Nation Media Group Limited v Munene (Civil Appeal E603 of 2021)
[2025] KECA 114 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KECA 114 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E603 OF 2021

DK MUSINGA, MSA MAKHANDIA & P NYAMWEYA, JJA

JANUARY 24, 2025

BETWEEN

NATION MEDIA GROUP LIMITED ..... APPELLANT

AND

MUGUMO MUNENE ..... RESPONDENT

(An appeal from the Judgment and Decree of the Employment and Labour Relation Court of Kenya at Nairobi (H. Wasilwa J.) made on 11{{^th}} November 2020 in ELRC Cause No. 975 of 2016.)

Distinction between the remedy of compensation for unfair termination and terminal dues

The appeal revolved around the termination of the respondent's employment on account of redundancy. The court noted that the respondent was not given notice of the redundancy, and was informed of the same the day that his employment was being terminated. The respondent was not given any opportunity to be heard, or internalise, discuss, and mitigate the redundancy. The court found that the respondent's termination of employment was unfair. The court further highlighted the distinction between the remedy of compensation for unfair termination and terminal dues.

Reported by Kakai Toili

Labour Law *– employment – termination of employment – unfair termination of employment – remedies – compensation and terminal dues - what was the distinction between the remedy of compensation for unfair termination and terminal dues - Employment Act (cap 226), section 49.*

Labour Law *– employment – termination of employment – redundancy - whether failure to give an employee adequate notice of redundancy amounted to unfair termination of employment – Employment Act (cap 226), sections 8, 45(1) and (2).*

Brief facts

The respondent was employed by the appellant from December 1999. On March 4, 2016, the respondent was called into the office of the appellant's editor-in-chief, who was in the company of the appellant's human resource director and was verbally informed that the appellant was in the process of restructuring and as a

result, his position as news editor would cease forthwith. He was then issued a letter on the same day with the heading 'redundancy' and was required to sign it immediately. He requested time to read the letter before signing, but the two senior officers declined and demanded that he signs it and leave the office which he did.

The respondent thereafter instituted a suit in the Employment and Labour Relations Court (ELRC) and claimed that; when he was promoted to news editor, the appellant did not pay him the requisite salary for his position between October 2007 and February 1, 2009; and that he did not receive prior notice or warning to declare him redundant. Additionally, the respondent claimed that the appellant thereafter hired a person who was executing the duties of a news editor. The respondent accordingly sought for among other orders, declarations that the appellant's letter of redundancy amounted to unfair termination and that he was underpaid, since the appellant ought to have used 15 years in calculating his terminal dues and not 13 years.

Issues

i. What was the distinction between the remedy of compensation for unfair termination and terminal dues?

ii. Whether failure to give an employee adequate notice of redundancy amounted to an unfair termination of employment.

Relevant provisions of the Law

Employment Act (cap 226)

Section 2 –Interpretation

"redundancy" 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;

Section 45 - Unfair termination

(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

Section 49 – Remedies for wrongful dismissal and unfair termination

(4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following—

(a) the wishes of the employee;

(b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and

(c) the practicability of recommending reinstatement or re-engagement;

(d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;

(e) the employee's length of service with the employer;

(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;

Held

1. Section 2 of Employment Act defined redundancy. Section 40 of the Act detailed the legal requirements to be met in a termination of employment on account of redundancy. Section 43(1) of

the Act in addition provided that in any claim arising out of termination of a contract, the employer shall be required to prove the reasons or reasons for termination and where he failed to do so, the termination shall be deemed to be unfair termination within the meaning of sections 45 of the Act.

