**Mwangi v Kenmaris Holdings Limited (Appeal E264 of 2025)**
**[2026] KEELRC 90 (KLR) (23 January 2026) (Judgment)**

Neutral citation: [2026] KEELRC 90 (KLR)

**REPUBLIC OF KENYA**

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

**APPEAL E264 OF 2025**

**JW KELI, J**

**JANUARY 23, 2026**

**BETWEEN**

**JOHN KURIA MWANGI ..... APPELLANT**

**AND**

**KENMARIS HOLDINGS LIMITED ..... RESPONDENT**

***(Being an Appeal from the Judgment and Decree of the Hon. M. Nanzushi (SPM) delivered on 25th July 2025 in Mavoko MCELRC E244 of 2024)***

## JUDGMENT

1. The Appellant herein, dissatisfied with the Judgment and Decree of the Hon. M. Nanzushi (SPM) delivered on 25th July 2025 in Mavoko MCELRC E244 of 2024 between the parties filed a Memorandum of Appeal dated the 13th August 2025 seeking the following orders: -

    a. This appeal be allowed.

    b. A part of the judgment and decree of the Honourable trial Court delivered and issued on 25th July 2025 be partially reviewed and a judgment be issued in favour of the Appellant for the claim of payment/award of terminal benefits and issuance of a certificate of service as prayed for in the Statement of Claim dated 6th November 2024.

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

    d. Any other relief that the Honourable Court may deem fit to grant.

2. The Respondent filed a Cross Appeal through a Memorandum of Cross-Appeal dated 4th September 2025 seeking the following orders:

a. The judgment delivered on 25th July, 2025 by Senior Principal Magistrate Hon M. Nanzushi in Mavoko Cm, Elrc Case No.e244 Of 2024 John Kuriamwangi Vs Kenmaris Holdings Limited be hereby set aside.

b. The appellant's case in Mavoko Cm.elrc Case No.e244 Of 2024 John Kuriamwangi Vs Kenmaris Holdings Limited be dismissed with costs to the respondent.

c. The costs of this appeal be borne by the appellant.

3. In response to the Cross-Appeal, the Appellant filed grounds of opposition dated 1st October 2025 challenging the same on the premise that it violates Rule 17 (2) of the Employment and Labour Relations Court (Procedure) Rules 2024 which requires that a cross-appeal be filed an served within twenty one (21) days from the date of service of the memorandum of appeal. They argued that the cross-appeal herein was filed twenty (29) days after service of the memorandum of appeal without leave of the court, and is therefore time-barred.

**Grounds Of The Appeal**

4. The Honourable Magistrate erred in law and in facts by failing to find and appreciate that the Appellant had established a case against the Respondent on the required standard for award of terminal benefits.

5. The Honourable Magistrate erred in law by failing to assess and award terminal benefits due and payable to the Appellant despite the claim for terminal dues not having been contested/challenged by the Respondent.

6. The Honourable Magistrate erred in law by failing to give reasons for not awarding the Appellant terminal benefits despite the claim for terminal dues having been admitted by the Respondent.

7. The Honourable Magistrate erred in law by failing to find that the Respondent was obligated to issue the Appellant with a certificate of service.

**Grounds Of The Cross-appeal**

8. The Honourable Magistrate erred in law and fact by failing to consider evidence that the employment contract entered between the appellant and the respondent was explicit that the employment was dependent on a 3rd party.

9. The Honourable Magistrate erred in law and fact by misinterpreting the provisions on termination on account of redundancy as provided under section 40 of the *Employment Act*.

10. The Honourable Magistrate erred in law and fact by ignoring the provisions of section 40(1) (b)and (f) of the *Employment Act* in which the Respondent had fully complied with.

**Background To The Appeal And Cross-appeal**

11. The Claimant/Appellant filed a claim against the Respondent vide a statement of claim dated the 6th of November 2024 seeking the following orders: -

a. A declaration that the termination of the Claimant's services on 7th October2024 by the Respondent on account of redundancy was unlawful and unfair for want of procedural fairness and substantive justification.

b. Payment of the Claimants' terminal dues as particularized at paragraph 12 at a sum of Kshs. 609,370/-.

c. Compensation for unfair termination of the Claimants' employment (12months*67,271/- per month) at Kshs. 807,252/-.

d. Costs of the suit.

e. Certificate of Service.

f. Interest on (b) from date of filing claim from date of filing claim.

g. Any other relief that the Honourable Count may deem fit to grant (pages 7-10 of Appellant's ROA dated 30th August 2025).

12. The Claimant filed his list of witnesses dated 6th November 2023 (sic); witness statement dated 6th November 2024; and bundle of documents of even date (pages 12-29 of ROA).

13. In response to the claim, the Respondent entered appearance on 21st May 2025 and filed a statement of response dated 22nd May 2025 (pages 30-32 of ROA). They also filed the Respondent's list of witnesses dated 22nd May 2025; and the witness statement of one Violet Wanja Waithaka and list of documents with the bundle of documents attached, both of even date (pages 33-53 of ROA).

14. The Claimant/Appellant's case was heard on the 29th of May 2025 where the claimant testified in the case, relied on his filed witness statement as his evidence in chief, and produced his documents as exhibits. He was cross-examined by counsel for the Respondent, Mr. Chuba (pages 76-77 of ROA).

15. The Respondent's case was heard on the same day with the Respondent's witness testifying in the case on their behalf. She relied on her filed witness statement as her evidence in chief, and produced the Respondent's documents as exhibits. She was cross-examined by counsel for the Claimant/Appellant, Mr. Njuguna (pages 77-80 of ROA).

