

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

APPEALS DIVISION

APPEAL NO. E072 OF 2023

MAKINI SCHOOL LIMITED.....APPELLANT

JOSEPH SHALINGA OMUTIA.....1ST RESPONDENT
HILARY ULUMA WANDIRI.....2ND RESPONDENT
DENIS BARASA OKUMU.....3RD RESPONDENT
DOUGLAS KISIA MUNIARE.....4TH RESPONDENT
CHRISTINE OKACHA KHATAB.....5TH RESPONDENT
VINCENT JUMA MAKOKHA.....6TH RESPONDENT

(Being an Appeal against the Judgment and Decree of Honourable H. E. Wanjala (P.M) dated and delivered on 26th August 2022 and the Subsequent Orders issued by Hon. R. L. Musiega on 27th March 2023 in Milimani CMELR 1939 of 2019 - consolidated with CMELR 1934, 1935, 1936, 1937 and 1938 of 2019)

JUDGMENT

1. Through the Memorandum of Appeal dated 1st November, 2023, the Appellant appeals against the whole Judgment and Decree of Honourable H. E. Wanjala (P.M) dated and delivered on 26th August 2022 and the subsequent orders issued by Hon. R. L. Musiega on 27th March 2023 in Milimani CMERL 1939 of

2019 - consolidated with CMELR 1934, 1935, 1936, 1937 and 1938 of 2019).

2. The Appeal was based on the grounds that:

- i. *The learned trial court erred in law and in fact by misinterpreting the orders and the import of the ruling by Lady Justice Maureen Onyango in ELRC 491 of 2019- Julius Lulle Kakello vs Makini School.*
- ii. *The learned trial court erred in fact and in law by issuing maximum compensation for redundancy without taking regard to the evidence on record in court and the provisions of Sections 49(4) of the Employment Act, 2007.*
- iii. *The learned trial court erred in fact by finding that the Appellant was at fault for the failure to recall the redundancy dues despite the evidence and documents presented in court placing the Respondents at fault.*
- iv. *The learned trial court erred in law in fact by making a finding and an interpretation that it was the duty to of the Appellant to call back the Respondent and the ruling by Lady Justice Maureen Onyango in ELRC 491 of 2019- Julius Lulle Kakello vs Makini School.*
- v. *The trial court erred in law by shifting the burden of proof to the Appellant, contrary to the principles governing redundancy disputes, and thereby reaching a decision that was unsupported by the evidence on record.*
- vi. *The trial court erred in law by awarding an excessive and unjustified decretal amount to the Respondents, failing to consider that the redundancy package provided by the*

Appellant was lawful, adequate, and in full compliance with statutory requirements

vii. *The trial court erred in law by granting damages that were disproportionate and punitive in nature, thereby setting a precedent that undermines the legitimate right of employers to undertake lawful redundancies.*

3. The Appellant prayed that the appeal be allowed. Judgment of Honourable H.E. Wambala (PM) dated 26th August 2022 be set aside and substituted with an order dismissing the Respondent's claims with the costs of this Appeal and those in the Employment and Labour Relations Court be granted to the Appellant.
4. The Appeal was disposed of by written submissions.

APPELLANT'S SUBMISSIONS

5. The Appellant's Advocates O&M Law filed written submissions dated 17th March, 2023 and correctly submitted on the role of the first appellate court relying on the often quoted case of **Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA.123** and **Peters v Sunday Post Limited [1958] EA 424**.
6. On the issue of whether the trial court misinterpreted the orders in the Ruling in ELRC 491 of 2019 Julius Lulle Kakelo vs

Makini School, counsel submitted that the learned trial Magistrate fundamentally misconstrued both the import and legal applicability of the ruling delivered by Lady Justice Maureen Onyango in ELRC No. 491 of 2019 on a matter concerning different Claimants. It was submitted that the Respondents herein were not parties to the earlier proceedings referenced in relation to the alleged unlawful redundancy process. The judgment delivered in that suit was rendered solely in favour of the named party who had approached the court seeking redress and did not intend to non-parties who neither pleaded nor were joined in the same cause of action.

