REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

ELRC APPEAL NO. E166 OF 2024

(Before D. K. N. Marete)

KERING ASSOCIATES ENGINEERS LIMITED …… APPELLANT

VERSUS

CHEPKOECH JESSCAH …… RESPONDENT

JUDGMENT

This matter was originated by way of a Memorandum of Appeal dated 7th June 2024. It is an appeal from a Judgment delivered on 22nd May 2024 at Milimani Employment & Labour Relations Court in Milimani Cause No. E855 of 2021.

The Memorandum of Appeal comes out as follows;

1. The trial court erred in law and in fact in holding that the termination of the Respondent's employment was unprocedural and amounted to unfair termination.
2. The trial court erred in law and in fact in awarding unpaid salary for 10 months instead of 6 months as admitted by the Appellant vide letter dated 23rd March, 2020.
3. The trial court erred in law and in fact in awarding payment for annual leave days accrued but not taken, the same having been inclusive in the Respondent's revised salary.
4. The trial court erred in law and in fact in awarding damages for unlawful termination equivalent to 10 months, the termination having been on account of redundancy.

5. The trial court erred in law and in fact in meting upon the Appellant an excessive award of Kshs. 656,250/= plus costs and interest without considering Section 40(1)(b) of the Employment Act 2007 on account of redundancy.
6. The trial court decision was not in tandem with the recent developments and interpretation of Sections 40(1)(b), 43, 47 and 90 of the Employment Act 2007.
7. The trial court exhibited actual bias against the Appellant herein without considering the interpretation of Sections 40(1)(b), 43, 47 and 90 of the Employment Act 2007.

The Appellant prays for orders that;

a) That the appeal herein be allowed.

b) That the findings or decisions of the trial court in Milimani Cause No. E855 of 2021 be set aside or vacated.

The Appellant's case before the trial court, as presented in the Record of Appeal, is that the Respondent was employed by the Appellant as a Civil Engineer/Site Supervisor at an initial monthly salary of Kshs. 10,500.00. This was later revised to Kshs. 25,000.00. The Respondent filed her Statement of Claim dated 17th May, 2021 seeking, *inter alia*, a declaration of unfair termination, payment of terminal dues of Kshs. 987,301.00, nominal damages, interest, a Certificate of Service and costs.

At the hearing before the trial court, the Respondent testified as the sole witness and adduced documentary evidence in support of her case. The Appellant, on the other hand, deliberately elected not to call any witness and did not adduce any evidence in rebuttal. The matter proceeded to judgment on that basis.

In its Written Submissions at trial, the Appellant, for the first time, introduced a defence of redundancy attributing the termination to the economic hardships caused by the Covid-19 pandemic. This defence was not pleaded in the Appellant's Statement of Response. The Appellant relied on a letter dated 23rd March, 2020 at page 46 of the Record of Appeal which it claimed constituted the notice contemplated under Section 40(1)(b) of the Employment Act, 2007. The Respondent filed further submissions to address this unpleaded defence. It is not in dispute that those further submissions were mischievously and deliberately excluded by the Appellant from the Record of Appeal compiled and filed on 14th March, 2025.

The Respondent's case before the trial court was that her employment was terminated without notice, without a show cause letter, without a disciplinary hearing, without a valid termination letter and without payment of any terminal dues. The Respondent denied at all material times that any redundancy was declared or that any of the statutory prerequisites for redundancy under Section 40 of the Employment Act, 2007 were observed by the Appellant. She testified that the purported letter of 23rd March, 2020 was issued more than two years after she was actually dismissed, rendering it incapable of constituting a notice of redundancy.

The parties filed their respective written submissions in this cause, the Appellant’s dated 14th March, 2025 while Respondent’s are dated 17th April, 2025. These were accompanied by Lists and Bundles of Authorities, all of even dates.