16. The court gave directions on filing of written submissions after the hearing, and both parties complied.

17. The Trial Magistrate Court delivered its judgment on the 25th of July 2025, partially allowing the Claimant/Appellant's claim to the tune of Kshs. 350,000/- being 7 months' salary as compensation for unfair termination, and costs of the suit.

**Determination**

18. The appeal was canvassed by way of written submissions. Both parties ccomplied.

**Issues for determination**

19. In his submissions dated 25th October 2025, the Appellant identified the following issues for determination:

i. Whether the learned magistrate erred in law and in facts when she arrived at a finding/ conclusion that the termination of the appellant's employment on account of redundancy on 7th October 2024 was flawed, unfair and unlawful.

ii. Whether the appeal is merited.

iii. What reliefs is the appellant entitled to.

iv. Who should bear costs of the appeal and cross-appeal.

20. The Respondent identified the following issues for determination in their submissions dated 14th November 2025:

i. Whether the reasons issued in support of the trial court's findings were proper and or factual.

ii. Whether the termination of the appellant's employment was fair in the circumstances.

iii. Whether the appellant is entitled to any reliefs sought.

21. The court on perusal of the submissions by the parties was of the considered opinion that the issues placed by the parties for determination in the appeal and cross-appeal were –

a. Whether the trial court erred in fact and law in decision on reliefs and whether the appeal is merited

b. whether the cross-appeal was proper and if so whether it was merited

c. costs

**The Appeal**

**Whether the trial court erred in fact and law in decision on reliefs and whether the appeal is merited.**

**Submissions by the appellant**

22. Whether the appeal is merited? The appellant is only appealing part of the said judgment and decree issued on 25th July 2025 by Hon. M. Nanzushi. Therefore, we shall address the second issue together with grounds 1,2,3 and 4. We submit that under grounds 1,2 and 3 of the appeal, the learned magistrate erred in facts and in law by failing to compute and award the appellant terminal benefits such as severance pay, one months' salary in lieu of notice, salary arrears and outstanding leave days. We further submit that the learned magistrate only addressed the claim for compensation and didn't address the issue of terminal dues and certificate of service despite finding that the appellant had been declared unfairly redundant. Also, the trial magistrate didn't give reasons for failing to entertain the claim for terminal dues as pleaded by the appellant. Respectfully see judgment and decree at pages 85 and 86 of the Record. We submit that in the primary suit, the appellant had vide a statement of claim dated 6th November 2024 pleaded and sought at paragraph 11 for a claim of terminal benefits including one months' salary in lieu of notice, unpaid leave days being a total 13 days, salary arrears for seven days worked in October 2024, severance pay for two years and nine months and payment for the remainder of the contract. Respectfully see page 8 and 9 of the Record. Moreover, we submit that the learned magistrate failed to appreciate that the respondent had not opposed this head of claim on terminal dues and had actually provided its own calculations on what the appellant was entitled as terminal dues, although the same was erroneous. See respondent's computation at page 45 of the Record. Further, we submit that the respondent failed to adduce any evidence in support of payment of terminal dues owed to the appellant, and in the absence of such evidence, it is crystal clear that the respondent had failed to comply with mandatory provisions of section 40(1)(e)(f) and (g) of the *Employment Act* (the Act).We submit that the learned trial magistrate erred and misdirected herself on the application of the mandatory provisions under section 40 of the *Employment Act*. Therefore, as a result of this error by the learned magistrate, the appellant was denied statutory benefits guaranteed upon being declared redundant by provisions of section 40 of the Act. Section 40 of the *Employment Act*, 2007 provides the mandatory procedure to be followed where termination of employment is on account of redundancy together with payment of statutory benefits as follows:- (2)An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions— ..... 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. 46.In addition, the learned magistrate erred by failing to enter a finding that the respondent was under a mandatory duty under section 51 of the Act to issue a certificate of service to the appellant. Section 51 of Act states: - "An employer shall issue to an employee a certificate of service upon termination of his employment, unless the employment has continued for a period of less than four consecutive weeks" 48.We rely on the decision of the Court in the case of Angela Wokabi Muoki –vs Tribe Hotel Limited (2016) eKLR , where the Respondent was ordered to pay the Claimant a sum of KES. 100, 000/- after the Respondent willfully refused to comply with the mandatory provisions of Section 51 of the *Employment Act*. Therefore, we submit that the trial magistrate erred by failing to find that the appellant was entitled to payment of terminal dues and issuance of a certificate of service. Moreover, we submit that the trial magistrate was duty bound to assess and award terminal dues upon making a finding that the appellant was unfairly and unlawfully declared redundant. We submit that had the trial magistrate applied legal principles and statutory provisions properly, she would have concluded that the appellant was entitled to terminal dues and a certificate of service. Therefore, we submit that the appeal is merited having established that the trial magistrate fell into error by failing to assess and ward terminal dues and order for issuance of a certificate of service to the appellant as per the provisions of the law. What reliefs is the appellant entitled to? Having established that the learned trial magistrate erred by failing to compute and award the appellant terminal dues and issue of certificate of service, we submit that this appeal is merited and should be allowed as prayed. Therefore, we submit that the this Honourable Court should interfere with part of the judgment delivered on 25th July 2025 and award the appellant terminal dues as follows: - One month's salary in lieu of notice. We humbly submit that the appellant is entitled to a one month's salary in lieu of notice at KES 50,000/- pursuant to section 40(1)(f) of the Act which provides that: - "(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 submit that this head of claim was not contested by the respondent and thus the learned trial magistrate erred when she failed to find that the appellant having been declared redundant abruptly was entitled to this head of claim. Also, the trial magistrate failed to find that this claim was not contested and neither did the respondent adduce evidence in support of payment of the same to the appellant. In addition, the trial magistrate erred when she failed to conclude that the appellant had availed sufficient evidence in support of terminal benefits on a balance of probabilities. salary arrears. We submit that it has not been disputed or contested by the respondent that the appellant was owed salary arrears for seven days worked in October 2024. Therefore, we submit that the appellant is entitled to salary arrears from 1st October 2024 to 7th October 2024 at KES 15,332/-Unpaid leave days 59.We submit that from the leave application forms adduced into evidence by the respondent, it is clear that appellant had only taken seven (7) leave days leaving a balance of thirteen (13) days. Therefore, we submit that the appellant is entitled to thirteen (13) earned but not taken leave days at KES 50,000/26* 13 days at KES 18,111/-. Severance pay. We submit that this claim was not controverted by the respondent. In fact, the respondent provided its perceived computation of this head of claim but didn't adduce any evidence to show that it had paid the same to the appellant. We submit that the appellant is entitled to a severance pay for the period of service. We submit it is a well-established principle that under section 40(1) (g) of the Act, an employee declared redundant is entitled to a fifteen (15) days salary for every completed year of service. It is well established principle that the same will be calculated on an employee's gross pay. 40(1)(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" Whereas the respondent computed the same at KES 50,000/- for a period of two years, being the completed two year of service, we submit that the respondent erred by failing to consider the nine (9) months of service on pro rata basis. Therefore, we submit that the appellant is entitled to severance pay at KES 50,000/26*15day* 2.9 at KES 83,653/-.

