



**London Distillers (K) Limited v Kenya Union of Commercial Food & Allied Workers  
(Civil Appeal E051 of 2022) [2025] KECA 216 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KECA 216 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL E051 OF 2022  
DK MUSINGA, S OLE KANTAI & JW LESSIT, JJA  
FEBRUARY 7, 2025**

**BETWEEN**

**LONDON DISTILLERS (K) LIMITED ..... APPELLANT**

**AND**

**KENYA UNION OF COMMERCIAL FOOD & ALLIED  
WORKERS ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of the Employment and Labour Relations Court  
at Nairobi (M. Onyango, J.) delivered on 19th January 2022 in ELRC Cause No. E490 of 2020)*

**JUDGMENT**

1. This is an appeal from the judgment and decree of the Employment and Labour Relations Court at Nairobi (M. Onyango, J.), delivered on 19<sup>th</sup> January 2022 in ELRC Cause No E490 of 2020.
2. Kenya Union of Commercial Food & Allied Workers, the respondent herein, (a Trade Union registered as such within the Laws of Kenya), via a Memorandum of Claim dated 3<sup>rd</sup> September 2020 filed a Claim against London Distillers (K) Limited, the appellant, (a company incorporated in Kenya and a leading distiller in East Africa licensed to distill and produce branded alcoholic beverages of over twenty (20) brands in various forms whisky, brandy, gin, vodka, and rum), for unlawful redundancy of ten (10) employees and unlawful retirement of five (5) employees. Also filed was the witness statement of Rebecca Muthoki, the Branch Secretary of the respondent.
3. It was the respondent's case that it had a valid Recognition Agreement pursuant to which parties had negotiated several Collective Bargaining Agreements (CBA), the last one being effective from 1<sup>st</sup> May 2015 for two (2) years and was still in force pending review. The respondent averred that on 19<sup>th</sup> June 2017 the appellant notified the respondent of its intention to terminate the parties' Recognition Agreement for the reason related to Trade Union membership. On 22<sup>nd</sup> June 2017



- the appellant actualized its threat by approaching the National Labour Board on revocation of Recognition Agreement, citing issues with Trade Union representative. That matter was still pending.
4. It was the respondent's case that on 12<sup>th</sup> August 2020 its members found a notice posted within the appellant's Athi River factory with communication that Covid-19 pandemic had drastically affected the company operations, resulting in low sales and that plans were underway to reorganize operations, that as such, some employees would no longer be required; some of them who had attained retirement age would be released from the company; and employees over 58 years and above would no longer be required. The respondent noted that clauses 6, 22 and 23 in the CBA related to the issue and that the clauses provided for termination of service, retirement and redundancy respectively.
  5. The respondent averred that up to the time of filing the suit no employee had opted to take voluntary early retirement, and no such notice existed, such that any early retirement could only be forced on employees. In that regard normal retirement or retirement on medical grounds or early retirement were dictated by age, medical report by the medical board and the personal choice of the employees.
  6. The respondent contended that the notice of 12<sup>th</sup> August 2020 was brought to its attention by its members on 17<sup>th</sup> August 2020. That it addressed the appellant on the concern and proposed a meeting on 20<sup>th</sup> August 2020 and another on 26<sup>th</sup> August 2020 to discuss the issues raised in the notice, but the appellant turned away the respondent on both occasions.
  7. The respondent claimed that on 30<sup>th</sup> August 2020 at close of business, ten (10) employees received letters dated 28<sup>th</sup> August 2020 terminating their services on account of redundancy, while five (5) others received letters retiring them. The respondent claimed that the said terminations were outside of clauses 6, 22 and 23 of the CBA and in violation of section 40 of the *Employment Act*, 2007 (hereinafter EA).
  8. Employees declared redundant were: Ezekiel Musembi Musyoki – Kisumu Depot, Michael Rapado - Nakuru depot, Fredrick Gwiyaya Aradi – Nanyuki Depot, Titus Mutua - Eldoret Depot, Patrick Mwangi Chege – Eldoret Depot, Benson Bett – Nanyuki Depot, Acquillinah Kaveke Katambo – Headquarters, Bernard Mwangi – Kisumu Depot, Christopher Mwaura Gatherer – Nakuru Depot, and Judith Sichangi Murumba – Headquarters.
  9. Employees served with retirement notices were: Juliana Mbaika Kivai, Ndagwa Musembi, Joseph Amoche Litaba, David Ogando, and Albert M. Libele.
  10. It was averred that in the said retirement notices the fifteen (15) employees were given three (3) days' notice to quit employment, and the appellant had promised to pay them one month's salary in lieu of notice. It was further averred that on 22<sup>nd</sup> January 2020 the appellant unlawfully moved and refused to deduct and remit union dues without cause, only citing Trade Union activities.
  11. The respondent acknowledged that there existed a Tripartite Memorandum of Understanding between the Government (State Department of Labour), the Federation of Kenya Employers and the Central Organization of Trade Unions (K) following the outbreak of covid-19 pandemic and that the parties adopted several measures to mitigate the effects of the pandemic, propositions which did not include job losses.
  12. The respondent contended that in any event, and according to the parties' CBA, voluntary early retirement could only be initiated by an employee and redundancy had a clear procedure under section 40 of the EA, 2007 and that the notice of 12<sup>th</sup> August 2020 could not be construed to mean any notice under the law for termination of employment, either by way of retirement or by way of redundancy.



