Mukali v Ketty Tours Travels and Safari Limited (Employment and Labour Relations Appeal E215 of 2024) [2026] KEELRC 750 (KLR) (12 March 2026) (Judgment)

Neutral citation: [2026] KEELRC 750 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

EMPLOYMENT AND LABOUR RELATIONS APPEAL E215 OF 2024

K OCHARO, J

MARCH 12, 2026

BETWEEN

TOM MAKUKU MUKALI ..... APPELLANT

AND

KETTY TOURS TRAVELS AND SAFARI LIMITED ..... RESPONDENT

(Being an Appeal from the judgment dated 11th September 2024 by Hon. D. Orimba in CMC/ELRC NO. E354 OF 2020)

JUDGMENT

Background

1. Through the Statement of Claim dated 12th August 2020, filed before the lower court in the above-stated claim, the Appellant sued the Respondent and sought judgment against the Respondent for;

    a. A declaration that the termination of the Appellant's employment was unlawful.

    b. An order directing the Respondent to pay the Claimant the following sum;

    a) One month's salary in lieu of notice ..... Kshs. 20,000/=

    b) Underpayment worked as both mechanic and driver (19,100 × 12 x 11)..Kshs.,2,521,200/=

    c) Gratuity (12x 20,000 x 11-90,000) ..... Kshs.20,000/=

    d) Compensation for unlawful termination (20,000 x 12) ....Kshs.240,000/=

    e) Reimbursement of the amounts deducted.

    f) Cost of this suit.

    h) Certificate of service.

2. The Respondent challenged the Appellant's claim through a Response to Statement of Claim dated 30th September 2020. It contended that the Appellant's employment was lawfully terminated on account of redundancy. All his terminal dues were duly paid.

3. This Court directed that this Appeal be canvassed by way of written submissions. The parties have filed their respective submissions.

The Appellant's case before the trial court

4. It was the Appellant's case that he was employed by the Respondent in June 2008 as a mechanic and worked in that role for two years. In 2010, he was assigned additional duties and began serving both as a mechanic and a driver, earning a combined monthly salary of KShs. 20,000, along with a trip allowance, an overnight allowance of KShs. 550 per day, and a disposal allowance of KShs. 650 per day.

5. He asserted that during his employment, he took annual leave each May and that the Respondent remitted his statutory deductions to NSSF and NHIF.

6. The Appellant further stated that on 18th March 2020, he took accrued off days for a period of 15 days and was scheduled to resume work on 4th April 2020. However, on 27th March 2020, before these off days lapsed, he was recalled to duty to ferry Grain Bulk employees from the Godown to Likoni for eight days while driving motor vehicle registration number KBS 110, a 40-seater coach.

7. He stated that on 4th April 2020, he was instructed to hand over the driving responsibilities to Hassan Kuledi. Afterwards, he returned to the office, where he was granted a further 15 days off.

8. According to the Appellant, before the expiry of the mentioned off days, he was again recalled on 16th April 2020 and issued with a notice of redundancy. He was subsequently instructed to go on leave from 24th April 2020 until 20th May 2020, when his employment was to end.

9. He further stated that on 23rd April 2020, he received a cheque for Kshs. 47,457 as part of his entitlements.

10. The Appellant contended that his dismissal on the grounds of alleged redundancy was illegal, and that the Respondent failed to follow the lawful procedures required for terminating an employee's employment, on account of redundancy.

11. He maintained that the Respondent still owed him terminal dues, including one month's salary in lieu of notice, gratuity, and compensation for wrongful dismissal.

The Respondent's case before the trial court

12. The Respondent, through its Accountant, Ahmed Mohammed Hussein, stated that the Appellant was employed as a machine attendant/mechanic earning a consolidated monthly salary of KShs. 20,000 at the time he was declared redundant.

13. He maintained that, although the Appellant was a qualified driver, he was not employed as a driver and did not serve in a dual role as both mechanic and driver, as claimed. According to the Respondent, the Appellant only occasionally provided driving services when regular drivers were unavailable and was paid separately for these duties.

14. The witness explained that Respondent operates a tours and safaris business that depends heavily on both local and international tourists, with most bookings made in advance. It argued that its business had been underperforming for several years due to security issues in Kenya, including terrorist attacks that led to travel advisories from several foreign governments discouraging travel to the coastal region.

15. The Respondent further stated that by 2019, its business had declined considerably, with many bookings being cancelled and long periods during which tour vehicles remained idle in the yard, despite the company continuing to incur expenses such as insurance premiums and employee salaries.