2. The letter informing the respondent of redundancy of his employment was dated March 4, 2016. The letter was handed over to the respondent on March 4, 2016, the very same day he was required to vacate his office. There was also no evidence provided by the appellant of the reorganization of the operations in the editorial department alluded to in the letter of redundancy, of the particular class of employees affected by the redundancy, and the basis of selection with regard to seniority, skill, ability and reliability as required by section 40 of the Employment Act. In the absence of that crucial evidence, which evidence ought to have come from the appellant under section 43 of the Employment Act, there was no basis for faulting the ELRC in finding that the appellant failed to show that there existed valid grounds to declare the respondent redundant.
3. While the decision to declare a redundancy was indeed one that could only strategically be made by an employer, and the courts could not substitute their judgment with that of an employer, the court should be satisfied that the employer genuinely believed that there was a redundancy situation and proceeded to exercise the redundancy discretion properly and legally. Hence the need for the employer to demonstrate to the court that there was indeed a redundancy situation, and that the reasons and extent thereof, including classes of employees affected, was communicated to the employee's union, the employee and the relevant labour officer in advance. That burden was not discharged by the appellant.
4. Section 45(1) of the Employment Act prohibited an employer from terminating employment unfairly, and section 45(2) stipulated what was unfair termination. In the instant appeal, the respondent was not given notice of the redundancy, and was informed of the same the day that his employment was being terminated. There was no notification in writing made to the respondent's union or the labour office.
5. The respondent was not given any opportunity to be heard, or internalise, discuss, and mitigate the redundancy. The reason why a redundancy process must be procedurally fair and substantively justifiable was because it was an involuntary termination of employment that occurred through no fault or mistake of an employee. The termination of the respondent from the appellant's employment on grounds of redundancy could not be justified, both for substantive infirmity and procedural impropriety, and there was no reason to fault the ELRC's finding that the termination was therefore unfair.
6. An award equivalent to a number of months' wages or salary not exceeding 12 months and based on the gross monthly wage or salary of the employee at the time of dismissal was an allowable remedy under section 49(1) of the Employment Act where termination of a contract of an employee was unjustified. In addition, the considerations and factors that a court was required to take into account in awarding that remedy came into play in the instant appeal, particularly those stated in section 49(4)(a)-(f) of the Employment Act.
7. Having been removed from work for no valid reason, the respondent was entitled to compensation for the unfair termination. In addition, taking into account the manner and circumstances in which the employment was terminated, not only without reasonable notice, but also in a most cavalier mode, the award of 10 months' salary compensation was reasonable.
8. The remedy of compensation for unfair termination was separate and distinct from any terminal dues that were due to the respondent as a result of the termination, whether by redundancy or otherwise. The terminal dues compensated the employee in view of the service rendered until the date of termination, and were set down by law and the contract of employment. Compensation for unfair termination compensated an employee for wrongful loss of employment, and were mainly at the discretion of the court, after consideration of the guidelines set down in section 49 of the Employment Act. The remedy of compensation for unfair termination was introduced by the Employment Act.

Appeal dismissed.

Orders

Costs to the respondent.

Citations

CasesCases

1. Cargill Kenya Limited v Mwaka & 3 others Civil Appeal 54 of 2019; [2021] KECA 115 (KLR) — (Explained)
2. Jabane v Olenja Civil Appeal 2 of 1986; [1986] KECA 71 (KLR) — (Followed)
3. Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others Civil Appeal 46 of 2013; [2014] KECA 404 (KLR) — (Explained)
4. Kenya Broadcasting Corporation v Geoffrey Wakio (Civil Appeal 352 of 2017; [2019] KECA 65 (KLR) — (Explained)
5. Ol Pejeta Ranching Limited v David Wanjau Muhoro Civil Appeal 42 of 2015; [2017] KECA 329 (KLR) — (Explained)

South Africa

SACTWU & others v Discreto (1998) (JA95/97) [1998] ZALAC 9 — (Explained)

Regional Court

1. Mbogo & another v Shah [1968] EA 93 — (Followed)
2. Selle and another v Associated Motor Boat Co Ltd & others (1968) EA 123 — (Followed)

Statutes

1. Employment Act (cap 226) — section 2,31,40,43(1)(2)(3);45(1)(2);49(1)(c)(4)(a)-(f)— (Interpreted)

Advocates

None mentioned

JUDGMENT

1. Mugumo Munene, the respondent herein, was employed by the Nation Media Group, the appellant herein, from December 1999. He rose from the position of correspondent, to reporter, and in October 2007, he was promoted to the position of news editor for the appellant's weekly publication, the Sunday Nation. He claimed that throughout his employment he did not have any disciplinary issues nor was he issued with any cautionary or warning letter, and that his rise to news editor was due to his good conduct and excellent performance and ability over the years.