13. The respondent averred that given the past experience particularly how unionisable employees at Bounty Limited, the appellant's sister company, were declared redundant and replaced with contract labour, the appellant's 394 employees feared that their fate would follow the same pattern.
14. The respondent contended that it was wrong for the appellant to pay service pay on the basis of fifteen (15) days for each year worked instead of seventy (70) days' pay for each year served for retirees as dictated by clause 22 (d) of the CBA. Further, that the appellant paid fifteen (15) days' pay for each year worked instead of between 30-60 days for those declared redundant or terminated as spelt out under clause 6 (c) of the CBA.
15. In the circumstances, the respondent averred that it would only be fair and proper that the alleged notice of 12<sup>th</sup> August 2020 be nullified and treated as unlawful and improper and any action arising therefrom declared an unlawful.
16. The respondent therefore sought for the following prayers.

“(A)

- i. Declare the notice dated 12<sup>th</sup> August 2020 as unlawful, invalid, improper, null and void.
- ii. Order the appellant to reinstate all the ten (10) employees terminated on account of redundancies by letter dated 28<sup>th</sup> August 2020 and five (5) employees retired by letter of even date.
- iii. Order the appellant to pay all the wages and allowances which the said terminated/retired employees would have earned had their services not been unlawfully terminated.
- iv. Award twelve (12) months gross wages being compensation for wrongful/unlawful termination.
- v. Costs be granted to the respondents.

(B).

- i. Where the court upholds the redundancies, the affected employees be paid for appropriate notice and severance (service) pay as per clause 6 and 23 of the parties Collective Bargaining Agreement (CBA);
- ii. Any other benefit due and owing to the affected employees.
- iii. The retired employees be paid in accordance with 6 and 23 of parties CBA.
- iv. Award twelve (12) months gross wages by way of compensation for wrongful retirement.
- v. Costs of the suit to the respondent.

(C) The appellant to observe clauses 6, 22 and 23 in the event they intend to terminate any of the remaining employees on account of redundancy or retire any of them.”



17. The appellant filed its reply to the claim dated 4<sup>th</sup> May 2021 together with appellant's witness affidavit sworn on 16<sup>th</sup> July 2021 by Peter Nzioka Muli, Group Manager, Human Resource & Administration of the appellant's company. It was the appellant's case that as a matter of fact, the issue of termination of the Recognition Agreement was ripe before the National Labour Board for hearing and determination.
18. The appellant stated that the requisite notice was issued in accordance with section 40 of the EA. Further, that it does not recognize the respondent and the attendant CBA and so it was not obligated to inform the respondent of any issues relating to its employment and further, that section 40 of the EA does not provide for any deliberations with the union upon issuance of the redundancy notice to the respondent's union and/or employees.
19. It was further stated that Bounty Limited is a different entity and thus the appellant could not make averments on its behalf. In addition, that the CBA did not bar the appellant carrying out redundancy exercise where it deemed necessary for its financial stability.
20. Lastly, the appellant reiterated that the redundancy and the retirement was procedural and in accordance with the law and therefore prayed that the court do dismiss the respondent's claim with costs and order any other relief that it may deem fit.
21. On 19<sup>th</sup> May 2021 the parties agreed to have the matter proceed by way of witness affidavits and written submissions.
22. By a judgment dated 19<sup>th</sup> January 2022, the trial judge found that the notice of 12<sup>th</sup> August 2020 and that of 28<sup>th</sup> August 2020 did not comply with either the CBA or section 40 of the EA in respect of the redundancy or the CBA in respect of retirement. That specifically, no notice was issued to any of the employees since the notice on the notice board did not refer to any employee, neither was it issued to any employee individually. Further, that there was no notification to the Union in terms of section 40(1) (a) and (b) of the EA.
23. The trial court noted that the appellant did not deny that it did not pay notice, severance pay and retirement benefits as provided for in the CBA; that it did not submit the tabulation of terminal dues to court to verify if payment was in accordance with the law; and, that the CBA was signed by the parties and registered in court. That further, it did not demonstrate the criteria for selection for redundancy.
24. For the retirements, the learned judge observed that the appellant did not demonstrate that the selected employees had attained retirement age as per the CBA, nor did it comply with the requirements for early retirement. Further, that the COVID-19 protocols cited by the appellant as the basis for redundancy did not provide for either redundancy or retirement of employees but only for safe working conditions to minimize exposure at the workshop.
25. With the foregoing, the learned trial judge held that it was evident that both the redundancies and the retirements declared by the appellant amounted to unfair termination of employment of all the affected employees for failure to comply with the statutory and contractual CBA provisions. The learned Judge declared both the redundancies and the retirements unfair. She further found reinstatement was not a viable option noting the hostile attitude by the appellant.
26. In the upshot the learned trial court issued the following orders.
  - “ 1. That for the employees declared redundant be and are hereby awarded the following:-
    - i. Salary up to date of leaving employment being 31<sup>st</sup> August 2020.