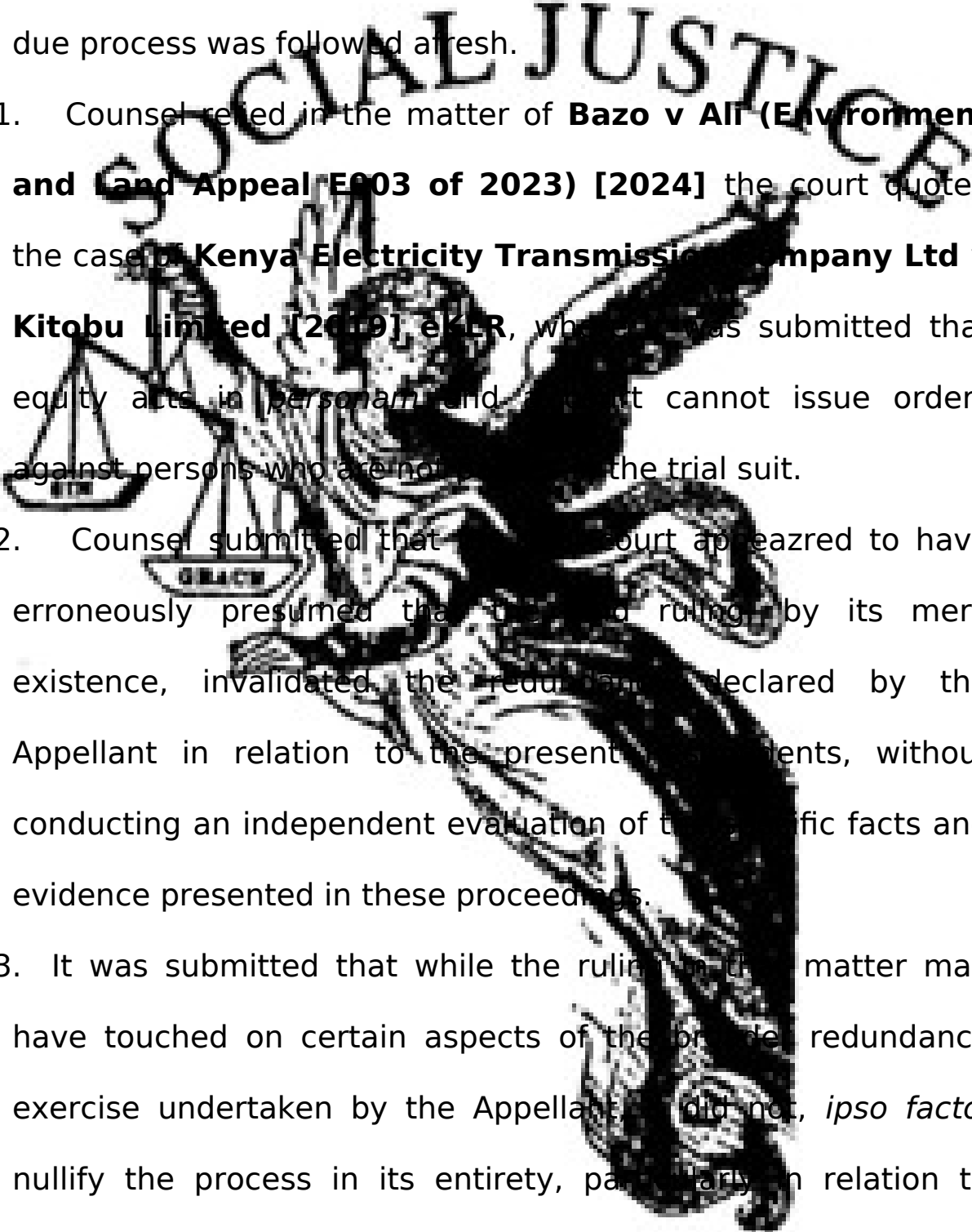
7. That it was a cardinal principle of law that judicial orders are binding only on the parties to the suit, and cannot be enforced or relied upon by individuals who were not participants in those proceedings. Furthermore, the principle of privity of litigation dictates that parties who are strangers to a suit cannot claim the protection of its orders.
8. It was submitted that section 40 of the Employment Act, 2007, which outlined the substantive and procedural requirements for

redundancy, mandated that notification be issued to each employee individually and to the labour officer. A failure to adhere to such requirements must be determined with respect to each affected employee on a case-by-case basis.

9. It was further submitted that it was manifestly clear from the record that the Respondents herein were neither included in the pleadings of the original action nor were they named beneficiaries of the judgment rendered. No application for joinder or consolidation was made and no reference to the present Respondents was made in the prior litigation. As such, the Appellant could not have been under any legal obligation to reinstate persons who had not been the subject of the court's directive.

10. That accordingly, the contention that the Appellant violated the court's orders by failing to reinstate the Respondents before undertaking a new redundancy process was legally untenable. The proper position in law was that unless and until the Respondents obtained specific orders to the contrary, the Appellant was not barred from restructuring its operations in

line with the provisions of the Employment Act, provided that due process was followed afresh.

- 
11. Counsel relied in the matter of **Bazo v Ali (Environment and Land Appeal E003 of 2023) [2024]** the court quoted the case of **Kenya Electricity Transmission Company Ltd v Kitobu Limited [2019] eKLR**, where it was submitted that equity acts *in personam* and that it cannot issue orders against persons who are not parties to the trial suit.
12. Counsel submitted that the court appeared to have erroneously presumed that the ruling by its mere existence, invalidated the redundancy declared by the Appellant in relation to the present respondents, without conducting an independent evaluation of the specific facts and evidence presented in these proceedings.
13. It was submitted that while the ruling in the matter may have touched on certain aspects of the broader redundancy exercise undertaken by the Appellant, it did not, *ipso facto*, nullify the process in its entirety, particularly in relation to employees not before the court in those proceedings. Indeed,

the Appellant presented evidence before the trial court clearly demonstrating the independent communication, procedures, and criteria applied in declaring the Respondent redundant. This evidence, regrettably, appears to have been given insufficient consideration by the trial court, which instead anchored its reasoning primarily on a general and unrelated ruling.

14. In essence, the trial court took a position that suggested a ruling in one employment case terminatively governs all subsequent or related claims, regardless of the individuality of each case. This approach undermined the foundational legal requirement that each case be adjudicated on its own merits. Counsel relied on the Court of Appeal in **A. v. Another v R. B., Civil Application No. 4 of 2016 (2016)**, cited with approval the Constitutional Court of South Africa's decision in **Burchell v. Burchell, Case No. 364 of 2008**, where the court emphasized on effective enforcement of court orders to avoid impacting negatively on rule of law.

15. Counsel urged the Court to disregard the Respondents' reliance on ELRC 491 of 2019, and to find that the learned trial magistrate erred by importing and applying findings from unrelated proceedings without proper legal justification or factual foundation.

16. On the issue of whether the trial court erred in finding that the Respondents were unfairly terminated counsel submitted that the trial court erred by finding that the redundancy of the Respondents amounted to unfair termination. The Appellant followed the due process stipulated under Section 40 of the Employment Act in carrying out the redundancy exercise.