2. On 4 March 2016, the respondent was called into the office of the appellant's Editor-in-Chief, who was in the company of the appellant's Human Resource Director, and was verbally informed that the appellant was in the process of restructuring and as a result, his position as news editor would cease forthwith. He was then issued a letter on the same day with the heading 'Redundancy' and was required to sign it immediately. He requested time to read the letter before signing, but the two senior officers declined and demanded that he signs it and leave the office. He signed the letter and left the office.

3. The respondent thereafter instituted a suit by way of Memorandum of Claim dated 26th May 2016 in the Employment and Labour Relations Court at Nairobi, being ELRC Cause No. 975 of 2016. He made three main claims therein. Firstly, that when he was promoted to news editor, the appellant did not pay him the requisite salary for his position for the period between October 2007 and 1st February 2009 with no explanation. The respondent also claimed that after he was confirmed, the appellant

stopped paying his house allowance as required by section 31 of the *Employment Act* as read together with *Regulations of Wages (General Order)*.

4. Secondly, that that he did not receive prior notice or warning to declare him redundant, nor had the appellant's management served or shared with any of his colleagues or him, any job evaluation or Human Resources Audit that would serve as a basis for reorganizing the structure of the appellant. Additionally, his position as news editor was central and pivotal to the production and running of a publication like the Sunday Nation, thus there was no way the position could be declared redundant. The respondent claimed that he was aware that the appellant thereafter hired a person who was executing the duties of a news editor of the Sunday Nation, and commissioned an ultra-modern printing press worth over Kshs 2.5 Billion in Nairobi.

5. The respondent accordingly claimed that the appellant breached section 40 of the *Employment Act* as he was not given notice of the intention to declare him redundant, and neither was such a notice copied to the Ministry of Labour as contemplated. It was his position that if the appellant had a valid reason to declare redundancies, the principles laid out in the law were not considered, particularly as he held a senior and pivotal role in the running of the publication and had served the appellant for 15 years, and thus should have been considered as an asset.

6. Thirdly, after signing the letter that declared him redundant, he commenced the process of clearing so as to facilitate the payment of his terminal dues by the appellant. His contract of employment provided for a retirement age of 60 years, or voluntary retirement with the appellant's permission upon attaining the age of 50 years. In addition, the appellant's Human Resources Manual provided in its redundancy policy that in the event of an employee being declared redundant, the following payments were to be made: basic pay in lieu of notice; leave pay in accordance with leave entitlement; pension in accordance with the scheme rules and the relevant legislation; and one month's salary for every year worked. Moreover, there were items payable at the discretion of management, being 15 days for every year of the remaining period to retirement, subject to a maximum of 12 months' pay; and entrepreneurial training at the expense of the company.

7. The appellant completed the clearance process and paid the respondent the dues tabulated in the letter of redundancy. The respondent claimed that the calculations used were wrong and not based on the correct salary, taking into account the fact that his house allowance was not reflected in his payslip, and that he worked for the appellant for a cumulative period of 15 years from his first engagement as a correspondent, while the appellant used 13 years to calculate his terminal dues. He further stated that the appellant's Human Resources Manual offered terminal pay with one month's salary being taken to include all allowances and not just basic pay, which was the figure the appellant used.

