REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT KISUMU

APPEAL NO. E049 OF 2025

PRIDE KINGS SERVICES LTD.....

APPELLANT

VERSUS

KENNEDY ONGORO.....

.....**RESPONDENT**

(Being an appeal from the judgment and decree of Hon. F. M. Rashid SPM in Kisumu CMELRC NO. E233 OF 2024 delivered on 30th June 2025)

JUDGMENT

1. This appeal arises from the Judgment of Hon. F. M. Rashid, SPM delivered on 30th June 2025 in **Kisumu CMELRC No. E233 of 2024, Kennedy Ongoro *v* Pride Kings Services Ltd**. Aggrieved by that decision, the Appellant lodged a

Memorandum of Appeal dated 28th July 2025 setting out the following grounds:

(1) The Learned Magistrate completely misunderstood the evidence before her, and wrongly analysed it therefore coming to wrong conclusions of fact and law.

(2) The Learned Magistrate erred in law and in fact by awarding the sum of Kshs. 35,000/- for leave days earned but not taken in the absence of evidence.

(3) The Learned Magistrate erred in fact and in law by awarding the Respondent the sum of Kshs. 109,000/- without taking in to consideration that the same was not proved.

(4) The Learned Magistrate erred in fact and in law by awarding the sum of Kshs. 140,000/- as salary arrears without taking in to consideration that the same was not proved.

(5) *The Learned Magistrate totally misunderstood and wrongly evaluated the evidence before her and therefore arrived at a wrong conclusion*.

2. On the basis of these grounds, the Appellant urges the Court to allow the appeal, reappraise the evidence afresh and arrive at an independent conclusion. It also seeks costs of the appeal.

3. The appeal was canvassed by way of written submissions.

Appellant's Submissions

4. The Appellant asserts that this appeal turns on whether the Respondent's termination was unlawful, whether the Respondent was entitled to damages, and whether due procedure was followed in effecting the termination. On the Respondent's termination the Appellant submits that the Respondent was lawfully declared redundant after his position became superfluous. Consequently, the Appellant maintains that there existed a valid and genuine reason for termination within the meaning of section 43 of the Employment Act. Relying on section 47(5) of the Employment Act, the Appellant asserts that the Respondent failed to discharge his burden of not only proving that his employment was terminated, but also that the termination

was unfair or wrongful, before the evidential burden could shift to the Appellant to justify the reasons for termination under section 43(1).

5. As regards the redundancy procedure, the Appellant submits that the requirements of section 40 of the Employment Act were complied with. It maintains that the Respondent was duly notified in writing of the reasons for redundancy and was therefore not entitled to notice pay. It asserts that the Respondent not being a member of a trade union, the only applicable requirement was his notification together with the labour officer. With respect to the reliefs sought, the Appellant submits that the Respondent did not prove entitlement to the same. Concerning, leave it asserts that it was unsubstantiated as no evidence was tendered showing that the Respondent applied for leave and was denied. On overtime, the Appellant contends that the letter of appointment provided for a 56-hour work week. In any case it contends that if the court is inclined to award anything under this head, it should do so for 8 days only as evinced by

the Respondent's documents. Accordingly, the Appellant urges the Court to allow the appeal with costs.

Respondent's Submissions

6. From the outset the Respondent submits that the dispute was confined to redundancy not unlawful termination. He highlights the pleadings before the trial court, and trial magistrate's judgement which did not address unlawful termination. With respect to adherence to section 40 of the Employment Act, he asserts that he was declared redundant but was never given notice pay. Additionally, he contends that although a redundancy notice was issued, he was not paid severance pay, or accrued leave, despite the letter itself indicating entitlement to those dues. He further submits that the Appellant failed to produce any leave records or forms to rebut his claim that he had not taken leave. With regard to salary arrears the Respondent submits that none was paid. He highlights his uncontroverted bank statements produced in evidence showing non-payment for the months of July and August 2023 March 2024 and April 2024. Concerning overtime, he contends that he is entitled to it having worked beyond the 56 hours per week provided in his employment

contract. He highlights the occurrence book produced in evidence which he asserts was uncontroverted. In conclusion he submits that the Trial Magistrate properly evaluated the evidence and correctly determined the issues before the court. He therefore urges the Court to dismiss the appeal with costs.