17. Counsel submitted that the reasons for redundancy were genuine and justifiable, arising from an internal reorganization undertaken to address role duplication and reduce operational costs. The Appellant demonstrated that the roles previously held by the Respondents were no longer viable. Moreover, a plain reading of the trial court's proceedings and judgment revealed that the positions

previously held by the Respondents were not subsequently re-advertised. This fact negated any inference of malice or ulterior motive on the part of the Appellant, and effectively dispelled the notion that the redundancy was a veiled attempt to terminate the Respondents' employment in order to replace them with new staff.

18. Counsel relied on the case of **Nazarene University v David Mutevu & 103** [2017] eKLR, where the Court of Appeal affirmed the employer's prerogative in determining its operational structure.

19. It was submitted that the Appellant complied with the procedural safeguards set out in law. Notices of intended redundancy were duly issued to the Labour Office and the affected employees as early as 29th January 2017. These were followed by five documented consultative meetings, in which the Appellant explained the rationale and process for the redundancy. The Appellant subsequently notified the Labour Office of the conclusion of the exercise on 15th July

2019. That the following key elements of Section 40 were specifically observed:

Section 40(1)(a) & (b): The Appellant notified the Labour Office and the individual Respondents, who were not members of a union. The Interested Party, in their affidavit, confirmed that the union was also duly notified and involved in consultation.

a) Section 40(1)(c): The Appellant adhered to the Last-In-First-Out (LIFO) principle in selecting employees for redundancy. No evidence was presented by the Respondents to suggest deviation from this selection criteria or that any senior employee was retained in preference to them.

b) Section 40(1)(e), (f), and (g): The Appellant calculated and prepared all redundancy dues, including payment for accrued leave, notice pay, and severance. These amounts were offered and remain available for collection by the Respondents. Evidence of payments made to other affected employees was also provided. Additionally, the Appellant expressed readiness to issue the Respondents with certificates of service.

20. It was submitted that the Appellant presented to the trial court a breakdown of all dues owed to the Respondents, consistent with the Employment Act. Based on this, the trial magistrate held that the termination was unfair, without a finding of non-compliance with the substantive or procedural elements of Section 40, an error in both law and fact.

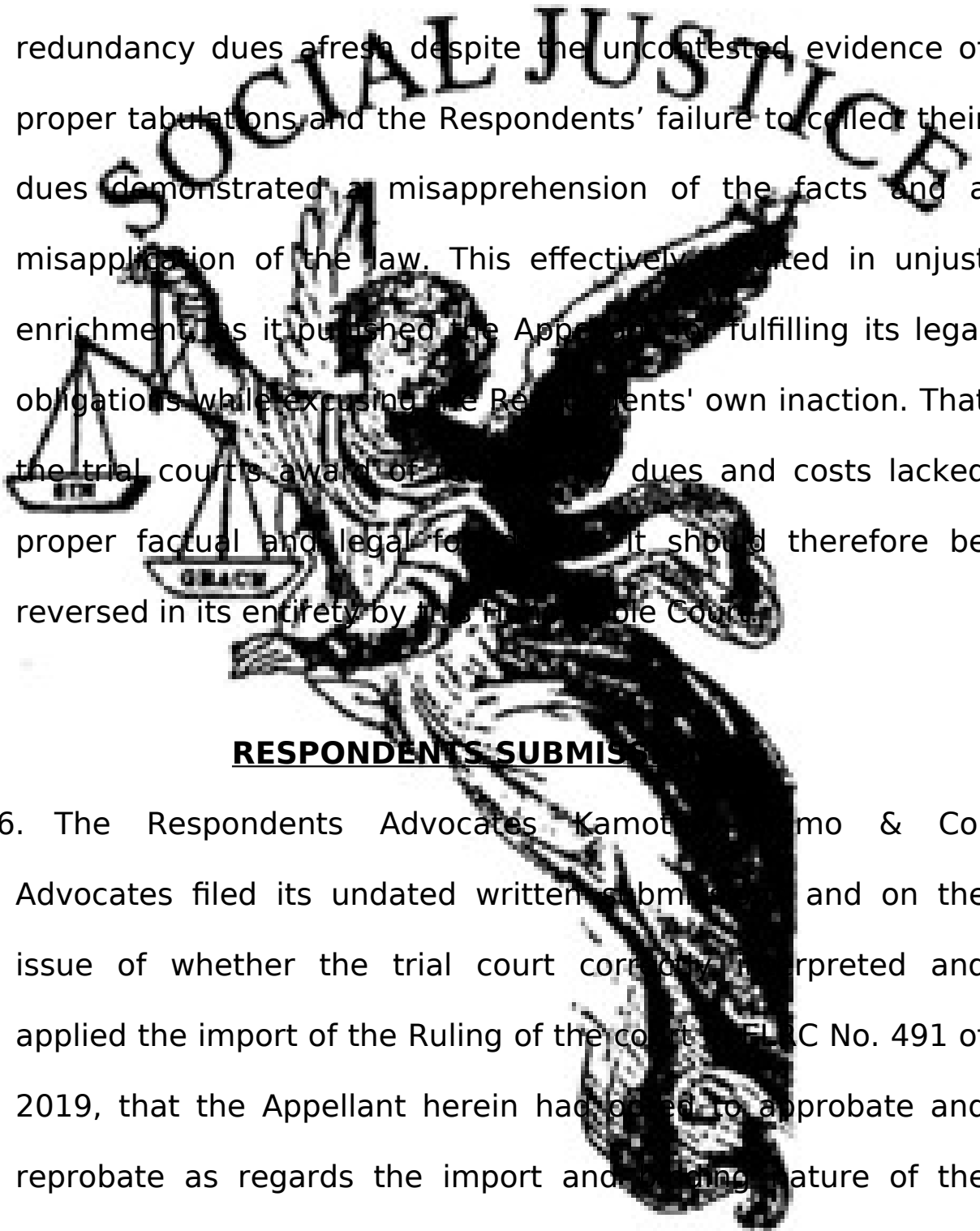
21. That the trial court erred in holding that the Respondents ought to have been reinstated to their former positions, purportedly in line with the orders issued in ELRC No. 491 of 2019, without due regard to the organizational restructuring process actively being undertaken by the Appellant at the time. The court failed to appreciate the legal and operational implications of the restructuring which rendered the affected positions redundant and ineligible for reinstatement.