63.We submit that the appellant is entitled to a certificate of service. No evidence was adduced by the respondent to confirm compliance with section 51 of the Act.

**Respondent's submissions on the appeal**

23. Whether the appellant is entitled to any reliefs? The respondent humbly submits that having terminated the appellant's employment as per the terms and conditions of the employment contract, the appellant is not entitled to any compensatory damages and or terminal dues. This position is supported by section 35(1)(c ), 6(d) and 36 of the *Employment Act*. The respondent avers that, since it was making statutory contributions for the appellant, the appellant was not entitled to any severance pay safe for payment in lieu of notice. Despite the above provisions, the respondent vide its termination notice issued to the appellant, the his laid down dues as follows: i. Salary up to the last working day (7th October 2024), ii. One month's salary in lieu of notice (KES 50,000), iii. Leave pay (for days not taken), iv. Severance pay (for two full years of service at 15 days# pay per year).

A clearance form was attached to the letter dated 7th October, 2024, requiring the appellant to have it signed by the concerned managers and present the same to the respondent's account office to initiate the processing of his final dues. However, the appellant ignored and or refused to clear hence his final dues were not processed. The respondent further contends that the appellant was made aware that his certificate of service will be issued to him once he clears with both the respondent and its client where he had been seconded to. The respondent contends that, it is ready to disburse the dues owed to the appellant outlined in paragraph 53 above and issue a certificate of service once the appellant has cleared with the respondent and its client.

**Decision**

24. The grounds of appeal were –

    a. The Honourable Magistrate erred in law and in facts by failing to find and appreciate that the Appellant had established a case against the Respondent on the required standard for award of terminal benefits.

    b. The Honourable Magistrate erred in law by failing to assess and award terminal benefits due and payable to the Appellant despite the claim for terminal dues not having been contested/ challenged by the Respondent.

    c. The Honourable Magistrate erred in law by failing to give reasons for not awarding the Appellant terminal benefits despite the claim for terminal dues having been admitted by the Respondent.

    d. The Honourable Magistrate erred in law by failing to find that the Respondent was obligated to issue the Appellant with a certificate of service.

25. The court adopted the submission of the respondent that -This being a first appeal, the principles guiding the duty of this Court as was stated by Sir Clement De Lestang, V.P., in Selle -vs- Associated Motor Boat Co. [1968] EA 123 (cited in China Zhongxing Construction Company Ltd v Ann Akuru Sophia [2020] eKLR: "An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such appeal are well settled. Briefly put they are, that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances

or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

26. The court on perusal of the impugned judgment found that the trial court held the termination was unfair for non-compliance with the provision of section 40 of the *Employment Act* on redundancy. The Respondent submits that -Despite the above provisions, the respondent vide its termination notice issued to the appellant, the his laid down dues as follows:

    a. Salary up to the last working day (7th October 2024),

    b. One month's salary in lieu of notice (KES 50,000),

    c. Leave pay (for days not taken),

    d. Severance pay (for two full years of service at 15 days# pay per year). A clearance form was attached to the letter dated 7th October, 2024, requiring the appellant to have it signed by the concerned managers and present the same to the respondent's account office to initiate the processing of his final dues. However, the appellant ignored and or refused to clear hence his final dues were not processed. The respondent further contends that the appellant was made aware that his certificate of service will be issued to him once he clears with both the respondent and its client where he had been seconded to. The court finds that the payment of terminal dues was not in contention and that in failing to award the same the trial court erred.

27. Notice pay- The appellant in submissions agreed that the Notice pay for 1 month salary was Kshs. 50,000 as submitted by the respondent which notice was due under section 40(1)(f) of the *Employment Act*.