8. The respondent claimed that the terminal pay of employees who had previously been declared redundant was based on one month's gross pay for every year worked, and not on basic pay. Additionally, the unionised employees were paid gratuity at the rate of one month's salary gross pay for every year worked, while he was paid at the rate of 15 days for every year worked based on basic pay, which amounted to discrimination. Lastly, that the appellant had paid past employees the 12 months' ex gratia pay provided in the redundancy policy and he was entitled to that as well.

9. The respondent accordingly sought declarations that the appellant's letter of redundancy amounted to unfair termination and that he was underpaid, since the appellant ought to have used 15 years in calculating his terminal dues and not 13 years. He also sought orders that he was entitled to salary arrears accrued from the difference in salaries of reporter and news editor as paid between October 2007 and February 2009, and after calculating his salary and house allowance due, leave entitlements, pay in lieu of notice, severance pay, gratuity, ex gratia payments, compensation for unfair

termination and damages for torture and mental suffering. The respondent sought a total award of Kshs 162,601,945.22/=.

10. The appellant opposed the respondent's claim by way of a replying memorandum dated 15th August 2016, and while admitting that the respondent was first engaged as a correspondent, averred that he was engaged as an independent contractor and was later employed as a reporter by a letter of appointment dated 22 January 2003. The appellant denied promoting the respondent to the position of news editor for the Sunday Nation, or that the respondent was entitled to any amount over and above the amount paid to him for the period between October 2007 and 1 February 2009 as claimed.

11. The appellant admitted to terminating the employment of the respondent on 4th March 2016 on account of redundancy but denied depriving the respondent the opportunity to study the said letter before signing it, and claimed that by signing the said letter, the respondent accepted and agreed to be discharged from his employment. The appellant further denied breaching the law in terminating the respondent's employment on account of redundancy, and averred that following the reorganisation of the appellant's Editorial Department among others, the respondent's position of reporter was rendered redundant, thus necessitating the termination. Further, that the contract of employment between the appellant and the respondent provided for its termination by either party by giving notice or salary in lieu of notice.

12. It was the appellant's contention that the respondent, as per the contract of employment, was entitled to a consolidated salary which took into account allowances, and he was not entitled to house allowance at the rate of 15% of the basic salary. Further, that the respondent was paid all his terminal dues and the same was accepted without disputing its computation, and if the calculations due were erroneous, the respondent should have disputed the same at the time the dues were paid. Additionally, that the contract of employment between the appellant and the respondent made no provision for gratuity and thus the respondent was not entitled to the same; it was at the discretion of the appellant's management under its redundancy policy to pay to an employee who had been declared redundant 15 days' pay for every year worked, subject to a maximum of 12 months' pay, and the respondent was paid gratuity amounting to Kshs 305,202/= in good faith; the respondent did not work for a cumulative period of 15 years as he was engaged as a reporter on 22 January 2002 and his employment terminated on account of redundancy on 14th March 2016, which was cumulatively a period of 13 years; and that the termination of the respondent was not unfair nor procedurally flawed.

13. It was thus the appellant's case that the respondent was not entitled to Kshs 162,601,945.22 or any amount, since upon the termination of the respondent on account of redundancy, vide the letter dated 4 March 2016, they paid him the following dues:

    a. Prorated salary of the 4 days worked in March 2016 Kshs. 37,175/-

    b. Prorated car allowance for 4 days worked in March 2016 Kshs. 14,080/-

    c. 3 months' salary in lieu of notice Kshs. 836,433.00/-

    d. Payment for 40 annual leave days not taken Kshs. 371,748.00/-

    e. Redundancy pay of one month's salary for each year completed totalling Kshs. 3,345,732.00/-

    f. 1 month's salary in lieu of redundancy notice Kshs. 278,811.00/-

    g. Gratuity payment Kshs. 305,202.00/-.

    Lastly, that the respondent's Certificate of Service was ready for collection, and he had refused, neglected or failed to collect the same from the appellant.