- ii. Pay in lieu of notification of intended redundancy being one month's gross salary as per section 40(1) (a) of the Employment Act.
  - iii. Pay in lieu of notice as per section 23 (c) as read with clause 6 of the CBA.
  - iv. Severance pay according to clause 23 (d) as read with clause 6 of the CBA.
  - v. Any leave due and not taken.
  - vi. Compensation equivalent to 10months' salary.
2. That for employees retired by the appellant, be and are awarded the following:-
    - i. Salary up to date of leaving employment being 31<sup>st</sup> August 2020.
    - ii. Pay in lieu of notice of 45 days as per clause 22 (1) of CBA.
    - iii. 70 days service pay per completed year of service as per clause 22 (d) of CBA.
    - iv. Kshs.27,000/- lump sum as per clause 22 (f) of the CBA.
    - v. Any leave due and not taken.
    - vi. Compensation equivalent to 10months' salary.
  3. That any payment in relation to any of the above heads already made to the employees shall be deducted from the amount payable.
  4. That interest shall accrue from the date of filing suit for all items except compensation which will accrue interest from date of judgment.
  5. That the respondent is awarded costs of this suit.”

27. Aggrieved and dissatisfied, the appellant preferred an appeal to this Court. In the memorandum of appeal dated 7<sup>th</sup> February 2022, the appellant faults the learned judge as erring in law and fact on eleven (11) grounds. We shall get back to these grounds later on in this judgment.

28. The appellant proposes that this Court allows the appeal and the decision of the ELRC be set aside and/or reversed; the Court issues an order of dismissal of the respondent's statement of claim dated 3<sup>rd</sup> September 2020; and the respondents to pay the costs of this appeal.

29. We heard this appeal through the virtual Go To platform of this Court on the 9<sup>th</sup> July, 2024. Present for the appellant were learned counsel Mr. Ogembo and Mr. Chadianya. For the respondent was learned counsel Mr. Nyumba. Both the appellant and the respondent filed their written submissions dated 2<sup>nd</sup> August 2022 and 12<sup>th</sup> April 2023 respectively. They briefly highlighted them before us, which we have considered.

30. This being a first appeal, we are mandated to reconsider the evidence adduced before the trial court, subject it to a fresh analysis, examination and evaluation, and draw our own conclusions. In Kenya



Ports Authority vs. Kuston (Kenya) Limited (2009) 2EA 212 the court espoused that mandate as follows:

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

See *Selle vs. Associated Motor Boat Company Ltd* [1968] EA 123 and also *Abok James Odera t/a A. J. Odera & Associates vs. John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR.