The issues for determination therefore are:

1. Whether the Respondent's termination was unfair and unlawful.

2. Whether the Appellant discharged the evidentiary burden under the Employment Act,2007.

3. Whether the trial court properly exercised its discretion in awarding the reliefs awarded.

4. Who bears the costs of this appeal.

The 1st issue for determination is whether the respondent's termination was unfair and unlawful. The standard of review on a first appeal is that this Court is entitled to re-evaluate the evidence on the record and draw its own conclusions, while remaining conscious that it lacked the advantage of observing the demeanour of witnesses at trial. Interference is warranted only where the trial court misdirected itself in law, misapprehended the facts, took irrelevant considerations into account, failed to consider relevant matters, or reached a decision that is plainly wrong. This is enunciated in the celebrated authority of **Selle and Another v Associated Motor Boat Co. Ltd [1968] EA 123.**

The central issue at the trial court was whether the Appellant validly terminated the Respondent's employment on account of redundancy, or whether the termination was unfair and unlawful. The Appellant, in the proceedings before the trial court, elected to call no witnesses whatsoever and to adduce no evidence in rebuttal to the Respondent's case. This act is fatal to the Appellant's position on appeal.

The Appellant's first line of defence on appeal is that the termination was on account of redundancy caused by the effects of the Covid-19 pandemic and sought to rely on Section 40(1)(b) of the Employment Act 2007. This court notes, as did the trial court, that the defence of

redundancy was introduced by the Appellant for the first time in its trial submissions and was never pleaded in the Statement of Response. A party is bound by its pleadings. A defence that is not pleaded cannot be advanced for the first time in submissions, still less on appeal. This principle is well-settled in the authority of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR**.

Even if this court was to consider the redundancy argument on its merits, the result would be no different. Section 40(1) of the Employment Act 2007 sets out conditions that are conjunctive and mandatory in nature. As was observed in **Kenya Union of Journalists and Allied Workers v Nation Media Group [2013] eKLR**, an employer desirous of undertaking an involuntary redundancy bears the sole responsibility of complying with all the conditions laid down by Section 40, even where the redundancy is by the consent of the parties.

The Appellant points to a letter dated 23rd March, 2020 as constituting the notice of redundancy under Section 40(1)(b). This Court finds that contention unsustainable on the facts. The Respondent's evidence, which was unchallenged on the basis of the Appellant having called no witness to dispute it was that she was dismissed from service well before 23rd March, 2020. A letter issued after the fact of dismissal cannot retroactively constitute a notice of intended redundancy. Section 40(1) contemplates a prospective notice given not less than one month prior to the intended date of termination. The purported letter dated 23rd March, 2020 fails this statutory test on any reasonable reading of the record.

Additional to the requirement of notice, the record discloses a complete failure by the Appellant to comply with any of the remaining requirements of Section 40(1). There is no evidence that the

Respondent or the relevant Labour Officer was notified of the reasons for and extent of any intended redundancy. There is no evidence of any selection process or criteria. There is no evidence of any consultations with the Respondent. There is no evidence of payment of leave in cash, notice pay or severance pay at the statutory rate.

This Court is guided by the majority decision of the Court of Appeal in **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** which established the four-limbed test applicable to a valid redundancy defence. Here, the employer must prove;

(i) The reason or reasons for termination;

(ii) That the reason is valid;

(iii) That the reason is fair, based on the operational requirements of the employer; and

(iv) That the employment was terminated in accordance with fair procedure.

The Appellant, having called no evidence, failed to satisfy any of the(se) four.

The Court of Appeal in that case and authority further observed that the purpose of the notice under Section 40(1)(a) and (b) is to give the parties an opportunity to consider measures to be taken to avert or minimise the terminations and measures to mitigate the adverse effects on the workers concerned. The notices under that provision are not merely for information: consultation is an imperative requirement implicit in the principle of fair play under our law. No such consultations in any way took place in our circumstances.