14. In reply, the respondent reiterated the assertions in his memorandum of claim, save to add that the contract of employment provided for an itemized pay with basic pay and a house allowance thereof, and that there was no reference to consolidated pay in any of the documents. Additionally, his signing and acceptance of dues as calculated did not in any manner amount to a waiver of his right to seek legal redress in law and challenging the legality, fairness and veracity of any happening tied thereto.

15. On 11 November 2020, the ELRC (H. Wasilwa J.), after considering the parties' submissions, and while citing sections 40 and 45 of the *Employment Act*, held that the appellant did not demonstrate the existence of valid reasons before termination of the respondent's employment without notice on account of redundancy, and that the termination was unfair and unjustified. The learned Judge awarded the respondent Kshs 3,844,110/= being 10 months' salary as compensation for unfair termination. The Judge however found that the claim for payment of the other redundancy dues was not proved, because the respondent was paid the dues in the redundancy letter. Lastly, the appellant was condemned to pay the costs of the suit together with interest at court rates with effect from the date of the judgement.

16. The appellant, being aggrieved by the said judgment, proffered this appeal, and has raised seven (7) grounds of appeal in a memorandum of appeal dated 20 August 2021, that mainly challenge the findings on unfair termination and the award of the sum of Kshs 3,844,110.00/-. We heard the appeal on this court's virtual platform on 15th May 2024, when learned counsel Mr. Eric Kivuti, holding brief for learned counsel Ms. Athman, appeared for the appellant; while learned counsel Mr. Martin Njeru, appeared for the respondent. The parties highlighted their respective written submissions dated 2nd May 2024 and 26th September 2022 respectively.

17. In commencing the determination of this appeal, we are mindful of the duty of this Court as a first appellate court, which was reiterated and set out in the decision of *Selle and another v Associated Motor Boat Co Ltd & others* (1968) EA 123. We will therefore reconsider the evidence adduced at the trial court, evaluate it, and draw conclusions of facts and law. In addition, we will only depart from the findings by the trial court if they were not based on evidence on record; where the said court is shown to have acted on the wrong principles of law as was held in *Jabane v Olenja* [1986] KLR 661, or where its discretion was exercised injudiciously as was held in *Mbogo & another v Shah* [1968] EA 93.

18. On the first issue as to whether the termination of the respondent's employment was unfair, Mr. Kivuti made two related arguments. Firstly, that the appellant had a valid reason for redundancy and the same had been aptly set out in the redundancy letter dated 4th March 2016 which was received and signed by the respondent. The reason was that the appellant was reorganizing its operations in the editorial department which affected the position of the respondent. While citing the decision in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR, counsel submitted that the reasonableness of the decision had to be judged by the circumstances prevailing at the time the decision was made, and it was not for the Court to substitute its judgment for that of the employer.

19. Secondly, that the appellant complied with the procedure and legal requirements for termination of employees on account of redundancy set out in section 40 of the *Employment Act*, by firstly, notifying the respondent in writing about the redundancy; secondly, having regard to seniority in time and the skill, ability and reliability of the respondent; and lastly, by paying all the terminal benefits that were due to the respondent at the time of the termination. Counsel submitted that the relationship between the parties was governed by the employment agreement dated 22 January 2003 and the appellant's policies, including the Redundancy policy, and made reference to clause 8 (b) of the contract which afforded both the appellant and the respondent the option of terminating the Contract by giving notice or salary in lieu of notice, while the *Employment Act* provides for a minimum notice period of 30

days. Accordingly, that the appellant was guided by the contractual terms and the provisions of section 40 of the *Employment Act* in terminating the respondent's employment relationship on account of redundancy.

20. In reply, Mr. Njeru submitted that no material was placed before the court to demonstrate that there were valid reasons for the redundancy, nor was the procedure set out in section 40 of the *Employment Act* followed, and relied on this Court's decision in *Kenya Airways Limited v Aviation & Allied Workers Union and 3 others* (*supra*) to submit that no consultation took place, and there was no indication that the labour officer and the union were informed.