31. We note that the parties agreed to rely on their filed witness statements without calling the witnesses, and their written submissions.
32. We are mindful that we will only depart from the findings of the trial court if they are not based on the evidence on record; or where the court is shown to have acted on wrong principles of law as held in *Jabane vs. Olenja* [1986] KLR 661; or if its discretion was exercised injudiciously as held in *Mbogo & Another vs. Shah* [1968] E.A.
33. The appellant preferred an appeal to this Court, and relies on the 11 grounds in its memorandum of appeal dated 7<sup>th</sup> February 2022. We are faced with a memorandum of appeal that does not comply with rule 88 of this Court’s Rules. That rule demands that a memorandum of appeal must set forth concisely, without argument or narrative, the grounds upon which a judgment is impugned. What we have before us are some 11 grounds of appeal (even though they are more in number, considering for instance ground 8 has three sub- grounds in it) that lack focus and are repetitively tedious. Rule 88 provides:

“88. Contents of memorandum of appeal

1. A memorandum of appeal shall concisely set forth under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying -
  - a. the points which are alleged to have been wrongly decided; and
  - b. the nature of the order which it is proposed to ask the Court to make.
2. The grounds of objection shall be numbered consecutively.”

34. In *Nasri Ibrahim vs. IEBC & 2 Others* [2018] eKLR and *Kenya Ports Authority vs. Threeways Shipping Services (K) Limited* [2019] eKLR this Court was emphatic that a memorandum of appeal should not be argumentative, repetitive or verbose. In *William Koross vs Hezekiah Kiptoo Kimue & 4 Others, Civil Appeal No. 223 of 2013*, this Court stated:

“We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better.”



35. The defect in form in the manner in which the memorandum of appeal filed in this appeal was drafted/ crafted is not fatal. We have summarized the grounds in the memorandum of appeal as below. The appellant faults the learned trial Judge and contends that she erred in law and fact in:
1. making a finding that the retirement of the respondents amounted to unfair termination of employment;
  2. making a finding that the appellant failed to comply with the requirements for early retirement;
  3. awarding the respondent's duly retired compensation of the equivalent of 10 months' salary; and pay in lieu of notice of 45 day;
  4. awarding the respondents duly declared redundant compensation equivalent to 10 months' salary when the said relief was neither prayed for nor pleaded; and awarding severance pay which was not provided for under the CBA;
  5. failing to find proof of existence of genuine reason for the declaration of redundancy and evidence of compliance with the procedural steps as by law required;
  6. failing to compute the actual decretal sum payable to each and individual grievant;
  7. applying the contents of the CBA, failing to find that there existed a genuine dispute as regards the contents, legitimacy and effect of it; and,
  8. shifting the burden of proof to the appellant.
36. We have carefully considered the evidence that was adduced before the trial court, the submissions relied upon as filed by the parties, as well as their list and bundle of authorities, and the memorandum of appeal. We find that the issues that fall for our determination can be divided into two; those that touch on the employees that were retired, and those that touch on the employees that were declared redundant. However, there are three issues that must first be determined as they are foundational and will determine the law, contract and/or the CBA applicable to the case at hand.
37. The foundational issues for our determination are:
- A.
- (i). Whether the Kenya Union of Commercial Food & Allied Workers and the Collective Bargaining Agreements were valid and binding;
  - (ii)
    - (a) Whether the notices dated 12th August 2020 and 28th August 2020 issued by the appellant were valid as against those 5 grievants that were retired and the 10 grievants declared redundant;
  - ii.
    - (b) Whether the appellant had a valid reason to terminate the grievants.
  - iii. Whether the learned judge erred in law and fact in failing to compute the actual decretal sum payable to each and individual grievant.
- B. Those retired:
- (I) Whether the award of the equivalent of 10 months' salary and the award of 45 days in lieu of notice were payable to the 5 grievants that were retired;



C. Those declared redundant

- i. Whether the grievants declared redundant were entitled to severance pay; and to compensation equivalent to 10 months' salary, and whether the said relief was prayed for or pleaded.

**A (i). Whether the Kenya Union of Commercial Food & Allied Workers and the Collective Bargaining Agreements were valid and binding.**

38. The appellant contended that it did not recognize the respondent and the CBA and for that reason it contended it had no obligation to issue the respondent with the notice dated 12<sup>th</sup> August 2020. Before the trial court, the appellant submitted that the CBA between the parties had been constructively vitiated by the respondent through its continuous neglect and violation. It also urged that the issue of termination of the Recognition Agreement was ripe before the National Labour Board for hearing and determination. The respondent has on the other hand posited that they have a valid Recognition Agreement pursuant to which parties negotiated several CBAs, the last one being effective from 1<sup>st</sup> May, 2015 for two years, and was still in force pending review at the time the suit was filed.