28. Salary Arrears- the same was not in contention before the trial court and is awarded as submitted by the appellant that he is entitled to salary arrears from 1st October 2024 to 7th October 2024 (7 days )at KES 15,332/-.

29. Unpaid leave days - The respondent in termination letter just stated leave days not taken. In submissions this issue is not in contention. The appellant had claimed 13 days of untaken leave in the claim (page 8 of ROA). The same is awarded as computed leave of 13 days Kshs. 18, 111/-.

30. Severance pay – the respondent had indicated in the termination letter that severance would be paid for two full years of service at 15 days per year. The appellant challenged this and contended he is entitled to a severance pay for the period of service. It is well-established principle that under section 40(1) (g) of the Act, an employee declared redundant is entitled to a fifteen (15) days salary for every completed year of service. It is well established principle that the same will be calculated on an employee's gross pay. section 40(1)(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" The appellant contended that the respondent computed the same at KES 50,000/- for a period of two years, being the completed two year of service, in error by failing to consider the nine (9) months of service on pro rata basis. The appellant submitted he is entitled to severance pay at KES 50,000/26*15day* 2.9 at KES 83,653/-. Severance pay is payable under section 40(1)(g) of the *Employment Act* to wit- '(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." The court finds that the intention of the legislature was for payment for a complete year of service. The respondent's interpretation was correct, and that the employer pays to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service. Severance pay is awarded at the rate of 15 days for each completed year . The monthly salary was Kshs. 50000. Thus, severance pay award of Kshs. 50,000/- is awarded on appeal .

**Whether the cross-appeal was merited**

**Cross-appellant's submissions**

31. Whether the reasons issued in support of the trial court's findings were proper and or factual? The learned magistrate in finding that the appellant was unfairly terminated held as follows;-"The claimant was served with a notice after termination but was given one month salary in lieu of notice. The respondent has not produced minutes of consultative meeting they had with the claimant on redundancy which the respondent claims to have had before the termination. The absence of which is construed as they are non –existence because no such meeting occurred and thus the claimant was not accorded a fair hearing before the termination. Some aspects of the law were complied with others were not .The contract didn't expressly state that the employment was dependent on a 3rd party."

32. From the learned magistrate's findings outlined above, it can be deduced that the reasons in support of trial court's findings are; no hearing and/or consultative meetings were held between the parties herein before declaring the appellant redundant, non-specified aspects of were not complied with and the contract of employment didn't expressly state that the employment was dependent on a 3rd party. The contract of employment entered by the parties herein the same dated 1st April, 2024, had express terms and conditions outlining and guiding the employment relationship between the appellant and the respondent. Paragraph 2 of the subject employment contract clearly outlines that;-"Your employment is deemed to have commenced on 1st April, 2024 and runs to 31st March, 2025 at midnight (12:00) for a period of one year, unless terminated in accordance with the provisions of this agreement. Your contract shall therefore be terminated via notice if our contract with the client is terminated. During your contract period, you shall be seconded to perform your duties exclusive and full time basis for a company to be determined by the employer." The term and condition;-„Your contract shall therefore be terminated via a notice if our contract with the client is terminated# was written in bold for emphasis and in clear terms for clarity. The appellant clearly affirmed that he had read and understood the contract and accepted the terms and conditions of the contract as set out therein. (Refer to the appellant's acceptance on page 43 of the record of appeal.) Vide an addendum dated 30th July,2024,the subject contract of employment was extended and the only term that was varied and or reviewed was on remuneration where the appellant's gross salary was raised to kshs.50,000/.The addendum was express that the other terms and conditions remained the same. (Refer to the addendum on page 44 of the record of appeal.) It is trite law that parties are bound by the terms of the contract they have entered into therefore both the appellant and the respondent are bound by all the terms and conditions outlined in the contract of employment dated 1st April,2024. 22. Aburili J in Kisumu High Court Civil Appeal No.E123 of 2023 James M.Mctough =versus= Amina Hassanali held as follows;-" It is trite law that parties are bound by the terms of their contract and that a court of law cannot rewrite a contract between parties unless fraud, mistake, misrepresentation or unfair bargain is apparent. The appellant having agreed to the terms of the lease agreement dated 1st October 2013 on the repairs to be effected by him to the premises was thus bound by the terms of that agreement. The appellant could thus not escape from effecting the said repairs."

33. The Court of Appeal in the case of National Bank of Kenya Ltd =versus= Pipe plastic Sankolit (K) Ltd Civil Appeal No 95 of 1999 held as follows;-"A court of law cannot rewrite a contract with regard to interest as parties are bound by the terms of their contract. Nevertheless, courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to procedural abuse..." In executing the subject contract of employment by affixing his signature, the appellant affirmed that he accepted all the terms and conditions outlined therein including the term and/or condition that his contract shall therefore be terminated via a notice if the respondent's contract