On the selection criteria, Section 40(1)(c) requires the employer, in selecting employees for redundancy, to have due regard to seniority in time and to the skill, ability and reliability of each

employee of the particular class affected. The Appellant produced no evidence of any selection criteria whatsoever. As was held in the authority of **Abere v Mini Bakeries (Nairobi) Limited [2024] KEELRC 2207 (KLR)**, an employer is ideally required to identify a pool of employees from which those to be made redundant are selected. Again in **Joseph Macharia Warutere & 3 Others v Saab Kenya Ltd [2017] eKLR**, that the selection criteria must be objective and, where questioned, the employer must be able to show that a criterion was in place. The Appellant has not demonstrated any of these.

On the evidentiary burden, Sections 43 and 47(5) of the Employment Act,2007 place the burden of justifying the termination, both substantively and procedurally, on the employer. The Appellant's complete failure to call evidence in rebuttal is, in this context, entirely telling. As was observed in **Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 Others [2012] eKLR**, where a party has custody or control of evidence which it fails or refuses to tender, the court is entitled to draw an adverse inference that if such evidence had been produced, it would have been adverse to that party. This Court draws that inference in this cause.

This Court accordingly finds, as did the trial court, that the Respondent's termination was unfair and unlawful. The Appellant failed to establish any valid reason for the termination, let alone demonstrate compliance with the mandatory requirements of Sections 40, 41, 43 and 45 of the Employment Act, 2007. The grounds of appeal fail and fall by the wayside.

The Appellant attacks the award of Kshs. 656,250.00 as excessive and raises, in addition, a contention that the claim was time-barred under Section 90 of the Employment Act, 2007.

On the limitation argument, the Respondent filed her Statement of Claim on 17th May, 2021. Section 90 of the Employment Act prescribes a limitation period of three years from the date the cause of action arose. The record, on the Appellant's own admission in the letter dated 23rd March 2020, places the termination at around that date at the latest, meaning that the cause of action could not have accrued before March, 2020. A claim filed in May, 2021 is plainly within the three-year window. The trial court properly addressed and rejected this contention. The argument is misconceived and fallacious.

On the quantum of the award, the trial court made an award of Kshs. 656,250.00. The Appellant contends that the unpaid salary component should have been limited to six months as admitted in the letter of 23rd March 2020. The Respondent claimed terminal dues of Kshs. 987,301.00 including unpaid salaries spanning the period of actual service. Having found that the termination was unfair and unlawful, the trial court exercised its discretion under Section 49 of the Employment Act, 2007 in assessing the appropriate awards, taking into account all the circumstances including the Respondent's length of service and the nature of the Appellant's default. The Employment Act, 2007 provides for compensation not exceeding twelve months' salary and the award made by the trial court falls comfortably within that statutory ceiling.

This Court finds no basis to interfere with the trial court's award. The trial court considered the relevant factors and its assessment cannot be described as plainly wrong. It is trite law that an appellate court should only interfere with a trial court's findings if they are based on no evidence, are perverse, or if the trial court misapprehended the law. None of those conditions are met in this case. The trial court's findings are firmly grounded in the evidence and the applicable statutory provisions.

On the ground of alleged bias, this Court finds that the ground is entirely unsubstantiated. The trial court arrived at its findings based on the evidence before it or more pertinently, on the Appellant's failure to produce any evidence at all. A finding adverse to a party that elects not to lead evidence is not evidence of bias, it is the predictable consequence of that election.

I am therefore inclined to dismiss the appeal and order as follows;

i. The judgment and award of the trial court in Milimani Cause No. E855 of 2021, delivered on 22nd May, 2024 be and is hereby upheld in its entirety.
ii. The Respondent is awarded the sum of Kshs. 656,250.00 together with interest thereon at court rates from the date of the trial court's judgment until payment in full.
iii. The Appellant is ordered to issue a Certificate of Service to the Respondent in fourteen (14) days of this judgment of court.
iv. The costs of this appeal and the trial court shall be borne by the Appellant.

Delivered, dated and signed this **14th** day of **May** 2026.

D. K. Njagi Marete
JUDGE

Appearances:

1. Mr. Nandwa holding brief for Nyaswenta instructed by N. Nyaswenta & Associates Advocates for the Appellant.
2. Mr. Kiprono instructed by CK. Advocates for the Respondent