39. The learned trial Judge considered the issue of validity of the CBA. She noted that the appellant had posited that it had been vitiated by the conduct of the respondent through continuous neglect. The learned Judge found that the appellant did not substantiate its statement, neither was any evidence adduced of any violations and neglect. The learned Judge delivered herself thus:

“The Respondent has however not given the particulars of the alleged violations of the CBA by the Claimant. This notwithstanding, a CBA is a document that is provided for by law. It cannot be vitiated constructively. It cannot even be terminated as the terms of a CBA once registered by the Court becomes subsumed into the terms of employment of an employee...

The CBA between the parties is therefore valid and binding upon the Respondent. The letter dated 22<sup>nd</sup> June 2017 which expressed the intention of the Respondent to terminate the Recognition Agreement did not therefore have any effect on the CBA.”

40. Section 59 of the *Labour Relations Act* spells out the elements and effect of a valid CBA. Under section 4 it provides that the CBA shall be in writing and shall be signed by the CEO of the employer and the General Secretary of the Trade Union that is a party to the CBA. Under section 5 such CBA is enforceable and implemented upon registration with the Industrial Court and is enforceable from the date agreed upon by the parties.

41. We note that the respondent admitted that the CBA was ripe for review, but that it was still valid. The appellant did not deny that the CBA in question was duly signed by the requisite signatories, nor was it claimed that it was not registered. Their contention was that the respondent vitiated it due to neglect and violation. Section 107 of the *Evidence Act* provides:

107. Burden of proof.

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

42. The burden of proof lay with the appellant to prove that the CBA was vitiated for the reasons claimed. We have gone through the record of the trial court and are satisfied that no evidence was adduced by the appellant to support its claims that the CBA had any issues, or that the respondent committed any act capable of vitiating it. The only evidence before the trial court was that it was pending review by letter of the appellant to the National Labour Board of June 2017. That process was incomplete by the time this claim was filed by the respondent. We find that the CBA was valid and binding to the parties.

**A (ii) Whether the notices dated 12<sup>th</sup> August 2020 and 28<sup>th</sup> August 2020 issued by the appellant were valid as against those 5 grievants that were retired and the 10 grievants declared redundant.**

**ii. (b) Whether the appellant had a valid reason to terminate the grievants.**

43. There is no dispute that two notices were issued by the appellant. The first notice was dated 12<sup>th</sup> August 2020 and was posted on the main gate of the Athi River factory; and the second one dated 28<sup>th</sup> August 2020 that was sent to individual employees. The former notice was a general notice not addressed to anyone. The issue is whether these notices complied with the law and therefore valid.

44. The learned trial Judge after considering the notice dated 12<sup>th</sup> August 2020 opined:

“56. Both notices do not comply with either the CBA or Section 40 of the Employment Act in respect of the redundancy or the CBA in respect of retirement. Specifically, no notice was issued to any of the employees. The notice on the notice board did not refer to any employee and no notice was issued to any employee individually...”

45. Dealing first with the notice affecting the 10 grievants declared redundant, section 40 of the EA is to the point. It provides two kinds of redundancy notifications, depending on whether the employee is a member of a trade union or not. Where he is a member of a union, service will be to the union and the labour officer in charge of the area where he is employed. Where he is not a member of a union, service is to the employee and the requisite labour office. See *Thomas De La Rue (K) Limited vs. David Opondo Omutelema* [2013] eKLR. It states thus:

40. Termination on account of redundancy

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;” (Emphasis added)

46. The section gives the condition precedent before an employer can terminate employment of an employee on account of redundancy. The appellant’s position is that it complied with this law by



posting the notice on the Athi River factory gate and subsequently by writing to the individual employees affected. The appellant was clear that as it did not recognize the respondent it gave it no notice. As we have stated, since the CBA was pending review initiated by the appellant through the National Labour Board, the CBA was still valid until such time as the process of review was complete. That means therefore that the appellant was bound by the Recognition Agreement and by section 40 (1)(a) of the EA. The notice of 12<sup>th</sup> August 2020 should have been served upon the respondent as well as the Labour office in charge of the area where the employee is employed.