is terminated by its client. The appellant was well aware and agreeable to the fact that his employment was pegged on availability of work from a third party, the respondent's client. The respondent in its termination notice issued to the appellant outlined its reasons for termination to be; „we are sorry to inform you that our client who we assigned you to work for in his factory as a trailer driver has decided to outsource the services. As a consequences, since your employment was pegged on availability of our services therein as stipulated in our contract of employment with you.#(Refer to letter dated 7th October, 2024 on page 46 of the record of appeal.) The notice of termination issued to the appellant and referred above was issued pursuant to an email issued to the respondent by its clients on 7th October,2024 directing to wit; Kindly terminate the services of the following drivers effective immediately. The company has made a decision to outsource the services they services they are offering. The drivers are Daniel Mukabana and John Kuria.# (Refer to an email extract on page 48 of the record of appeal.) In both the termination letter and the email on effecting service of the termination notice to the appellant, the respondent reiterated the term and/or condition of the subject agreement which provided that the appellant's employment was dependent on availability of the respondent's services to its clients# (Refer to a letter dated 7th October, 2024 and an email extract both on pages 46 and 47 of the record of appeal respectively.) 28. As highlighted above, it is clear that the contract of employment expressly stated that the employment was dependent on a 3rd party. Taking into consideration the facts outlined above and perusing the impugned judgment, it is evident that the trial court ignored the fact that the employment contract entered between the appellant and the respondent was explicit that the employment was dependent on a 3rd party. The respondent humbly urges this honourable court to take into consideration the terms and conditions agreed by the parties herein in their agreement dated 1st April, 2024, while making its consideration on whether the termination of the appellant's employment was lawful and/or fair. Rule 68(4) of the Employment and Labour Relations Court rules provide that; - decision of the Court shall be in writing and contain concise Statement of facts and the reasons for the decision. The respondent humbly submits that the trial court derogated its duty by failing to concisely state which specific laws were not complied with by the respondent. It is a fundamental requirement of common law that reasons for judgment or ruling be given by the judicial officer. The honourable court in Nyeri High Court Civil Appeal No. 73 of 2013 Philip Mururi Nd'ung'u =versus= Housing Co-operative Society Ltd Mativo J cited the findings of Thomas J in Bell-Booth v. Bell-Booth [1998] 2 NZLR 2 where the learned judge put it succinctly when he rendered himself as follows:- "Reasons for judgment are a fundamental attribute of the common law. The affinity of law and reason has been widely affirmed and Judge's reasoning -his or her reasons for the decision - is a demonstration of that close assimilation. Arbitrariness or the appearance of arbitrariness is refuted and genuine cause for lasting grievances is averted. Litigants are assured that their case has been understood and carefully considered. If dissatisfied with the outcome, they are able to assess the wisdom and worth of exercising their rights of appeal. At the same time public confidence in the legal system and the legitimacy and dynamic of the common law is enhanced. The legal system can be seen by working and, although possibly at times imperfectly, striving to achieve justice according to law." Being guided by the authority cited above, the respondent humbly submits that the learned magistrate erred by failing to concisely state the specific laws not complied with by the respondent in terminating the appellant's employment thus the respondent urges the court to set aside the impugned judgment on this basis. The other reason outlined by the learned magistrate for arriving at her finding is that no hearing and/or consultative meetings were held between the parties herein before declaring the appellant redundant. As per the email extract on page 48 of the record of appeal, it is apparent that the appellant was one of the two driver whose both positions were declared redundant hence there was no option to consider the issue of seniority, skills, ability and reliability of each employee, since the appellant and Daniel Mukabana were the only drivers employed by the respondent and seconded to its client. 36. In the case of Ngaira & 126 others =versus= Sendwave Limited (ZEPZ) (Cause E532 of

2023) (2024) KEELRC 567 the court held;-“ Regarding the condition on selection criteria as required under Section 40(1)(c) of the *Employment Act*, the Respondent states that the subject redundancy affected the entire class of employees. This being a mass redundancy, the Court found no reason to fault the Respondent on this score.” Furthermore, in the case of Muraguri =versus= Mpala Research Center & 2 others [2024] KEELRC 440 (KLR) where the court held that;-“ From the documents produced, it is apparent that the Respondents adhered to the notification requirements as there were notices to the Claimant, the Labour Office and additional Termination notice. It is therefore accurate to state that in so far as notices were concerned there was procedural fairness.” Taking into consideration that there were only two positions within the appellants class of employment, the respondent humbly submits that the provisions of section 40(1) (c) of the *Employment Act*, 2007 were not applicable in the circumstance. The respondent humbly submits that learned magistrate erred in fact and in law by basing her decision on lack of minutes evidencing that a hearing and a consultative meeting was held prior to the declaration of the redundancy herein noting that the provisions of section 40(1) (c) of the *Employment Act*,2007 were not applicable in the circumstance. From the foregoing, the respondent humbly submits that the reasons proffered by the learned magistrate in support of her findings and/or decision are not sufficient to maintain her findings that the appellant’s termination was improper, unfair and unlawful. The respondent contends that in her judgment, the learned magistrate misapprehended the facts presented by parties, applied inapplicable provisions in the circumstance arriving at erroneous decision thus the respondent humbly urges this honourable court to set aside the impugned judgment.