21. We have considered the arguments made on the nature of termination of the respondent's employment. Section 2 of *Employment Act* in this respect defines redundancy as:

> " The loss of employment, occupation, job or career by involuntary means through no fault of the 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."

22. Section 40 of the *Act* details the legal requirements to be met in a termination of employment on account of redundancy 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 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 an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service."

23. Section 43(1) of the *Act* in addition provides that in any claim arising out of termination of a contract, the employer shall be required to prove the reasons or reasons for termination and where he fails to do so, the termination shall be deemed to be unfair termination within the meaning of sections 45. Section 43(2) provides:

> "43.
>
> (2). The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee."

24. In the present appeal, the letter informing the respondent of redundancy of his employment was dated 4th March 2016 and stated that:

> "I regret to advice that your employment with Nation Media Group is terminated on grounds of redundancy with effect from 4th March 2016, which will be your last working day.
>
> This has been necessitated by the company's decision to reorganize operations in the editorial department hence affecting your position.
>
> You will be paid as follows..."

25. The appellant did not dispute that this letter was handed over to the respondent on 4th March 2016, the very same day he was required to vacate his office. There was also no evidence provided by the appellant of the reorganization of the operations in the editorial department alluded to in the letter of redundancy, of the particular class of employees affected by the redundancy, and the basis of selection with regard to seniority, skill, ability and reliability as required by section 40 of the *Employment Act*. In the absence of this crucial evidence, which evidence ought to have come from the appellant under section 43 of the Act, we have no basis for faulting the learned Judge of the ELRC in finding that the appellant failed to show that there existed valid grounds to declare the respondent redundant.

26. The role of the court in this regard needs to be restated. While the decision to declare a redundancy is indeed one that can only strategically be made by an employer, and the courts cannot substitute their judgment with that of an employer, the Court should be satisfied that the employer genuinely believed that there was a redundancy situation and proceeded to exercise the redundancy discretion properly and legally. Hence the need for the employer to demonstrate to the Court that there was indeed a redundancy situation, and that the reasons and extent thereof, including classes of employees affected, was communicated to the employee's union, the employee and the relevant labour officer in advance. This burden was not discharged by the appellant.

27. The balance that needs to be maintained in this regard was explained by the South African Labour Appeals Court in *SACTWU and others v Discreto* (1998) (JA95/97) [1998] ZALAC 9 as follows:

> As far as retrenchment is concerned, fairness to the employer is expressed by the recognition of the employer's ultimate competence to make a final decision on whether to retrench or not (cf. the *Atlantis Diesel case* at 1252H (ILJ); 28I (SA)). For the employee fairness is

found in the requirement of consultation prior to a final decision on retrenchment. This requirement is essentially a formal or procedural one, but, as is the case in most requirements of this nature, it has a substantive purpose. That purpose is to ensure that the ultimate decision on retrenchment is properly and genuinely justifiable by operational requirements or, put another way, by a commercial or business rationale.

The function of a court in scrutinising the consultation process is not to second guess the commercial or business efficacy of the employer's ultimate decision (an issue on which it is, generally, not qualified to pronounce upon), but to pass judgment on whether the ultimate decision arrived at was genuine and not merely a sham (the kind of issue which courts are called upon to do, in different settings, every day). The manner in which the court adjudges the latter issue is to enquire whether the legal requirements for a proper consultation process has been followed and, if so, whether the ultimate decision arrived at by the employer is operationally and commercially justifiable on rational grounds, having regard to what emerged from the consultation process. It is important to note that when determining the rationality of the employer's ultimate decision on retrenchment, it is not the court's function to decide whether it was the best decision under the circumstances, but only whether it was a rational commercial or operational decision, properly taking into account what emerged during the consultation process."