47. The notice to the Labour office was served upon the Labour office in Nairobi, and in general terms stated that the employees affected by the notice were based in the appellant's factories in Kisumu, Eldoret, Nanyuki and Nakuru. That service did not meet the requirement of section 40 (1)(a), service having not been effected upon the labour officer in charge of the area where the affected employees were employed, and was invalid.
48. There is a second area of inquiry whether the notices gave the required notice period. Section 40 (1)(a) provides that the notice 'of the intended redundancy' should be served 'not less than a month prior to the date of the intended date of termination on account of redundancy...' That means that in order to meet the requirement of this law, the letter of 12<sup>th</sup> August should have been served upon the respondent and the relevant Labour Office, and would then have been followed by a notice served on the individual employee at least one month prior to the date of the intended redundancy. The letter of 28<sup>th</sup> August received on 31<sup>st</sup> August gave the 10 grievants notice to quit employment by 1<sup>st</sup> September 2020, which in effect was a 3 days quit notice. In that regard, we find that there was no compliance with the law and the CBA and that the two impugned notices were not valid.
49. The notice was invalid for reason it was not served upon the parties as prescribed in the law, section 40 of the EA. Further it was invalid for failure to give the requisite notice period. Above all, it was invalid for reason, having flouted the law in terms of service and notice period, meant that the appellant failed to abide by the due process of the law.
50. In respect of the 5 retired grievants, the relevant provision covering retirement was Clause 22 of the CBA. Under sub- clause (a) the normal retirement age is 60 years. While under sub-clause (b) an employee may apply to retire voluntarily at the age of 50 years.
51. What we have stated in regard to the notice of 12<sup>th</sup> August 2020 applies to the 5 retired grievants. The retired grievants, apart from the general notice posted on the factory gate dated 12<sup>th</sup> August 2020, were individually served the retirement notice dated 28<sup>th</sup> August 2020. Regarding notice, the CBA under Clause 22 (e) provides:
  - “(e) an employee may be retired or may retire voluntarily or on medical grounds; by receiving from the employer or he/she giving forty-five (45) days' notice in writing.”
52. The CBA was clear that where an employer initiated the retirement, he initiated it by giving the employee 45 days' notice in writing of the intended retirement. The notice given to the individual employees did not comply with the CBA Clause 22 (e), having failed to give the 5 grievants 45 days' notice before the date of retirement. It was therefore invalid for that additional reason.
53. As to whether the appellant had a valid reason to terminate the grievants, the appellant has challenged the finding by the learned trial Judge that the termination of employment on account of redundancy and retirement were unfair. The learned Judge went further and found that the reason given, of the covid-19 guidelines did not advocate for retirement or redundancy of employees. The respondent



relied on the case of Kenya Airways Limited vs. Aviation & Allied Workers Union of Kenya & 3 Others [2014] eKLR where the court was of the view that as long as the employer believes that there is a genuine redundancy situation, it is not for the Court or the union to question the employer's business decision.

54. Both section 2 of the *Employment Act* and section 2 of the *Labour Relations Act* define redundancy as:

“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.”

55. Section 40(1) of the EA is merely procedural by its tenor. It has to be read together with sections 43, 45 and section 47(5) of EA. From the four sections it is clear that an employer has to prove:

- i. the reasons or reasons for termination.
- ii. that reason for termination is valid, and that
- iii. the reason for termination is fair reason based on the operational requirements of the employer, and
- iv. that the employment was terminated in accordance with fair procedure.

56. In the case cited by the appellant of Kenya Airways Limited vs. Aviation and Allied Workers Union of Kenya and 3 Others, (supra), this Court (differently constituted) pronounced itself as follows, per Githinji, JA:

“Thus, redundancy is a legitimate ground for terminating a contract of employment provided there is a valid and fair reason based on operational requirements of the employer and the termination is in accordance with a fair procedure. As Section 43(2) provides, the test of what is fair reason is subjective. The phrase “based on operational requirements of the employer” must be construed in the context of the statutory definition of redundancy.

What the phrase means, in my view, is that while there be underlying causes leading to a time redundancy situation such as reorganization, the employer must nevertheless show that the termination is attributable to redundancy – that is that the services of the employee has been rendered superfluous or that redundancy has resulted in abolition of office, job or loss of employment.”

57. In *Aoraki Corporations Limited vs. Collin Keith McGavin*; *CA 2 of 1997* [1998] 2 NZLR 278, the Court of Appeal of New Zealand stated:

“... It is convenient in other termination cases, and essential in redundancy cases, to consider whether the dismissal was substantively justified. Thus if dismissal is said to be for a cause it may be substantively unjustified in the sense of a cause not being shown or being subject to significant procedural irregularity as to cast doubt upon the outcome. ...”