22. Counsel relied on the case of **Kenya Airways Limited v Aviation & Allied Workers Union of Kenya & 3 others [2014] eKLR**, where the Honourable Justice A.K. Murgor aptly underscored the discretionary nature of a remedy of reinstatement. Counsel further submitted that the trial court appeared to have conflated the distinct and individualized redundancy of the Respondents with procedural concerns raised in ELRC No. 491 of 2019, without assessing whether those concerns applied to these specific cases. The Appellant reiterates that it acted lawfully and in compliance with all statutory obligations.

23. On the issue of whether the trial court erred in law by awarding the redundancy dues and costs of the suit, counsel submitted that the Appellant finds the trial court's award of redundancy dues to be particularly perplexing and erroneous in law. The Appellant had fully complied with the requirements of Section 40 of the Employment Act by tabulating all the redundancy dues payable to the Respondents. These tabulations, which included terminal pay, accrued leave, and notice pay, were prepared and presented to each of the Respondents in accordance with the law and internal policy.

24. That despite being duly informed and given the opportunity to clear and collect their terminal dues, the Respondents failed to avail themselves for the clearance process as per the Appellant's institutional policy. That it is a standard requirement that separating employees undergo a formal clearance process before the final release of terminal dues, a process which the Respondents wilfully neglected. This failure on their part could not be construed as non-compliance by the Appellant.

25. It was submitted that the trial court's decision to award redundancy dues afresh despite the uncontested evidence of proper tabulations and the Respondents' failure to collect their dues demonstrated a misapprehension of the facts and a misapplication of the law. This effectively resulted in unjust enrichment as it punished the Appellant for fulfilling its legal obligations while excusing the Respondents' own inaction. That the trial court's award of redundancy dues and costs lacked proper factual and legal foundation, it should therefore be reversed in its entirety by this Honorable Court.



RESPONDENTS' SUBMISSIONS

26. The Respondents Advocates Kamote, Kamote & Co. Advocates filed its undated written submission and on the issue of whether the trial court correctly interpreted and applied the import of the Ruling of the court in ELRC No. 491 of 2019, that the Appellant herein had opted to approbate and reprobate as regards the import and binding nature of the Ruling in ELRC No. 491 of 2019. In the trial court, the Appellant

indeed recognized the ruling of the court as applicable to the Respondent's case and even sought to invoke the principle of *res judicata* yet in the present appeal, they now turn and argue that the Respondents herein were strangers to the said earlier case.

27. It was submitted that it was not in dispute that the Respondents were at all times members of the Kenya Union of Domestic Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA), who was named as an interested Party in ELRC No.491 of 2019, and that the KUDHEIHA being a representative of the Respondents acted on behalf of the Respondents in the said matter. The Appeal duly recognized the role and position of the Union *vis-à-vis* the Respondents.

28. That this statement was replicated with respect to the case of each filed case of the Respondents. The Appeal was hence estopped from making submissions that the findings of the court in ELRC No. 491 of 2019 did not affect the case of the Respondents in the trial court. Counsel asked the court to so find that the ruling of the court in ELRC No. 491 of 2019

declared null and void the individual notices issued by the Appellants directly to the members of the Union in its entirety and directed the Appellant to issue fresh notices directly to the Trade Union.

29. That indeed, the trial court did not limit its finding to the employees of the Appellant who were involved in the case, but to each employee who was served with the redundancy notice but members of KUDHEIHA as the said notices were invalidated.

30. It was submitted that the nullity of the ruling and orders therefore, were to render null and void the notices which were issued to the employees directly in July 2019 yet they were members of KUDHEIHA. This applied to the entire Respondents who all received notices of intention to declare redundancies on 19th July 2019. Contrary to the submissions of the Appellant, the Appellant was directed to issue fresh notices to the Union as concerns all members of the Union including the Respondents herein.

31. That indeed, all affected employees of the Appellant were issued with redundancy notices on the same date of 19th July, 2019. The fact that the redundancy notices issued as regards the Respondents were declared null and void directly affected the legitimacy of the redundancy notices of the Appellant herein. All the unionized employees of the Appellant were placed in exactly similar situations and circumstances and no attempt can be made to sever them as regards the implication of the said finding of the court as regards the validity of their redundancy notices.

32. Counsel submitted that the effect of the direction of the Court in ELRC No. 491 of 2019 would be to require the Appellant to issue a fresh notice in compliance with the law. It was indeed the responsibility of the Appellant to proceed to withdraw all the redundancy notices and termination letters they had initially issued to the Respondents and commence the process afresh. This they could only do by recalling the employees and commencing redundancy by issuing fresh redundancy notices.

33. That the Respondent's witness confirmed in court that there existed no evidence that any of the Respondents herein were ever recalled at all. The Respondent's witness admitted in cross examination that the redundancy notices directly to the trade union and inviting them for consultative meeting on behalf of their members was the correct mode of dealing with redundancies of employees who are members of a trade union. None of these steps were done in effecting redundancy of the Claimants herein.