16. The COVID-19 pandemic, which began in late 2019 and was declared in Kenya on 12th March 2020, further weakened the tourism sector. Restrictions on international travel, airport closures, and lockdowns halted most tourism activities, greatly affecting the Respondent's operations.

17. The Respondent was compelled to immobilise its tour vehicles and subsequently rescind insurance policies for several of those vehicles owing to the cessation of operations and the inability to bear the associated costs.

18. The Respondent stated that it later informed the County Labour Officer of its intention to declare redundancy and also issued an internal memo to employees, notifying them of the planned workforce reduction due to the severe downturn in business.

19. It was further stated that several departments, including the car wash section, part of the workshop (mechanics and drivers), and administration, were temporarily closed due to the business slump, leading to the declaration of redundancy affecting employees in those departments, including the Appellant.

20. The witness stated that the Appellant was declared redundant by a letter dated 16th April 2020, and that the redundancy was carried out in accordance with the law, including adherence to the procedure under Section 40 of the *Employment Act*.

21. It stated that the Appellant's terminal dues were calculated and paid, and that he received a total of Kshs. 47,457 by cheque, after statutory deductions. The Respondent further stated that the Appellant signed a final dues certificate, acknowledging receipt of his payments and confirming that he had no further claims against the company.

22. It was thus argued that the redundancy was lawful and justified by economic circumstances beyond its control, and that the Appellant's claims were unfounded.

Judgment of the Lower Court

23. After hearing the parties and considering their respective evidence, and their Counsels' submissions, the trial Court returned that the Appellant hand not proved his case, and dismissed the same with no order as to costs.

The Appeal

24. Dissatisfied with the Judgment of the lower Court, the Appellant filed the instant appeal, setting forth the following grounds;

    a. The learned Trial Magistrate erred in law and in fact when the court held that the Respondent followed the requirements outlined under Section 40 of the *Employment Act*, when in fact there was no evidence of redundancy notice issued to the Appellant adduced to that effect.

    b. The learned Trial Magistrate erred in law and in fact by determining that the Appellant's termination was not unlawful despite acknowledging that the Respondent's witness had confirmed that no redundancy notice was issued personally to the Appellant as required under Section 40 of the *Employment Act*.

c. The learned Trial magistrate erred in law and in fact and held that the Appellant had failed to prove his Claim on redundancy, whilst it was clear that the Respondent had failed to follow all the required procedures under Section 40 of the *Employment Act*

d. The learned Trial Magistrate in dismissing the Claimant's claim failed to consider the provisions of Section 10 (5) of the *Employment Act*, Cap 226, that any changes in the employees' employment contract by the employer shall be in consultation with the employee.

e. The learned Trial Magistrate in dismissing the Claimant's case failed to consider the Respondent's witness had failed to prove that there was consultation done with the Appellant in regards to the imminent redundancy.

f. The learned Trial magistrate erred in law and in fact and held that the Appellant had been paid all his dues despite that fact that the Respondent's witness had failed to prove the payment of the said terminal dues.

g. The learned Trial Magistrate erred in law and in fact when it failed to consider the issues raised by the Appellant in his Statement of Claim and his evidence.

h. The Honourable judge erred in law and in fact by allowing the Respondent's suit and failing to consider the Appellants case.

Appellant's submissions

25. The Appellant argued that the Trial Magistrate mistakenly concluded that the Respondent adhered to section 40 of the *Employment Act* when terminating his employment due to redundancy. No legitimate redundancy notice was served to the Appellant. The internal memo provided by the Respondent only suggested that redundancy was under consideration, without outlining the reasons for or the scope of the redundancy. To buttress the submission that in the circumstances of the matter, therefore, the notice contemplated under section 40 was not issued, reliance was placed on Inbukwa v Tentacle Communications Limited [2023] KEELRC 2535 (KLR).

26. The Appellant further argued that he was not personally served with a redundancy notice as required under section 40(1)(b) and (2) of the *Employment Act*. He claimed that the letter dated 16th April 2020 produced by the Respondent was simply a termination letter issued after the redundancy decision had already been made, and therefore did not meet the statutory requirement of a prior notice of intention to declare redundancy. To support this argument, reference was made to Wazir v Redstar International Limited (Cause E477 of 2023) [2024] KEELRC 1971 (KLR).