58. We agree that an employer has a right to terminate employees where in its discretion it is justified due to difficulties it may be encountering, with a rider that the termination must be carried out procedurally and in compliance with the law and the CBA applicable. The reasons advanced by the appellant for the



decision to declare some employees redundant and to retire others was contained in the notice dated 12<sup>th</sup> August 2020. The notice read in part thus:

“We wish to inform that owing to the prevailing conditions of covid-19 in the country which has drastically affected our operations resulting to low sales, the management is planning to reorganize our operations. As a result, services of some of our employees will no longer be required. Likewise, some of the employees who have attained retirement age will be released from the company. This is also as per government covid-19 guidelines that employees over 58 years should stay at home for their own health and safety.

The management will organize to pay all concerned the required lieu of notice and all other dues entitlement before being released from the company.

....

Signed: P.S. Mann

G.M. Administration

59. The reasons advanced for the termination are clear. We can take judicial notice that the entire economy of our country was affected by the pandemic, and many operations were downsized, while others faced closure. The reasons given by the appellant to terminate were valid. However, the termination was not carried out in accordance with procedural and fair practice. The required notices and the required notice period were not met. We note that the moment the respondent got to know about the notice of 12<sup>th</sup> August on the 17<sup>th</sup> August, it wrote to the appellant requesting for a meeting and also reminding it to be guided by the law and the CBA. Both requests were ignored.
60. The procedure used to identify the employees to be terminated was not demonstrated by the appellant in terms of section 40 (1)(c) that requires the employer to have 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. For those retired, Clause 6 of the CBA prescribes that normal retirement is 60 years; however, the appellant did not show that those retired had attained 60 years. The reasons for the terminations though valid, the appellant went about effecting them in a manner that demonstrated significant procedural irregularity.
61. We do not agree with the learned trial Judge that covid-19 pandemic was not a valid reason to justify terminations; however, we agree with her that the manner in which the termination was implemented was procedurally irregular, was in some instances opaque, and did not therefore comply with the law.
  - i. Whether the learned judge erred in law and fact in failing to compute the actual decretal sum payable to each and individual grievant.
62. The appellant, in ground 9 of its grounds of appeal challenged the trial Judge of failure to compute the decretal sum payable to each individual grievant. We are aware that the learned Judge gave directions to the parties following which the learned Judge gave judgment in the same matter on the 12<sup>th</sup> April 2024, which is reported in the Kenya Law Reports. The judgment read in part as follows:
  - “2. The parties disagreed on the tabulation of the said judgment and were directed to each file their tabulation together with submissions in support of the same. The Claimant’s submissions are 6<sup>th</sup> (sic) dated April 2023 while the Respondent’s submissions are dated June, 2023.



23. From the foregoing it is evident that the tabulation by the Claimant is the correct one. The Court notes that the only points of disagreement were on severance pay and notice pay. The parties were in agreement on all other items of the tabulation. The court thus awards each of the Grievants as herebelow. The tabulation is as set out in table A and B attached.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 12<sup>TH</sup> DAY OF APRIL 2024.”

63. It is our view that this ground of appeal is moot for reason the learned Judge entered judgment in that regard after directing the parties to file their opinion on the tabulation of amounts due to each individual grievant in her judgment dated 12<sup>th</sup> April 2024.

## **B. Those retired:**

### **(I)**

Whether the award of the equivalent of 10 months' salary and the award of 45 days in lieu of notice were payable to the 5 grievants that were retired.

64. The appellant has challenged the trial court's judgment awarding the 5 grievants retired by the appellant an equivalent of the 10 months' salary in compensation and 45 days in lieu of notice. Clause 22 of the CBA spells out the entitlement of a retired employee to include:

- d. An employee who retires or is retired including medical retirement he/she will be entitled to 70 days of service pay for each completed year of service.
- e. An employee may be retired or may retire voluntarily or on medical grounds.
- f. by receiving from the employer or he/she giving forty five (45) days' notice in writing.
- g. An employee who retires or is retired will be given Kshs.27,000.00 (twenty seven thousand shillings only) lumpsum by the management.

65. The learned Judge awarded the retirees as follows:

“For employees retired by the Respondent, I award the following: -

- i. Salary up to date of leaving employment being 31st August 2020.
- ii. Pay lieu of notice of 45 days as per Clause 22(f) of CBA.
- iii. 70 days service pay per completed year of service as per Clause 22(d) of CBA.
- iv. Kshs.27,000/- lumpsum as per Clause 22(f) of the CBA.
- v. Any leave due and not taken.
- vi. Compensation equivalent to 10 months' salary.”