34. It was submitted that in having confirmed the Respondents were members of the trade union, section 40(1) (a) of the Employment Act mandated the respondent to serve the notice of intended redundancy on the trade union at least 30 days before the redundancy date (being 30th August, 2019) and not to the employees individually. Under section 40(1)(b) of the Employment Act, it was only in cases where an employee was not a member of the trade union that an employer was to serve the notification letter directly to the employee. The net effect was that the employer was required to directly deal with the

KUDHEHIA and not directly with the employees or put in another way, they could not purport to deal directly with employees who were members of a trade union to the exclusion of their trade union.

35. In support of the above proposition, counsel relied on the celebrated Court of Appeal case of **De La Rue (K) Limited v David Omond Ombaka (2013) eKLR**. That what the court in the *Thomas* case contemplated was that the Respondent was mandated to serve the very same notification letters to KUDHEHIA. Since that was achieved, it was not necessary to personally serve the individual employees. The Respondent clearly put its best foot forward before the horse and the entire redundancy was patently legal.

36. On the issue of whether the trial court made correct findings that the Respondents were unfairly terminated counsel submitted that on issuance of notices the Respondent failed to issue the notices as by law required. That on consultations it was not in dispute that the Respondents were all terminated pursuant to the notice of redundancy dated 19th July 2019,

which was never served upon the Union. It was hence not in dispute that the Appellant herein did not at any time conduct consultations with the Respondents' trade union before termination of the employment contract of the Respondents. It was against this backdrop that the trial court faulted the Appellant for failing to conduct consultations with the Trade Union. Counsel urged the court to find that indeed the findings of the trial court was consistent with the evidence availed and cannot be faulted.

37. Counsel proceeded to demonstrate that once the court finds that the redundancy notices were not properly issued to the trade union and no consultations done with said union prior to the termination process, the entire redundancy process was patently unfair. Counsel relied on the decision of **Joseph TamaNdua & 11 others v Jacaranda Hotels (Pty) Limited (2014) eKLR**, on the need for redundancy notices and consultations during redundancy process. Counsel further submitted that despite the clear role of the trade union in the subsequent process of consultations and selection criteria, the

Appellant did not afford the above rights to the Respondents herein at all as all these events outlined herein before occurred long after the Respondent had terminated their service.

38. The locking out the union where the Respondents were members denied the Respondents meaningful consultations. Counsel further contended that the Court of Appeal has interpreted the provisions of article 24 to import the concept of meaningful consultations in redundancy and in the case of **Barclays Bank of Kenya Ltd v Gladys Muthoni & 20 Others (2018) eKLR** on a failure to consultations pre-redundancy as part of enforcing fair labor practices.

39. That the now defective redundancy notices which were issued on 19th July 2019 with the redundancies being effected on 29th August, 2019 aside from direct consultation with the trade union which did not exist, the Respondents' witness in cross examination could not produce any single evidence of any invitation made to any of the Respondents herein personally for any consultative meeting between the said dates at all. Counsel urged the court to return a finding that indeed the

Respondent never engaged any of the Claimants herein in any consultations between the date of issuance of the redundancy notices to the date of termination.

40. On selection criteria counsel submitted that upon issuance of the redundancy notice, section 40(1)(c) of the Employment Act directs an employer to assess his workforce in terms of skills, abilities and capabilities and determine on this basis which employee is to receive a redundancy notice. Counsel briefly demonstrated the nature of the burden placed on an employer as per law and court decisions. At the outset, the law required that in selecting employees for redundancy, an employer shall have regard to seniority, age and to skill, ability and reliability of each employee within a class or pool of employees affected by the redundancy.

41. Counsel further submitted that courts have held that the selection parameters in Section 40(1) (c) of the Employment Act were not in alternative such that in redundancy process, an employer must demonstrate that all parameters have been taken into account in an objective manner. Even though an

employer has or enjoys discretion to place given weights on each of the parameters, it cannot be applied in exclusion to each other. In support of this proposition, counsel relied on the decided case of **Kenya Plantation and Agricultural Workers' Union v Harvest Limited** [2015] 1 KLR. It was submitted that the Appellant herein failed to explain and avail evidence to the trial court of any comparative score sheet and how the employees were ranked to set the Respondents for redundancy on an objective basis.

42. That all the Appellant produced before the trial court was undated document at page 108-117 in the Respondent's bundle of Documents titled 'Justification for redundancy, Redeployment & New Roles. It was not passed to any person in particular and no evidence of it having been served upon the Respondents herein. That there was no evidence that the entire parameter of seniority in time and back skill, ability and reliability of each employee was ever considered and applied.

43. On the issue of whether the trial court erred in awarding redundancy dues and costs of the suit counsel submitted that

from the judgment of the trial court, the Respondents were awarded damages in a separate head and order for payment of redundancy dues as a separate award. By the manner the Appellant had framed the issue herein and made arguments thereon in their written submissions, the Appellant has isolated to argue their Appeal as concerns the order for award of redundancy dues and abandoned the issue as regards the damages so awarded by the

44. That it was not in dispute that the redundancy dues with respect of each Respondent were ascertained and computed by the very Appellant. It was clear that the trial court merely decreed the payment of the dues as already ascertained and computed by the very Appellant. That by orders of this Court the Appellant proceeded and remitted the entire dues to each Respondent as they were not part of or be subjected to Appeal.

45. Counsel submitted that the law was clear that all redundancy payments including severance pay, notice pay and outstanding leave days must be made before the termination of the contract of service on account of redundancy. Failure to meet

any of the conditions under Section 40, which include payment of all terminal dues before termination, would result in an unfair and unlawful termination.