28. In addition, section 45(1) of the *Act* prohibits an employer from terminating employment unfairly, and section 45(2) stipulates what is unfair termination. It provides:

> "(2) A termination of employment by an employer is unfair if the employer fails to prove-
>
> a. that the reason for the termination is valid;
>
> b. that the reason for the termination is a fair reason-
>
> i. related to the employee's conduct, capacity or compatibility; or
>
> ii. based on the operational requirements of the employer; and
>
> c. that the employment was terminated in accordance with fair procedure.

29. We have already found that the appellant did not demonstrate that there were fair and valid reasons to declare the respondent redundant. As regards procedural impropriety, the respondent's position, which was not contested by the appellant, was that he was not given any notice of the termination by redundancy. Maraga, JA. (as he then was) in *Kenya Airways Limited v Aviation & Allied Workers Union and 3 others* (supra), expressed himself on the procedure to be followed during termination of employment by redundancy, including on the requirement for notice, as follows:

> "My understanding of this provision is that when an employer contemplates redundancy, he should first give a general notice of that intention to the employees likely to be affected or their union. It is that notice that will elicit consultation between the parties, and I will shortly show that consultation is imperative, on the justifiability of that intention and the mode of its implementation where it is found justifiable. At that initial stage, the employer would not have identified the employee(s) who will be affected. So that notice cannot have the names of

the employees as Mr. Mwenesi contended. It does not have to be a calendar months' notice as Mr. Mwenesi contended. The Act requires one month's notice. The period runs from the date of service of that notice. It is after the conclusions of the consultations on all issues of the matter that notices will be issued to the affected employees of the decision to declare them redundant."

30. The learned Judge concluded that:

> "As I have said, besides this Convention, the requirement of consultation is implicit in the principle of fair play under Section 40(1) of the *Employment Act* itself and our other labour laws. The notices under this provision are not merely for information. Read together with Part VIII of the *Labour Relations Act*, 2007 which provides for reference to the Minister for Labour of trade disputes, including those related to redundancy (see section 62(4)) for conciliation, I am of the firm view that the requirement of consultations is implicit in these provisions. The purpose of the notice under Section 40(1) (a) and (b) of the *Employment Act*, as is also provided for in the said ILO Convention No. 158- Termination of Employment Convention, 1982, is to give the parties an opportunity to consider "measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment." The consultations are therefore 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. This means that if parties put their heads together, chances are that they could avert or at least minimize the terminations resulting from the employer's proposed redundancy. If redundancy is inevitable, measures should to be taken to ensure that as little hardship as possible is caused to the affected employees. In the circumstances, I agree with counsel for the 1st respondent that consultation is an imperative requirement under our law."

31. In the present appeal, the respondent was not given notice of the redundancy, and was informed of the same the day that his employment was being terminated. There was no notification in writing made to the respondent's union or the Labour office. In sum, the respondent was not given any opportunity to be heard, or internalise, discuss, and mitigate the redundancy. It is necessary to underscore that the reason why a redundancy process must be procedurally fair and substantively justifiable is because it is an involuntary termination of employment that occurs through no fault or mistake of an employee. We accordingly find that the termination of the respondent from the appellant's employment on grounds of redundancy could not be justified, both for substantive infirmity and procedural impropriety, and we have no reason to fault the learned trial Judge's finding that the termination was therefore unfair.

32. The second issue raised in the appellant's Memorandum of Appeal is that of the legality and justification for the award by the learned trial Judge of Kshs. Kshs 3,844,110.00/=. Mr. Kivuti's submissions on this issue were again twofold. First, that the learned trial Judge erred in law and in fact by awarding the respondent 10 months' salary as compensation for unfair termination, and failed to consider the payment made and received by the respondent at the time of termination. Further, the learned Judge failed to consider the import of the discharge voucher signed by the respondent. It was the appellant's case that awarding the Kshs 3,844,110.00/- amounted to unjust enrichment of the respondent, who had already received a substantial amount of money from the appellant as terminal benefits following the termination. Additionally, assessing the compensation at 10 months was excessive, and the learned Judge did not consider the circumstances of the instant case in arriving

at his decision. Reliance in this regard was placed on the case of *Cargill Kenya Limited v Mwaka & 3 others* (Civil Appeal 54 of 2019) [2021] KECA 115 (22 October 2021.