Disposition

7. The matter being a first appeal, this Court as the appellate court is obliged to evaluate and examine the record before the Magistrates' Court and the evidence presented before that Court in order to arrive at its own conclusion. This principle of law was enunciated in the celebrated case of **Selle *v* Associated Motor Boat Co. Ltd [1968] EA 123** where the Court of Appeal outlined the duties of a first appellate court as follows:

> "*I accept counsel for the respondent's proposition that 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."

[Emphasis supplied]

8. Having properly warned myself that I neither saw nor heard the Appellant nor the Respondent testify in trial, I have duly evaluated the evidence the parties presented in the Trial Court, and which evidence and documents in support thereof, are before this Court and I have come to the following determination.

9. The Appellant asserts the termination was on account of the Respondent's job being superfluous and consequently the position being declared redundant. The letter declaring redundancy was dated 30th April 2024. In the letter, the Appellant's HR and Administration Manager Mr. Fredrick Mashuke, notified the Respondent that there had been an organisational design review of the enterprise and there were roles that were to be declared redundant. It notified the Respondent that the position of assistant operations officer

Homabay, which the Respondent held at the time, had become redundant with effect from the date of the letter.

10. The Employment Act makes provision on declaration of redundancy in section 40. The section reads as follows *in parre materia*:

(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—

(a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

(b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

(c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of

the particular class of employees affected by the redundancy;

(d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

(e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

(f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

(g) the employer has paid to an employee declared redundant

severance pay at the rate of not less than fifteen days pay for each completed year of service.

(2) Subsection (1) shall not apply where an employee's services are terminated on account of insolvency as defined in Part VIII in which case that Part shall be applicable.

(3) The Minister may make rules requiring an employer employing a certain minimum number of employees or any group of employers to insure their employees against the risk of redundancy through an unemployment insurance scheme operated either under an established national insurance scheme established under written law or by any firm underwriting insurance business to be approved by the Minister.

11. The Appellant did not copy the letter to the Labour Officer as required under section 40(1)(b). The letter only addressed the Respondent. There was no evidence of the criteria applied in the declaration of the redundancy. There was no payment made despite promises to do so on the letter. The Respondent testified in Court and his testimony was unchallenged. He stated that he was not paid the terminal benefits as promised by the Appellant. The payment is required to be made under the law. Leave in particular must be paid off in cash. No evidence was adduced of any payment made. The Respondent confirmed his last pay was in August 2023.

12. The Learned Magistrate did not err in awarding the sums she did. In fact, the aspect of overtime was understated as the evidence before the Court was that the Respondent had between 11-12 hours of service each day he worked which means he had an overtime of 3½ hours a day at the minimum. This was not properly articulated in his claim thus handicapping the Court in awarding him additional sums. Nevertheless, the award by the Learned Magistrate factored under payment as evidenced in the payment for August 2023 which was Kshs. 14,200/- as opposed to the full pay which was Kshs. 34,200/- per his bank statements. The Appellant was the employer and under section 74 of the Employment Act is obliged to keep records. If there had been payment, the employer would have had the record to show the payments made.

13. The Court therefore upholds the decision of the Learned Magistrate as she neither fell into any error nor misapprehended the evidence before her. The sums awarded were reasonable and the Court will therefore not interfere

with the findings. The Appeal is accordingly found to be unmerited and is dismissed with costs to the Respondent.

It is so ordered.

Dated and delivered at Kisumu this 22nd day of April 2026

Nzioki wa Makau, MCIArb.
JUDGE