27. The Appellant further argued that the Respondent failed to comply with other mandatory procedural requirements under section 40 of the *Employment Act*. Specifically, it was contended that there was no evidence that a redundancy notice was served on the Labour Officer, no proof demonstrating the reasons and scope of the redundancy, and no evidence indicating that the selection criteria, allegedly based on a "last in, first out" principle, were applied. The Appellant relied on Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others [2018] KECA 718 (KLR).

28. It was further submitted that the Respondent failed to hold consultations with the Appellant prior to the redundancy. The Appellant argued that consultation is a vital part of fair redundancy procedures under Kenyan law and that no evidence of such consultations was produced by the Respondent. In support of this position, reliance was placed on Regency Slots Limited v Njahira (Employment and Labour Relations Appeal E010 of 2021) [2023] KEELRC 2250 (KLR).

29. Regarding the issue of underpayment, the Appellant argued that the Trial Magistrate overlooked section 10(5) of the *Employment Act*, which mandates that any modifications to an employee's job description must be included in a revised contract after consulting with the employee.

30. The Appellant contended that although he was initially employed as a mechanic, he was subsequently required to perform duties as both a mechanic and a driver without any revision of his contract or adjustment of his salary. Reliance was placed on Ali v National Health Insurance Fund & 2 others; Transparency International & 2 others (Interested Parties) [2022] KEELRC 13443 (KLR).

31. The Appellant further contended that the Trial Magistrate erred in her conclusion that he had received his terminal dues. It was argued that the Respondent asserted the dues were paid in cash but failed to produce any documentary evidence, acknowledgment, or receipt to substantiate that the payment had been effectuated.

32. Lastly, the Appellant argued that the Trial Magistrate failed to properly consider the evidence and issues raised in the Statement of Claim, including the alleged failure by the Respondent to adhere to both substantive and procedural requirements in declaring redundancy and the claim for underpayment resulting from the additional duties assigned to the Appellant.

Respondent's submissions

33. The Respondent contended that the Appellant's business was significantly affected by factors beyond its control, including a decline in tourism, which resulted in redundancies and workforce reductions.

34. The Respondent argued that the Appellant was properly notified of the intended redundancy through an internal memo dated 1st April 2020. The Appellant acknowledged receipt of the memorandum by signing it. To fortify its position that the internal memo was sufficient notification of the intended redundancy, reliance was placed on Shivachi & 5 others v SBM Bank (Kenya) Limited (Cause E122 of 2022) [2024] KEELRC 1164 (KLR). The Appellant did not deny the receipt of the internal memo. The Appellant's allegation that the signature was a forgery remained just an unproven assertion.

35. Through the letter dated 16th April 2020, the Appellant was lawfully declared redundant. The notice strictly complied with the requirements set out in section 40[1][b] of the *Employment Act*.

36. The witness for the Respondent's evidence before the trial Court clearly showed that the Appellant was consulted. There was a meeting between the Respondent and him, during which he was informed that his employment would be terminated due to redundancy.

37. Regarding the grounds assailing the learned Magistrate's failure to grant the reliefs that the Appellant had sought, the Respondent argued that, having failed to establish his claim for unfair termination, the reliefs were rightfully not made available to him. The case of Nancy C. Maritim v Sot Tea Growers Sacco Ltd [2018] eKLR was cited to support the point.

38. On the relief for compensation for underpayment, the Respondent argued that at all material times, the Appellant was employed and paid his contractual salary of KShs. 20,000 per month. He was never paid less than the amount. As such, a claim for underpayments would not arise. The trial Court didn't err when it declined to grant the relief.

39. Regarding gratuity, the Respondent submitted that the Appellant's contract did not include a provision for gratuity. Gratuity is not a statutory benefit under the *Employment Act*. To support this submission, reliance was placed on Pathfinder International Kenya Limited v Stephen Ndegwa Mwangi [2019] eKLR.

40. On compensation for unfair termination, the Respondent urged the Court to award only four months' salary (KShs. 80,000), should it find that, for any reason or other, the termination of the Appellant's employment was unfair.

41. The Respondent contended that claims for reimbursement of deductions were baseless and vague. There would be no basis for its grant,

Analysis and determination

42. In the case of Selle & Another v. Associated Motor Boat Co Ltd & Others [1968] EA 123, the court accordingly stated as follows: -

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ...is by way of retrial, and the principles upon which this court acts in such an 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 this respect..."

