

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT MOMBASA**  
**ELRC APPEAL /E048/2025**

**ALI SERENGE JUMA.....APPELLANT**

**VS**

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

**JUDGMENT**

Background

1. Through the Statement of Claim dated 15th March 2022, the Appellant sued the Respondent and sought judgment against it for;

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

b) An order directing the Respondent to pay the Appellant the following sum;

i. One month's salary in lieu of notice .....Kshs.23,500/=

ii. Leave pay on pro rata basis  $(260/21 \times 23,500)0,000$  .....Kshs.290,952.38/=

iii. Compensation for unlawful termination  
.....Kshs.282,000/=

TOTAL Kshs. 596,452.38/=

c) Cost of this suit.

d) Certificate of service.

e) Any other relief this Honourable court may deem fit and just grand.

2. The Respondent contested the Appellant's claim in a Response to Statement of Claim dated 30th September 2020. It contended that the Appellant didn't have any cause of action against it as the termination of his employment was on account of a valid reason, redundancy and in accordance with the dictates of procedural fairness. His terminal dues were properly calculated and paid.

3. After hearing the parties on their respective cases and considering their evidence, the trial court dismissed the appellant's case upon determining that it was lacking in merit. The present appeal contests the judgment.

The Appellant's case before the trial court

4. The Appellant stated that he was employed by the Respondent in June 2012 as a painter at a monthly salary of Kshs. 20,000.

5. He stated that during his employment, the Respondent dutifully remitted his statutory deductions to NSSF and NHIF.
6. The Appellant further stated that he went on his annual leave in March 2020. While on leave, he received a call from the Respondent instructing him to attend its offices to collect a letter dated 1st April 2020. The letter turned out to be a termination of employment letter.
7. The Respondent paid him his salary for April 2020, along with two cheques worth KShs. 23,500. Additionally, he was issued a certificate of service.
8. The Appellant argued that the decision to dismiss his employment was unlawful, unfair, and unjustified. The Respondent failed to follow the due process required by law in carrying out the termination.
9. He asserted that the Respondent failed to pay him his terminal dues, including one month's salary in lieu of notice, and compensation for wrongful termination.
10. He therefore argued that the termination of his employment was unjust and illegal.

The Respondent's case before the trial court

11. The Respondent, through its Accountant, Ahmed Mohammed Hussein, stated that the Appellant was employed as a General Labourer on or about 1st June 2012. At the time he was declared redundant, he was earning a consolidated monthly salary of KShs. 20000.
12. It was explained that it operates a tours and safaris business that depends heavily on both local and international tourists, with most bookings made in advance. It is said the business had been performing well for several years until Kenya began experiencing security attacks, which caused many foreign governments to issue travel advisories to their nationals visiting Kenya as a tourist destination, especially the coastal region that had suffered numerous tourist attacks.
13. The Respondent also stated that by 2019, its business had greatly declined, with many bookings being cancelled and long periods where tour vehicles remained idle in the yard, despite the company still bearing costs such as insurance premiums and staff salaries.
14. Furthermore, it was asserted that the emergence of the COVID-19 pandemic in late 2019 and its subsequent declaration as a pandemic in Kenya on 12th March 2020 further impaired the tourism sector. International travel restrictions, airport closures, and lockdown measures led to a near cessation of tourism activities, significantly affecting the Respondent's operations.
15. According to the Respondent, under the circumstances, it was forced to ground its tour vehicles and even cancel insurance policies for several of them due to the lack of operations and the inability to cover the related costs.
16. In the circumstances, the Respondent was forced into considering redundancy. In its letter dated 31st March 2020, addressed to the County Labour Officer, Mombasa, and served on the Appellant, it informed them of its intention to declare redundancy.

17. By an internal memorandum dated 1st April 2020, the receipt of which the Appellant acknowledged, the Respondent informed its employees of its intention to declare redundancy owing to the severe downturn in business.
18. It further clarified 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.
19. As an urgent measure to contain the spread of COVID-19, the Kenyan Government declared a lockdown in Mombasa, Kilifi and Kwale, among other Counties. The Respondent had all its tour vehicles parked in the yard.
20. In its letter dated 22nd April 2021, the Respondent further informed the Labour Officer that it intended to close the car wash section, part of the workshop [mechanics and drivers], and administration for the time being. The same letter also notified the Officer that employees in these departments were to be declared redundant and that the exercise would be conducted without discrimination.
21. The Respondent argued 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.
22. The letter dated 1st April 2020, contained a one-month notice. The Appellant was declared redundant. Contrary to his allegations, the letter contained the reasons for the termination.
23. The Respondent asserted that, contrary to the Appellant's assertion, it duly complied with the statutory procedure under Section 40 of the Employment Act, in effecting the terminations on account of redundancy.
24. It had due regard to the seniority in time, and to skill, ability and reliability of each employee of the class affected by the redundancy.
25. It was stated that the Appellant's terminal dues were calculated and paid, and that he received a total of Kshs. 47,457 via cheque, after statutory deductions. The Respondent further indicated that the Appellant signed a final dues certificate, acknowledging receipt of the payments and affirming that he possessed no additional claims against the company.

#### Judgment of the Lower Court

26. After hearing the parties' respective cases and considering their evidence and submissions, the trial Court returned that the Appellant had failed to prove his case. He consequently dismissed the same.

