance pay KSh. 41,707.50.**
- c) Compensation Ksh. 16,683.**
- d) Leave pay Ksh. 15,141.10.**
- e) Costs for the trial court as awarded.**
- f) For the appeal, each party bears its costs.**

Delivered in open court at Malindi, this 11th day of December 2025.

M. MBARŪ
JUDGE

In the presence of:

Court Assistant: Davis Wekesa

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