43. It is with the above lens that I shall consider the instant appeal.

44. Having carefully examined the record, the grounds of appeal, and submissions, the instant appeal revolves around two central issues. Thus:

    a. Whether the termination of the Respondent's employment on account of redundancy was procedurally and substantively fair

    b. Whether the Appellant was entitled to the remedies sought in the Memorandum of Claim.

45. There is no dispute that the termination of the Appellant's employment was due to redundancy. Undoubtedly, the employer is generally allowed to dismiss staff when genuine redundancy exists. This right aligns with the principle that the social balance within a constitutional framework—where the right to fair labour practices is fundamental—is to provide an employee with protection against unfair dismissal, while also giving the employer the right to dismiss for a fair reason, provided a fair procedure is followed.

46. Time and again this Court has emphasised lack of no fault on the part of the employee is the defining characteristic of termination of an employment on account of redundancy, and that it is for this reason that the *Employment Act*, 2007 has set out detailed conditions that must be satisfied by an employer terminating the employment of an employee, otherwise, the termination shall be deemed unfair.

47. It is important to point out that the conditions are set out conjunctively. As such, the must all be met, otherwise the termination would stand seen as unfair and unlawful. See Kenya Airways Limited v Aviation &Allied Workers Union & 3 others [2014] eKLR.

48. The Section provides;

> " 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 employer personally in writing and to the labour officer.

c. The employer has in the selection of the employees to be declared redundant had due regard to the seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundanc;

d. Where there is in existence a collective agreement between an employer and a trade union setting out terminal dues 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 employer 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."

49. The Appellant argued that the Respondent did not issue to him and the Labour Officer the notices contemplated under section 40[1][b], and as such, the learned trial Magistrate erred in law when he held that he was issued with a proper redundancy notice.

50. It is not in contention that on 16th April 2020, the Respondent issued the Appellant a letter captioned "Redundancy Notice", which read in part;

> " As you are aware, the current global pandemic, covid 19, and the effects it has caused our business, the management has no other recourse but to restructure its costs hence declare redundancy.
>
> We therefore hereby regretfully notify and give a notice of one month from 16. O4. 2020. You will proceed on leave from 24th April, 2020, till 15th May, 2020, when your services will end, and you will be paid your dues.
>
> The Management takes this opportunity to thank you for your dedication and loyalty for the period you served the company."

51. A careful consideration of the provisions of section 40 of the *Employment Act* reveals that the notice issuable thereunder must meet the thirty days' threshold, set out the reason for the proposed redundancy, and the extent of the redundancy.

52. The notice issued appears to have included the reason for the termination and complied with the statutory notice period. However, I have no hesitation in concluding that it did not specify the extent of the redundancy. It failed to specify which department was affected or how many employees would be affected. The notice didn't duly meet the statutory requirements.

53. Undoubtedly, the Respondent's letter, in my view, was a termination letter. It clearly demonstrates that, at the time of its issuance, the Respondent had already decided to terminate the Appellant's employment. The notice required under section 40[1][b] must be of a kind that initiates a process

of consultation between the employer and the employee, discussing how the redundancy might be avoided, or its impact on the affected employee minimised. It shouldn't be one that shuts the door on consultations by stating that an employee's employment has been terminated. See the German School Society v Helga Ohany [2023] KECA 894 [KLR].

54. Undoubtedly, consultation is not explicitly outlined as a requirement under Section 40 of the *Employment Act*. However, considering the defining characteristic of redundancy termination mentioned above, and the obligation imposed by *the Constitution* to adhere to international standards under Article 2[5], judicial precedent has established that consultation prior to redundancy is a crucial step and is implicitly encompassed within the provisions of the *Employment Act*. See Kenya Airways case [supra].

55. In the German School Society v Helga Ohany [supra], the Court of Appeal stated;

> " Having regard to the legislative intention of section 40 of the *Employment Act*, the International Law, and decided cases, we find that consultation on an intended redundancy between the employer and the employee is implied under section 40[1][a] and[b] of the *Employment Act*. Moreover, consultation is now specifically required by Article 47 of *the Constitution* and the Fair Administrative Act. Article 47 and section 3 of the *Fair Administrative Action Act* provide that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give notice to the person affected by the decision. [See Cargill Kenya Limited v Mwaka & others."

56. The Respondent has submitted in this appeal that there was ample evidence before the trial Court that there was consultation between the Appellant and the Appellant. The Appellant holds otherwise. I have carefully considered the record and find no difficulty in concluding that no sufficient evidence was placed before the trial Court to establish that consultations took place. The Respondent's witness baldly asserted that there was a meeting, without elaborating on when the meeting was held, what the agenda was, who was in attendance, or producing minutes of the meeting.