#### The Appeal

27. Unsatisfied with the Judgment of the lower Court, the Appellant lodged this appeal, outlining 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 on the face of the record, 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 without considering the fact that the Respondent's witness had failed to prove that there was consultation done with the Appellant in regard to the imminent redundancy.
- e) The learned Trial Magistrate erred in law and in fact in failing to consider the Appellant's assertions. Respondent's witness had failed to prove that he did not append his signature to the Memo.

Appellant's submissions

- 28. The Appellant contended that the Trial Magistrate erred in concluding that the Respondent complied with the provisions of section 40 of the Employment Act when terminating his employment due to redundancy. No valid redundancy notice was issued to the Appellant. The internal memorandum provided by the Respondent merely indicated that redundancy was under consideration, without specifying the reasons or the scope of the redundancy. To reinforce the argument that, given the circumstances of this case, the notice required under section 40 was not issued, the case of *Imbukwa v Tentacle Communications Limited* [2023] KEELRC 2535 (KLR) was cited.
- 29. 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 1st 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, reliance was placed on *Wazir v Redstar International Limited* (Cause E477 of 2023) [2024] KEELRC 1971 (KLR).
- 30. 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).
- 31. 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 the Respondent produced no evidence of such consultations. 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).

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 argued that its business was markedly impacted by factors beyond its control, including a decrease in tourism, which led to redundancies and workforce cuts.
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 1st 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 demonstrated 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 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.

#### Analysis and determination

39. In the case of *Selle & Another v. Associated Motor Boat Co Ltd & Others* [1968] EA 123, the Court 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...”

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

41. 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.

42. There is no dispute that the termination of the Appellant’s employment was due to redundancy.

Undoubtedly, the employer is generally permitted 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.

43. Time and again, this Court has emphasised that the lack of any fault on the part of the employee is the defining characteristic of termination of employment due to redundancy, and that it is for this reason that the Employment Act, 2007, has set out detailed conditions that must be met by an employer when terminating an employee's employment; otherwise, the termination shall be deemed unfair.

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

45. 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 employee 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 redundancy;

- 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."

46. 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.

47. It is not in contention that on 1st April 2020, the Respondent issued the Appellant a letter captioned "Redundancy of Employment ", 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 01. 04. 2020. You will proceed on leave from 24th April, 2020, till 30th April, 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."

48. A thorough review of the provisions outlined in section 40 of the Employment Act indicates that the notice issued pursuant to this section must satisfy the thirty-day requirement, specify the reason for the proposed redundancy, and detail the scope of the redundancy.

49. 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 impacted. The notice did not duly meet the statutory requirements.

50. 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], and the *Kenya Airways* case [supra].

51. 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], and *Cargill Kenya vs Mwaka & 3 others* [2021]KECA115[KLR]
52. 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.*"]
53. The Respondent has submitted in this appeal that there was ample evidence before the trial court indicating that consultations occurred between the parties involved. Conversely, the Appellant disputes this assertion. After meticulous review of the record, I have found no difficulty in determining that no sufficient evidence was presented to the trial court to substantiate that such consultations took place. The Respondent's witness merely stated that a meeting occurred, without providing details regarding the timing, agenda, attendees, or furnishing minutes of the meeting.
54. In the case of *Reale Hospital Limited v Cheronno* [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.”
55. This Court has not overlooked the Respondent’s argument that an internal memorandum dated 1st April 2020 was issued to the Appellant and twenty other employees. In my view, the notification allegedly contained therein was inadequate. It did not specify the scope of the intended redundancy. It is not one that appears to have been designed to facilitate consultations.
56. The legislation requires employers to act impartially when making decisions about employees. They must base their decisions on an objective criterion. In disputes concerning the termination of employment on grounds of redundancy, it must be explicitly shown that factors such as seniority, skill, ability, and reliability were taken into account. In cases where there is a dispute about whether the employer had an objective criterion and applied it correctly, the burden of proof lies with the employer to prove the existence of such a criterion and its application. It is not enough to merely assert that seniority in time, skills and ability of the affected employees were considered. Cogent evidence must be placed forth.
57. I conclude that, based on the materials presented to the trial Magistrate, there is insufficient and unconvincing evidence to suggest that an objective selection criterion was used.
58. 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 used to select 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.
59. 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.
60. Regarding whether the Appellant received his terminal dues as required by law, the Respondent presented evidence that the Appellant was paid a salary for the month of April 2020, and KShs. 23,500. The payment included compensation for unutilised leave days. The Appellant admits the payment. The Appellant also signed a final dues certificate confirming receipt of his terminal payments. This evidence demonstrates compliance with the stipulations of section 40(1) of the

Employment Act, which mandates payment of notice pay and pay for outstanding.

61. By reason of the foregoing premises, I conclude that the termination of the Appellant's employment was procedurally unfair. Having found as such, I now must consider whether the Appellant was entitled to the compensatory relief contemplated under section 49[1][c] of the Employment Act.
62. Section 49[1][c] of the Employment Act grants authority to the Courts to award compensation to an employee who has successfully contested their employer's decision to unfairly terminate their employment. However, it is important to emphasise that the exercise of this authority remains at the Court's discretion, depending on the specific circumstances of each case.
63. I have considered the fact that the Appellant did not contribute to the termination, the Respondent's failure to comply with the statutory procedural dictates, and the length of service of the Appellant, and hold that he is entitled to a compensatory award under the stated section of the law, to an extent of four months' gross salary, KShs. 80,000.
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, four months' gross salary, KShs. 80,000.
    - III. Costs of the lower court suit to be computed on this amount awarded.
    - IV. Costs of this appeal.

Read Signed and Delivered this 9th Day of April 2026.

OCHARO KEBIRA

JUDGE