66. The appellant did not give the retired employees 45 days' notice and in lieu of that it was correct for the learned Judge to order payment equivalent to 45 days' salary. For the 10 months compensation, the learned Judge did not show on what basis she came up with the 10 months. In our view, as the underlying reason for the termination was the covid-19 pandemic which affected the entire economy



including the appellant, 10 months' compensation was on the higher side. We think that 4 months' compensation is sufficient.

## **B. Those declared redundant**

### **i. Whether the grievants declared redundant were entitled to severance pay; and to compensation equivalent to 10 months' salary when the said relief was not prayed for nor pleaded.**

67. We set out at the beginning of this judgement the orders sought by the respondent. For ease of reference we repeat here the relevant portion:

“B.

- vi. Where the court upholds the redundancies, the affected employees be paid for appropriate notice and severance (service) pay as per clause 6 and 23 of the parties Collective Bargaining Agreement (CBA);
- vii. Any other benefit due and owing to the affected employees.
- viii. The retired employees be paid in accordance with 6 and 23 of parties CBA.
- ix. Award twelve (12) months gross wages by way of compensation for wrongful retirement.
- x. Costs of the suit to the respondent...”

68. The learned Judge entered judgement in response to the above prayers and awarded as follows:

“64. For the employees declared redundant I award the following:

- i. Salary up to date of leaving employment being 31<sup>st</sup> August 2020.
- ii. Pay lieu of notification of intended redundancy being one month's gross salary as per Section 40(1)(a) of the *Employment Act*.
- iii. Pay in lieu of notice as per clause 23(c) as read with Clause 6 of the CBA.
- iv. Severance pay according to Clause 23(d) as read with Clause 6 of the CBA.
- v. Any leave due and not taken.
- vi. Compensation equivalent to 10 months' salary.”

69. The appellant is aggrieved because the court awarded severance pay and the 10 months' compensation. As for the 10 months' compensation, the same observation we made in regard to the same payment to the retired employees applies here. In that regard, we agree there was no basis shown why the court decided to award 10 months in compensation. The appellant suffered fate as did the rest of the economy in the country due to the covid-19 pandemic. Therefore we find 4 months sufficient to compensate the employees declared redundant under this head.



70. For the severance pay, the appellant claims that it was not pleaded and so was not awardable. That is not tenable as under prayer B (iv) the respondent sought: Where the court upholds the redundancies, the affected employees be paid for appropriate notice and severance (service) pay as per clause 6 and 23 of the parties Collective Bargaining Agreement (CBA).

71. The respondent claimed under the CBA ‘severance (service)’ pay, and invoked Clause 6 (c) and 23 thereunder. The CBA clause 23 (d) provides that the redundant employee will be entitled to a service pay as provided under clause 6 (c) of this CBA. Clause 6 is headed termination of service. Under sub-clause (c) it provides:

“The affected employee will be entitled to service pay of:

- i. 1 year - 4 years (30 days)
- ii. 5 years to 8 years (50 days)
- iii. 9 years and above (60 days)”

72. We find that the parties in their negotiated CBA provided for payment of service pay for employees declared redundant. It is not open for the appellant at this late stage to challenge the terms of the CBA agreed upon by the parties, by trying to make distinctions of terminologies. The CBA was a negotiated contract, and having been signed by all the parties is binding to all.

In *National Bank of Kenya Limited vs. Pipe Plastic Samkolit (K) Ltd* [2002] 2 EA 503 [2011] eKLR, this Court stated:

“A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded or proved.”

See also *Pius Kimaiyo Langat vs. Co-operative Bank of Kenya Limited* [2017] eKLR.

73. All the respondent did was to invoke the CBA for payment of service pay as prescribed under the CBA. We find that it was payable as per the CBA. The learned Judge was correct to allow that claim. The case relied on by the appellant, *Peter Wambua Nzioka vs. AsL Limited* [2017] eKLR, does not apply to the circumstances of this case, as the learned Judge in that case was making distinctions of terms used under section 35 and section 40 of the [Employment Act](#).

74. Having carefully considered this appeal, we find that the learned trial Judge did not err in the decision she made, subject to our finding on the decision to award 10 (ten) months’ compensation to both the employees declared redundant and those retired. We have come to the conclusion that the appeal by the appellant succeeds in part as follows:

1. That the award of Compensation equivalent to 10 months’ salary for the employees rendered redundant and those retired be and is hereby set aside and in substitution thereof, compensation equivalent to four months is ordered.
2. The rest of the orders by the learned trial Judge are confirmed and up held.
3. The appellant will meet half the costs of appeal of the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**B. K. MUSINGA (P.)**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

Deputy Registrar