34. Whether the termination of the appellant’s employment was fair in the circumstance? The notice of termination issued to the appellant was issued pursuant to an email issued to the respondent by its clients on 7th October, 2024 directing to wit; kindly terminate the services of the following drivers effective immediately. The company has made a decision to outsource the services they services they are offering. The drivers are Daniel Mukabana and John Kuria.# (Refer to an email extract on page 48 of the record of appeal.) The respondent in its termination notice issued to the appellant outlined its reasons for termination to be; „we are sorry to inform you that our client who we assigned you to work for in his factory as a trailer driver has decided to outsource the services. As a consequences, since your employment was pegged on availability of our services therein as stipulated in our contract of employment with you.#(Refer to letter dated 7th October, 2024 on page 46 of the record of appeal.) The respondent concurrently notified the labour office of the termination vide a letter dated 7th October, 2024. (Refer to a letter dated 7th October, 2024 on page 45 of the record of appeal. As per the facts on record, the appellant was well aware that his employment was pegged on a third party and termination was to be issued in the event that the said third party terminated its contract with the respondent. The 3rd party directed the respondent to with immediate effect; terminate Daniel Mukabana and the appellant’s employment as depicted on scrutiny of the email extract on page 48 of the record of appeal. The respondent subsequently issued the said termination notice to two drivers including the appellant herein. From the foregoing, it is evident that the decision to terminate did not originate from the respondent. However, the appellant was well aware that the said notice would likely be issued. In light of the above, it is evident that the appellant adhered to the procedure outlined under section 40(1) of the *Employment Act*. In the case of Thomas De La Rue (K) Limited =Versus= David Opondo Umutelema eKLR the Court said;-“It is quite clear to us that section 40(a) and 40(b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing to the employee and the local labour officer...” The decision to terminate the appellant’s employment was beyond the respondent’s power. However, the notice to terminate was issued in compliance with the terms

and/or conditions of the contract of employment entered on 1st April, 2024 and section 40(1)(b) of the *Employment Act*. By executing the subject employment agreement, the appellant was amenable to being issued with a termination notice once the 3rd party terminated its agreement with the respondent. The respondent in its termination notice vide a letter dated 7th October, 2024, notified the appellant that he was entitled to; salary for days worked up to 7th October, 2024, severance pay for each completed year of service, one month pay in lieu of notice and leave days earned but not taken up to 7th October, 2024. By outlining the dues owed to the appellant, the respondent was in complaint with the provisions of section 40(1) e, f and g of the *Employment Act*. In light of the above, the respondent humbly submits that the subject redundancy was both procedurally and substantively fair and justified considering the circumstances outlined above.

**Appellant's submissions on the cross- appeal**

35 Whether the learned trial magistrate erred in law and in facts when she arrived at a finding/conclusion that the termination of the appellant's employment on account of redundancy on 7th October 2024 was flawed, unfair and unlawful? On this first issue your Ladyship, we shall address the same together with grounds 1,2 and 3 of the cross appeal dated 4th September 2025. We submit that these grounds cover the question as to whether the cross-appeal is merited or not. We submit that the learned trial magistrate after considering the evidence of the parties, facts, pleadings and submissions, correctly concluded as follows: - "The respondent has not produced minutes of a consultative meeting they had with the claimant on redundancy which the respondent claims to have had before the termination. The absence of which is construed as they are non-existence because no such meeting occurred and thus the claimant was not accorded a fair hearing before termination. Some aspects of the law were complied with, others were not. In this case , there is no evidence offered by the respondent that due process was followed in termination of the claimant. There is no evidence of notice sent prior to termination. I do hereby find and hold that the said termination was improper, unfair and unlawful" see pages 83 and 84 of the Record. Emphasis added. We submit that it was not disputed in the primary suit that the appellant's employment was terminated by the respondent on account of redundancy on 7th October 2024, which termination the learned trial magistrate concluded was unfair and unlawful for being flawed for want of procedural fairness and substantive justification. Therefore, we submit that the learned trial magistrate properly interpreted and applied the provisions under section 40 of the *Employment Act* to the facts, evidence and correctly concluded that the respondent had breached the provisions of the law when declaring the appellant redundant. Therefore, the findings of the learned trial magistrate on the unlawfulness and unfair termination of the appellant's employment was well founded in law and supported by the evidence recorded in the primary suit and applicable legal principles. We further submit that the process adopted by the respondent leading to the appellant being declared redundant on 7th October 2024 was flawed and illegal for want of compliance with the mandatory procedures provided for under section 40 of the *Employment Act*. We submit that the respondent was under a legal duty under section 40, 41, 43 & 45 of the *Employment Act* to show that the procedure adopted in declaring the appellant redundant on 7th October 2024 was lawful and further justify the grounds for termination on account of redundancy were valid/justified. Section 45 (2) of the *Employment Act* No. 11 of 2007(the Act) provides that: - "A termination of employment by an employer is unfair if the employer fails to prove— (a) That the reason for the termination is valid; (b) That the reason for the termination is a fair reason— (i) Related to the employees conduct, capacity or compatibility; or (ii) Based on the operational requirements of the employer; an (c) That the employment was terminated in accordance with fair procedure." In addition, section 41 (1) of the Act also provide as follows: - "an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination

and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation." Further, section 43 of the *Employment Act* provides that; "In any claim arising out of termination of a contract, the employer shall be required to provide the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45. (2) The reason or reasons for termination of a contract genuinely believed to exist, and which caused the employer to terminate the services of the employee." In the case of Kenafric Industries Limited v John Gitonga Njeru (2016) eKLR, the Court held that: - "it is trite law that where termination of employment is contested and alleged to be unfair, the burden of proving the unfairness rests on the employee while the burden of justifying the grounds for termination or dismissal rests with the employer." That redundancy is defined under Section 2 of the *Employment Act* 2007, thus: - "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." section 40 of the *Employment Act*, 2007 provides the mandatory procedure to be followed where termination of employment is on account of redundancy as follows: (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. Emphasis mine.