57. In the case of Reale Hospital Limited v Cherono [2026] KEELRC 89 (KLR), the Court held that,

> " The Appellant argued that a prior meeting, which was held on 10th July 2019, constituted sufficient notice and consultation. However, there is no documentary evidence, such as minutes of meetings or correspondence, that demonstrates a consultation process in accordance with Section 40(1) of the *Employment Act*. Mere attendance of a meeting does not constitute meaningful consultation envisaged by section 40, requiring the employees to be notified of the intended redundancy at least one month prior to the termination on account of redundancy, and an opportunity to engage on the extent, criteria for selection, and make representations on alternatives to termination.
>
> ...The burden of proof lay with the Appellant to demonstrate that a fair selection criterion was applied. In the absence of minutes, evaluation reports, or any objective framework showing how the Respondent was selected over other employees, that burden was not discharged."

58. The law requires the employer to act fairly when making decisions about the employee. They must rely on an objective criterion. It should be clear that factors such as seniority in service, skill, ability, and reliability were taken into account. When there is a dispute over whether the employer used an objective criterion and whether it was applied, the burden falls on the employer to prove that such a

criterion existed. It is my finding that, from the material placed before the trial Magistrate, one cannot discern that there was sufficient and convincing evidence, speaking to an objective selection criterion.

59. In summary, the notice alleged to have been issued by the Respondent did not possess the characteristics of the notice contemplated under section 40[1][b] of the *Employment Act*. Furthermore, there were no consultations conducted between the Respondent and the Appellant prior to the termination of his employment due to redundancy. Additionally, the Respondent failed to establish that objective criteria were utilised in selecting the Appellant as one of those affected by the redundancy. Consequently, the termination of the Appellant's employment is, in my opinion, both unfair and unlawful. The learned trial Magistrate erred in law by failing to recognise this.

60. The employer must also settle the employee's outstanding entitlements. This includes paying any accrued leave in cash, providing at least one month's notice or one month's salary in lieu of notice, and paying severance pay at a rate of not less than fifteen days' wages for each completed year of service. These requirements ensure that redundancy is conducted lawfully and fairly.

61. Regarding whether the Appellant received his terminal dues as required by law, the Respondent presented evidence that the Appellant was paid Kshs. 47,457 by cheque. His dues included severance pay calculated at Kshs. 10,000 for each of the nine years of service, amounting to Kshs. 90,000. The Appellant also signed a final dues certificate confirming receipt of his terminal payments. This evidence demonstrates compliance with Section 40(1)(g) of the *Employment Act*, which mandates payment of severance pay at a rate of not less than fifteen days' wages for each completed year of service.

62. Regarding the claim of underpayment, I agree with the trial court's finding that the Appellant was employed as a mechanic earning a monthly salary of Kshs. 20,000, and that there was no evidence showing he was contractually employed in a dual role as both mechanic and driver. The Respondent's evidence that the Appellant occasionally provided driving services when needed and was paid for these services was not sufficiently rebutted.

63. Regarding gratuity, I agree with the trial Court's finding that gratuity is not payable unless explicitly stated in the employment contract, a collective bargaining agreement, or a statute. The Appellant did not demonstrate the existence of such a provision. In Pathfinder International Kenya Limited v Stephen Ndegwa Mwangi [2019] eKLR, the Court of Appeal held that,

> "We are persuaded by the above reasoning and would further add that for an employee to claim gratuity, it must be provided in the contract of employment or provided for in a Collective Bargaining Agreement or a statute. Suffice to state that the *Employment Act* of 2007 does not make it mandatory for employers to pay gratuity to employees."

64. In the upshot, the Appellant's appeal succeeds;

    a. The learned trial Magistrate's judgment is hereby set aside. In place thereof, judgment is entered for the Appellant in the following terms;

        I. A declaration that the termination of his employment on account of redundancy was unfair.

        II. Compensation pursuant to the provisions of section 49[1][c] of the *Employment Act*, for unfair termination of employment, six months' gross salary, KShs. 120,000.

        III. Costs of the lower court suit to be computed on this amount awarded.

        IV. Costs of this appeal.

READ SIGNED AND DELIVERED THIS 12TH DAY OF MARCH 2026.

OCHARO KEBIRA

JUDGE