46. It was submitted that the refrain under Section 40 was that the employer has paid and the law does not state that the employer shall pay. The action of the Respondent in tabulating redundancy dues, proceeding to terminate and decline to remit the redundancy dues as at the date of termination constituted unfairness. In support of this proposition, counsel relied on the decided case of **Stephen Mulaki Kimer v Lochab Transport Co. [2016] eKLR** where the court while grappling with the exact issue held that the payments ought to be made in strict compliance with Section 40 of the Employment Act.

47. That all the Claimants herein testified and confirmed that indeed they had already cleared from the institution but the Respondent failed to remit their redundancy dues hence the suit. The issue of non-clearance from the institution as a basis for withholding terminal dues was not genuine. First, the

Appellant did not at all plead before the trial court the issue of non-clearance as a basis for withholding redundancy dues at all in their Statement of response to enable the Respondents to fully respond. Secondly, there was nowhere in the Respondent's Witness statement as filed in the trial court of any allegations to the effect that the Respondents had not cleared in a manner to lead to withholding of their terminal dues. Thirdly, there existed no disclaimer before the trial court of any liability that any of the Respondents herein owed the Appellant which could in any way ever lead to withholding of their terminal dues at all.

48. Lastly, it was submitted that the Appellant did not produce at the trial court any evidence to demonstrate what was actually required to be done by the Respondents to be deemed as 'clearance.' No policy was ever produced and no sample clearance letter was equally not produced.

DETERMINATION AND DISPOSITION.

49. The court has considered the grounds in the Memorandum of Appeal, the record of appeal and submissions filed by the parties herein and notes that the judgment of the trial court was that it entered judgment for the Respondents against the Appellant in terms of maximum compensation for unfair termination, redundancy dues, salary arrears up to 29th August, 2019, one month notice pay, severance pay and unpaid leave days with costs and interest on the suit and certificates of service. The Redundancy dues to be computed by labour officer and be filed in court.

50. The trial court presided over by Hon. R.L. Musiega (Mr.) on 27th March, 2023 adopted the computation of the letter dated 3rd November, 2022 which formed part of the judgment of 26th August, 2022. The Appellant was aggrieved by the trial court's judgment and the order of Hon. R.L. Musiega adopting the labour officer's computation and fronted several grounds of Appeal. It was however submitted that the Appellant had since paid the redundancy dues to the Respondents and what was pending was the legality or not of the redundancy process and

the compensation for unfair termination. The court will condense the grounds to two main issues namely: -

a. Whether the trial court erred by finding that the termination of the Respondents on account of redundancy was unfair and unlawful.

b. Whether the trial court erred in awarding the Respondents the maximum compensation for unfair termination.

Whether the trial court erred by finding that the termination of the Respondents on account of redundancy was unfair and unlawful

51. The Appellant alleged that it terminated the services of the Respondents due to redundancy as seen from the redundancy notices of 19th July, 2019 and termination letters of 29th August, 2019. It was not in dispute that the Respondents were members of KUDHEIWA. The Appellant alleged that vide the ruling by lady Justice Margaret Onyango of 11th October, 2019 in **ELRC 491 of 2019 Julius Kulle Kakello vs Makini School** the court nullified the redundancy notices issued to the Respondents and directed that the notices be issued afresh.

52. The Respondent's on the other hand argued that they were not parties to the suit and hence the directions could not apply to them. It was clear to the court that the Respondents herein were members of the Union and the redundancy notices were those dated 19th July, 2019 issued to them in that suit and the Respondents herein. This therefore means the notices declared null and void in that suit were the same and would therefore apply in this case for the same reason that the Appellant did not issue redundancy notice to the Respondents' union as required by section 40 of the Employment Act.

53. In addition, the Respondents were employed by the same employer, the notices were issued on the same date and the Respondents were members of the union. In any direction to the union ought to apply to all its members. In any case the Respondents were terminated vide the redundancy notices of 19th July, 2019 followed by the termination of 20th August, 2019.

54. The court notes that by the time the award was delivered in October, 2019 the Appellant had already terminated the Respondents services and it stands clear that by the ruling of

the court the process was already faulted. The same having been delivered by the court of equal status as this court and it has not been appealed meant the issue had already been determined hence *res judicata*. The Redundancy notices were therefore declared null and void which led to termination of the Respondents.

55. The court notes that redundancy is one of legitimate ways of ending employment relationship as it is done as per the law. Redundancy of the other hand has been defined under section 2 of the Employment Act as follows:

"...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."

56. It has been stated in several decisions that even in cases of redundancy the reason ought to be valid as provided for under section 43 of the Employment Act. In **Kenya Airways Limited VS. Aviation and Allied Workers Union of Kenya and 3 Others (2014) eKLR**, the Court of Appeal pronounced itself as follows:

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

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

57. From the above precedent, it appears the reason given by the Appellant was reorganization after the take-over by international company. The Appellant alleged that the Respondents' roles were rendered superfluous while the Respondents alleged that their role was not rendered superfluous as the Appellant advertised new vacancies in different wording but the roles remained the same.

58. The court further notes that even though the advertisement which was done after the Respondents received their redundancy notices stated that the Respondents were free to apply it was not clear why no discussions were done to enable

the Respondents take over the new roles instead of job loss. The Appellant did not illustrate that there was complete loss of the Respondents roles. The reason for the redundancy was not properly proved in as much as the Appellant had a right to restructure its business to meet the operational requirements. This was supported by the reason for the correspondences between the parties was a review of terms including salaries when the Appellant changed the redundancy narrative.

59. The Appellant was again bound to follow a fair procedure in terminating the Respondents on redundancy. The guiding law on procedural fairness on redundancy is section 40 of the Employment Act which provides 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 in writing, 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 where 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.

60. In this case it was clear the Appellant did not comply with section 40(1) (a) of the act as observed by Lady Justice Maureen Onyango that the redundancy notices were never sent to the trade union 30 days before start of the redundancy process to enable consultations yet the respondents were members of a trade union. It was clear the Appellant only notified the Commissioner of Labour in January 2019 and July 2019 as observed by the trial court.