36. Further, the Court in the case of Gerrishom Mukhutsi Obayo v Dsv Air and Sea Limited [2018] eKLR had the following to say on the notice of intended redundancy: - "The Respondent's argument that the order in which the notice to the employee and the Labour Officer is given is inconsequential is in my opinion, a misapprehension of the requirements of both Section 40(a) and (b). In both sections the provision is that the notice is given to the employee and the Labour Officer, or the union and the Labour Officer. It means that in each case, the Labour Officer must be entitled to at least one month's notice before the redundancy is effected, and the employee or union must also be notified at least one month before the redundancy is effected. The word used is notification. This period of one month is intended for the person receiving the notice to confirm that the preconditions of redundancy have been complied with. These preconditions as set out under Section 40(1) include the communication of reason for, and extent of, the redundancy, and the selection criteria. The period is necessary for any disputes over these issues to be settled before the redundancy is effected. The period also allows for consultations and any negotiations to take place before the redundancy is carried out, and for the Labour Officer to ensure that the redundancy will be carried out in accordance with the Act. (emphasis added).Similarly, in the case of Abigael Jepkosgei Yator & another v China Hanan International Co. Ltd [2018] KEELRC 2541 (KLR), Hon.Lady Justice Monicah Mbaaru held as follows:- "..The employer faced with a redundancy must follow the mandatory provisions of section 40 as otherwise any

termination of employment arising thereof is unfair....Before termination of employment where there is a redundancy, an employer must issue notice to its employees and where unionised ensure such notice has been served upon the trade union and the labour officer. The notice should set out the reasons for and the extent of the intended redundancy. Selection criteria to be followed in laying off some employees and not others should also be indicated. Where there is a collective bargaining agreement, its terms and conditions should be put into account... The notice contemplated under section 40 of the *Employment Act*, 2007 is important in two respects. First where not issued, the employer fails to prove the justification for termination of employment and secondly such termination of employment is inherently unfair in view of sections 43 and 45 of the Act" 21.Further, in the case of Hesbon Ngaruiya Waigi Vs Equitorial Commercial Bank Limited (2013) eKLR, the Court held as follows: - "These conditions outlined in the law are mandatory and not left to the choice of the employer. Redundancies affect workers livelihoods and where this must be done by an employer must put into consideration the provisions of the law.." emphasis mine.

37. From the totality of the evidence adduced by the parties in the primary suit, we submit no notice of intended redundancy was issued thirty days prior to the labour officer and the claimant as required by section 40(1)(b) and thus the termination of the claimant was flawed, unfair and abrupt. Therefore, the procedure adopted by the respondent to declare the appellant redundant was procedurally unfair and unlawful for want of compliance with mandatory provisions of sections 40, 41 and 43 of the *Employment Act*. We submit that the respondent's witness admitted during cross-examination that a notice of an intended redundancy was not issued prior to declaring the appellant redundant as required by the law. Further, the said witness admitted that the labour officer was only notified on 9th October 2024, this was after the appellant's employment had been terminated on 7th October 2024. This is buttressed by the acknowledgment stamp from the labour office endorsed on the respondent's letter on 9 th October 2024. We respectfully draw your attention to the respondent's exhibit 3 at page 45- whereby the respondent's letter to the labour office was issued after the fact, after the termination of the appellant's employment on 7th October 2024.During cross-examination, the respondent's witness admitted as follows in respect to issuance of a notice of an intended redundancy: - " We didn't pay terminal dues. He was terminated on basis of redundancy. We didn't serve a notice of intended redundancy to the claimant" pages 78 and 79 of the Record emphasis added. Further, the respondent did not accord the appellant a fair hearing before terminating his services on account of redundancy as required by mandatory provisions of section 41 of the *Employment Act*. Also, we submit that the respondent has not proved that the reasons for termination of the appellant' services were valid and fair reasons as required by provisions of section 43 and 45 of the *Employment Act*. We submit that the onus was on the respondent to prove existence of a redundancy situation, which burden it failed to discharge in terms of section 43 and 45 of the *Employment Act*. Further, we submit no genuine redundancy existed to warrant termination of the appellant' employment. Moreover, we submit that the respondent didn't avail any evidence of the alleged termination of contract between the respondent and a third party. 28.Further in response to ground 1 of the cross appeal, we submit that the appellant didn't have any binding contract with a third party and the existing employment contract was only binding between the appellant and respondent. In any event, the respondent could not terminate that contract without complying with provisions of the law. In addition, we submit that the respondent through its letter of termination dated 7th October 2024 and letter to labour officer were contradictory on the reasons for the redundancy. In the letter to the appellant, the respondent alleged outsourcing as the reasons for termination while in a letter to the labour officer alleged scaling down of operations by the client. Respectfully see pages 45 and 46 of the Record 30.Also, during cross-examination, the respondent witness admitted that there were no minutes to prove that consultations was undertaken prior to the appellant being declared redundant. Further, the respondent did not disclose the selection criteria that was adopted by the respondent while declaring the appellant redundant. We submit