33. Second, that that the learned Judge did not give any reasons to justify the award of 10 months' salary compensation for unfair termination. Attention was drawn to the case of *Ol Pejeta Ranching Limited v Davi Wanjau Muhoro* [2017] eKLR where this Court held that in the absence of any reasons justifying a maximum award, the trial Judge took into account irrelevant considerations and or failed to take into account relevant considerations, which act then invited the Court's intervention. Counsel submitted that under the circumstances of the case, the respondent was not entitled to any damages for unfair termination, and the award of 10 months' salary was excessive, and that if the court was inclined to award any damages to the respondent, then 2 months' salary was reasonable assessment of damages, taking into account the payment made at the time of termination.

34. Mr. Njeru on his part placed reliance on section 49 (1)(c) of the *Employment Act* which provides for, among other remedies, the award of 'the equivalent to a number of months' wages or salary not exceeding 12 months based on gross monthly wage or salary of the employee at the time of dismissal or termination'. Reliance was also placed on the decision in *Kenya Broadcasting Corporation v Geoffrey Wakio* (2019) eKLR, where an award of twelve (12) months' gross salary was upheld by this Court. Counsel stated that the trial Judge found that the appellant did not demonstrate any valid reason before termination of the respondent's employment on account of redundancy, and that the respondent was issued with the redundancy letter on 4th March 2016 with effect from the same date with no prior notice or consultation.

35. It is notable that an award equivalent to a number of months' wages or salary not exceeding twelve months and based on the gross monthly wage or salary of the employee at the time of dismissal is an allowable remedy under section 49 (1) of the *Employment Act* where termination of a contract of an employee is unjustified. In addition, the considerations and factors that a Court is required to take into account in awarding this remedy come into play in this appeal, particularly those stated in section 49(4) (a)-(f) of the *Employment Act*, namely:

> "(a) the wishes of the employee;
>
> b. the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
>
> c. the practicability of recommending reinstatement or re- engagement; the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
>
> d. the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
>
> e. the employee's length of service with the employer;
>
> f. the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination; ..."

36. Having been removed from work for no valid reason, the respondent was entitled to compensation for the unfair termination. In addition, taking into account the manner and circumstances in which the employment was terminated, not only without reasonable notice, but also in a most cavalier mode,

we are of the view that the award of 10 months' salary compensation was reasonable. It is also notable that the trial Judge did clearly state the basis of the award, which was that the respondent was "unfairly terminated without notice".

37. Lastly, it also ought to be emphasised that the remedy of compensation for unfair termination is separate and distinct from any terminal dues that were due to the respondent as a result of the termination, whether by redundancy or otherwise. The terminal dues compensate the employee in view of the service rendered until the date of termination, and are set down by law and the contract of employment. Compensation for unfair termination compensates an employee for wrongful loss of employment, and are mainly at the discretion of the court, after consideration of the guidelines set down in section 49 of the *Employment Act*. It is also notable that the remedy of compensation for unfair termination was introduced by the *Employment Act*.

38. The judgment dated 10 November 2020 by the Employment and Labour Relations Court at Nairobi (H. Wasilwa J.) in ELRC Cause No. 975 of 2016 is therefore upheld in its entirety, and this appeal is accordingly dismissed with costs to the respondent.

39. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY, 2025.

D. K. MUSINGA (PRESIDENT)

JUDGE OF APPEAL

ASIKE-MAKHANDIA

JUDGE OF APPEAL

P. NYAMWEYA

JUDGE OF APPEAL

I certify that this is a true copy of the original,

Signed

Deputy Registrar.