61. The Appellant although alleged that there were meetings between the Respondents on the intended redundancy, no evidence of meetings such as minutes, notes or emails of the said consultative meetings were produced at the trial. The same ought to have been produced if it were true that the Appellant notified the Respondents, which could have bargained on behalf of the Respondents on the best option to avoid redundancy, now that there were new vacancies in the Appellant's institution.

62. In **Cargill Kenya Limited v. Mwakaka & Others (Civil Appeal 54 of 2019) [2021] KECA (CLR) (22 October 2021) (Judgment)** the court held as follows on this issue: _

While the requirement of consultation is not expressly provided in section 40 of the Employment Act, this requirement is 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 employer is redundancy... We can only add that in interpreting statutes, the courts have the function of filling in the textual detail by implication, which arises either because it is directly suggested by the words expressed, or because they are indirectly suggested by rules or principles of law which are not excluded by the express wording of a statute. See in this regard the text by F. Bennion: Bennion on Statutory Interpretation, 5th Edition, at sections 172 to 174. Having regard to

the legislative intention of the provisions of section 40 of the Employment Act, the international law and decided cases, it is our finding that consultations on an intended redundancy between the employer and the relevant unions, labour officials and employees is implied by section 40(1)(a) and (b) of the Employment Act.

36. Furthermore, consultation is also now specifically required by article 47 of the Constitution and the Fair Administrative Action Act. Article 47 and section 4(3) of the Fair Administrative Action Act provide that where an administrative decision is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give notice prescribed by the decision-

- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
- (b) an opportunity to be heard and to make representations in that regard;
- (c) notice of a right to a review or judicial appeal against an administrative decision, where applicable;
- (d) a statement of reasons pursuant to section 4(3)(b);
- (e) notice of the right to legal representation, where applicable;
- (f) notice of the right to cross-examine or where applicable; or
- (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

63. This then means consultation is very crucial in the redundancy process. Unless the circumstances are such that it would be an utterly futile exercise to hold any meaningful negotiations, consultation has to be real and not cosmetic. The New Zealand

Chief Judge succinctly expressed this point in the case of **Cammish v. Parliamentary Service**¹²:

“Consultation has to be a reality, not a charade. The party to be consulted must be told what is proposed and must be given sufficiently precise information to allow a reasonable opportunity to respond. A reasonable time in which to do so must be permitted. The person doing the consulting must keep an open mind and listen to suggestions, consider them properly, and (before finally) decide what is to be done.”

64. The court finds that the requirement of consultation is 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. A failure by the Appellant to meet this requirement faults the procedural requirement.

65. On selection criteria as per section 40(1)(c) of the Act the Appellant’s criteria of selection of employees to be declared redundancy was not very clear as it did not produce performance records or sheets to show that the Respondents were not performing as required. No evaluation report was furnished to the court by the Respondent. In the above case of *Cargil* the court held as follows: -

From the above provisions and decisions, the requirements in fulfilling the threshold set by section 40(1)(c) of the Employment Act can

therefore be surmised as follows. First, an employer should include the factors set out in section 40(1)(c) of the Employment Act in the criteria for evaluating and selecting the employees to be declared redundant. Second, the employer is required to prove that the criteria was objectively, uniformly and fairly applied. The Appellant has in this respect relied on a report titled 'Job Evaluation Report' dated November 2014 undertaken by its consultants, who also gave evidence in the trial Court. The Appellant argues that the said report stated the criteria for selection for redundancy.

66. This court is therefore of the view that the selection criteria as per the Act of first in last out was not observed in this case since the Respondents had worked between 3 to 12 years which were diverse periods. The Appellant did not pay the Respondents their redundancy dues before termination as anticipated by the Act which requires that they be paid before an employee is terminated. The Appellant alleged that the Respondents did not clear with the Appellant before being paid yet the same was never raised in defence and it was not clear which policy required an employee declared redundant to clear first before being paid their dues yet the law was clear that payment must be made first.

67. The Appellant did not raise any defence hence why their dues could not be paid. This also amounted to unfair

termination as it went against section 40(1) (e),(f) and (g) of the Act. In conclusion, this court agrees with the trial court findings that the redundancy herein amounted to unfair termination and would therefore not disturb the finding by the trial court.

Whether the trial court erred in awarding the Respondents the maximum compensation for unfair termination.

68. On the issue of the trial court awarding the Respondents 12 months as compensation for unfair termination, the Appellant faults it as excessive because the trial court did not justify the reasons for the award. The quantum of compensation under section 49 of the Act is a matter of judicial discretion and this court as an appellate court can only interfere with such discretion if there was an error on some basis leading to erroneous decision as was held on the case of **Kenya Revenue Authority & 2 others v Darsa Investments Limited (2018) eKLR** where the court held;

The court ought not to interfere with the exercise of discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case

as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice.