that the absence of consultations rendered the whole redundancy process to be unfair and flawed. In the Court of Appeal decision of Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR. Maraga JA (as he then was), observed as follows- "The purpose of the notice under section 40 (1) (a) and (b) of the *Employment Act*, as is also provided for in the said ILO Convention No. 158 – Termination of Employment Convention, 1982, is to give the parties an opportunity to consider "measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment." Consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable... If redundancy is inevitable, then measures should be taken to ensure that as little hardship as possible is caused to the affected employees." That for redundancy to be valid, the employer must prove that the procedure adopted to declare the appellant redundant was valid and complied with the law. Further, the employer must prove that the redundancy was justified or there was a substantive justification. Therefore, we submit that the respondent failed to comply with the mandatory redundancy procedure set out under Section 40(1)(b)(f) and (g) of the *Employment Act*, and as such, the redundancy was to that extent unprocedural and unfair and unlawful for want of procedural fairness and substantive justification. On grounds 2 and 3 of the cross appeal, we submit that the respondent breached the provisions of section 40(1)(b)(f) and (g) of the *Employment Act*. Therefore, the learned trial magistrate was correct in finding that the termination on account of redundancy was unfair and unlawful. Moreover, there is no evidence that the respondent complied with provisions of section 40(1)(b) and (f) as alleged. In view of the foregoing, your Ladyship, we humbly submit that the procedure of declaring the appellant redundant was unfair, unjustified, flawed and malicious and thus unlawful and unfair termination and therefore the appellant was entitled to compensation for unlawful termination under section 49 of the Act. Therefore, we submit that the trial magistrate was justified in awarding the appellant compensation for unfair and unlawful termination. We submit that the award of compensation was justified and well-grounded in both law and in facts. In any event, the respondent has not challenged the quantum of compensation awarded in its cross-appeal. Therefore, we urge your Ladyship to uphold the finding on quantum by the trial magistrate, which finding has not been challenged by the respondent. There is no ground on the cross appeal challenging the finding on quantum.

**Decision on cross-appeal**

38. The grounds of the cross-appeal were -

    a. The Honourable Magistrate erred in law and fact by failing to consider evidence that the employment contract entered between the appellant and the respondent was explicit that the employment was dependent on a 3rd party.

    b. The Honourable Magistrate erred in law and fact by misinterpreting the provisions on termination on account of redundancy as provided under section 40 of the *Employment Act*.

    c. The Honourable Magistrate erred in law and fact by ignoring the provisions of section 40(1)(b)and (f) of the *Employment Act* in which the Respondent had fully complied with.

39. There are various ways of separation between employer and employee. While the regular termination is vide dismissal based on misconduct (section 45) of the *Employment Act* or resignation, in some cases on no fault or consent of the employee, redundancy is invoked to terminate employment. Redundancy is defined under the *Employment Act* as - "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;"

40. The trial court proceeded on the basis of termination by redundancy. The letter of termination was filed with the trial court on 7th October 2024 (page 29 of the ROA). The letter attributed the termination to the client having outsourced the work to a third party. The letter indicated that the employment was contingent on the respondent's availability to the client. In the letter of contract, it was indicated that your contract shall therefore be terminated via notice if our contract with the client is terminated. In a letter addressed even to the labour officer, it was stated that the employment was terminated due to the scaling down of operations by the third party. (page 45 of ROA). The witness for the respondent told the court that the termination was due to redundancy. The respondent did not comply with the notice for redundancy. The witness stated they did consultation but did not produce the minutes and told the trial court the third party did not want a driver and that other staff were left. He did not produce before the court the third-party contract (cross-examination of cross-appellant witness at page 79 of ROA).

41. The court holds that scaling down work means work is no longer available to some employees. The witness for the respondent told the trial court the termination was on the basis of redundancy and that they did not issue the notice. Redundancy is the involuntary termination of employment at no fault of the employee (section 2 of the *Employment Act*(supra) . The termination on the basis of lack of work, whether attributed to a third party or internal, amounts to redundancy as correctly stated by the respondent's witness.

42. The redundancy process is highly protected by the legislature under section 40 of the *Employment Act* to wit- '(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." The foregoing process is mandatory for the termination on account of redundancy to meet the test of fairness. The respondent produced email correspondence which stated that the drivers be terminated, one of whom

was the appellant. There was no correspondence from the alleged third party. He who alleges proves. The cross-appellant had the burden to prove the validity of the reason for redundancy, but failed to present in court the contract with the said third party and its termination or change of terms. The court, for the foregoing reason, finds no basis to interfere with the finding of the trial court that the reason was not justified and the process for redundancy was not complied with. The appellant did not pursue the issue of whether the appeal was proper for being filed out of 21 days under Rule 17 (2)of the Court (procedure) Rules of 2024 , to wit-'2)A cross appeal shall be filed and served within twenty-one days from the date of service of the memorandum of appeal." The ground of opposition was that the memorandum of appeal was served on 26th August 2025 and cross-appeal filed on 23rd September 2025. The court did not find affidavit of service to ascertain timelines hence the issue rests. In the upshot the cross-appeal is held to lack merit.

**Conclusion**

43. The appeal is allowed. The cross-appeal is dismissed. The Judgment and Decree of the Hon. M. Nanzushi (SPM) delivered on 25th July 2025 in Mavoko MCELRC E244 of 2024 is set aside and substituted as follows-

    Judgment is entered for the claimant against the respondent as follows-

    a. Notice pay of Kshs. 50,000

    b. compensation for unfair termination equivalent of 7 Months Kshs. 350,000

    c. Salary Arrears- 1st October 2024 to 7th October 2024 (7 days )at KES 15,332

    d. Unpaid leave days of 13 days Kshs. 18,111

    e. Severance pay Kshs. 50000

    The award amount for total sum of Kshs.483,443 is payable with interest at court rate from date of judgment.

    f. cost of the suit.

44. The default position in litigation is that costs follow the event. Cost of the appeal and cross-appeal awarded to the appellant against the respondent.

45. 30 days stay granted.

46. It is so ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 23RD DAY OF JANUARY, 2026.**

**J.W. KELI,**

**JUDGE.**

In The Presence Of:

Court Assistant: Otieno

Appellant – Njuguna

Respondent- Marusei h/b for Sang