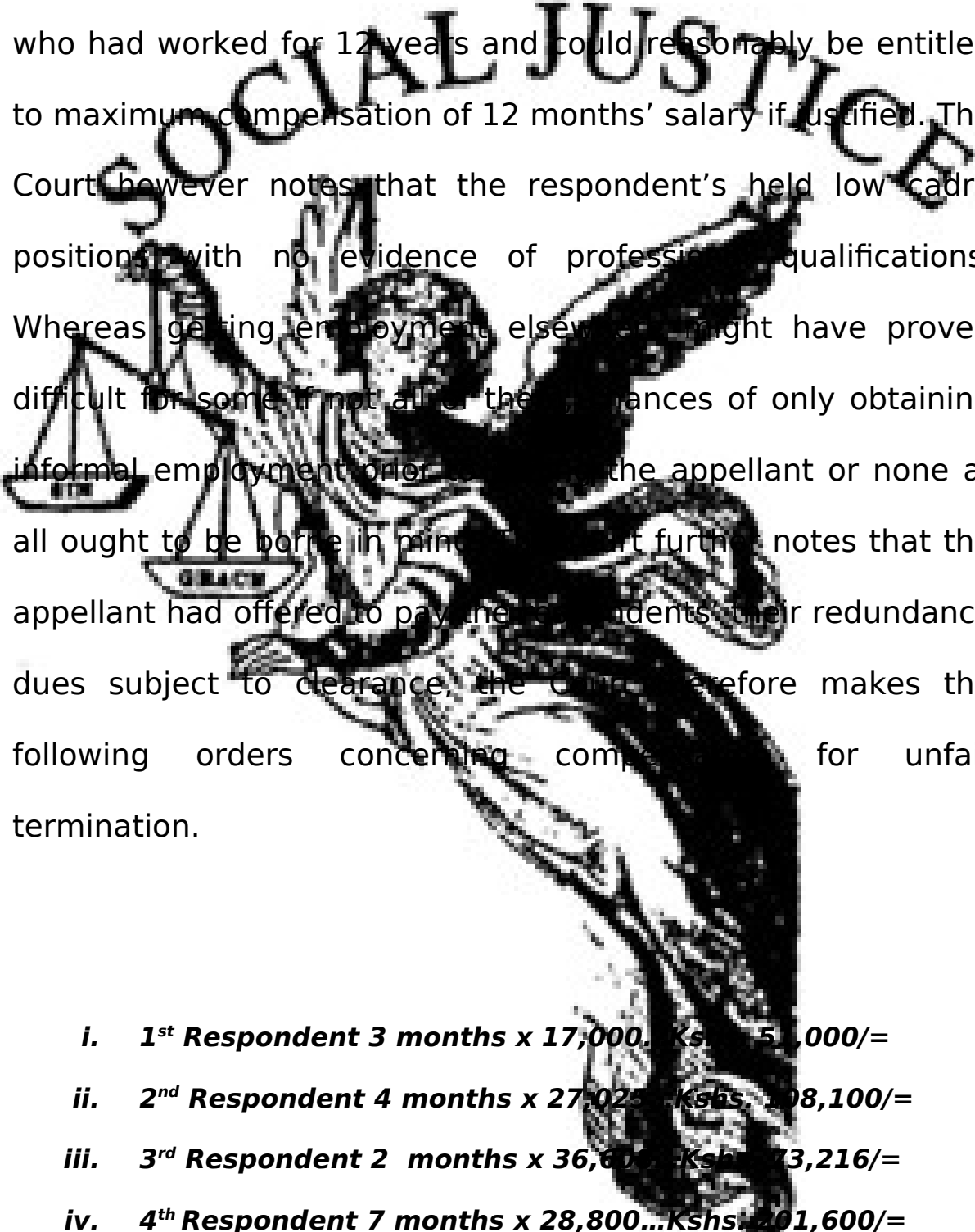
69. This court will therefore only disturb the award herein if it is proved that the trial court misdirected itself in some matter hence arriving at a wrong decision. The court notes that the award of compensation is discretionary of the court but the exercise of such discretion ought to be guided by considerations set out under section 49(4) of the Employment Act.

70. Having reviewed the judgment of the trial court, it seems clear that it failed to properly justify the reasons for the maximum compensation as was held by the Court of Appeal in **Kenya Broadcasting Corporation v George Wakio (2019) eKLR** where the Court of Appeal stated that

*[22] This Court has established the rule that the award of the maximum 12 months' pay must be based on sound judicial principles. In **Ol Pejeta Ranching Limited vs. David Wanjau Muhoro [2017] eKLR** this Court categorically stated that the trial judge must justify or explain why a claimant is entitled to the maximum award; that the exercise of discretion must not be capricious or whimsical.*

71. While taking note of the duration the respondents worked for the Appellant which is between 3 years to 12 years the

court notes that it was only the fourth Respondent Mr. Kisia who had worked for 12 years and could reasonably be entitled to maximum compensation of 12 months' salary if justified. The Court however notes that the respondent's held low cadre positions with no evidence of professional qualifications. Whereas getting employment elsewhere might have proved difficult for some if not all of the respondents of only obtaining informal employment prior to the appellant or none at all ought to be borne in mind. The court further notes that the appellant had offered to pay the respondents their redundancy dues subject to clearance, the court therefore makes the following orders concerning compensation for unfair termination.

- 
- i. 1st Respondent 3 months x 17,000...Kshs. 51,000/=**
 - ii. 2nd Respondent 4 months x 27,025...Kshs. 108,100/=**
 - iii. 3rd Respondent 2 months x 36,608...Kshs. 73,216/=**
 - iv. 4th Respondent 7 months x 28,800...Kshs. 201,600/=**
 - v. 5th Respondent 2 months x 28,000...Kshs. 56,000/=**

vi. 6th Respondent 6 months x 17,000...Kshs. 102,000/=

TOTAL: 591,916/=

72. The award shall be subject to taxes and statutory deductions where applicable but shall attract interest at court rates from the date of this judgment until payment in full. The appellant shall further pay the respondent's their refundable fees as provided under section 40 of the Employment Act that has not been paid already.

73. The appeal being partially successful, each party will bear their cost of this Appeal.

74. It is so ordered.

Dated at Nairobi this 13th day of March 2026

Delivered virtually this 13th day of March 2026

Abuodha Nelson Jorum

Presiding Judge Appeals Division