



Mijengo Investments Limited v Kemunto (Employment and Labour Relations Appeal E040 of 2024) [2025] KEELRC 387 (KLR) (14 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 387 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS APPEAL E040 OF 2024
AN MWAURE, J
FEBRUARY 14, 2025**

BETWEEN

MIJENGO INVESTMENTS LIMITED APPELLANT

AND

ROSE KEMUNTO RESPONDENT

(Being an Appeal from the Judgment of Honourable Ruth Kefa Chebesio, Principal Magistrate, delivered on 19th December, 2023 in Nakuru MCELR Case Number E217 of 2022)

JUDGMENT

1. The Appellant being dissatisfied with the Judgment of Honourable Ruth Kefa Chebesio, Principal Magistrate, filed this appeal vide a Memorandum of Appeal dated 29th May 2024.
2. The Appellant came up with 15 grounds, and this Honourable Court has condensed the grounds to 5 as follows:
 - i. That the learned trial magistrate erred in law and fact in finding that the Respondent's termination was unfair, unlawful and unprocedural.
 - ii. That the learned magistrate erred in law and fact by holding that there was consent to terminate the employment on mutually agreed terms.
 - iii. That the learned trial magistrate erred in law and fact by inadequately evaluating the evidence on record, leading to unjustifiable adverse findings contrary to the weight of the evidence presented.
 - iv. That the learned magistrate erred in law and in fact in failing the Respondent had paid for leave days.



- v. That the learned magistrate erred in law and in fact in awarding underpayment and terminal dues that are unjustified, excessive, disproportionate and exorbitant in the circumstances.
3. The Appellant prays that:
 - a. The appeal be allowed;
 - b. The judgment of Honourable Ruth Kefa Chebesio be set aside and substituted with an order of this court dismissing the suit.
4. Both parties canvassed the appeal by way of written submissions.

Appellant's submissions

5. The Appellant submitted that due process followed was fair in terminating the Respondent's employment according to section 40 of the *Employment Act* by issuing a notice to the County labour office, general notice of termination to the Respondent and other employees together with the issuance of individual notices to affected employees.
6. The Appellant also submitted that the letter dated 7th July 2022 contained the reasons for termination on the grounds of redundancy, citing harsh economic times and environmental constraints due to the COVID-19 pandemic therefore, it could not sustain paying the Respondent. The Appellant relied on the case of Francis Maina Kamau V Lee Construction (2014) eKLR, where the court held that if the employer fails to observe the procedure set out in section 40 of the *Employment Act*, it amounts to unfair termination according to Section 45 of the *Employment Act*.
7. In Margaret Mumbi Mwago V Intrahealth International (2017) eKLR, the court cited the case of Bernard Misawo Obora V Coca Cola Juices Kenya Limited [2015] eKLR where the court held that a notice to the Labour officer is meant to elicit advice to the employer on the modalities to be employed in the redundancy process. This is an important process which not only ensures proper preparation for the affected employees but also acts as a control measure to curb unlawful termination clothed as redundancy.
8. In Kenya Airways Limited V Aviation Allied Workers Union of Kenya & 3 Others (2014) eKLR where Maraga JA (as he then was) opined as follows:

“I disagree with Mr. Mwenesi that the Appellant's letter of 1st August 2012 did not constitute the notice envisaged by Section 40(1)(a) of the *Employment Act*... 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.”
9. The Appellant submitted that the oral evidence was submitted before the trial court supporting the employees, including the Respondent, attending the meetings in April, May and June on the redundancy due to financial constraints faced, which led to the negotiated settlement executed by the Respondent on 7th July 2022. The Appellant relied on Section 62 of the *Evidence Act*, which provides that oral evidence should be directed and corroborated. In Republic V E.O.O & Another [2016] eKLR, the court relied on Sections 62 and 63 of the *Evidence Act*, where direct evidence was given save in the exceptions provided under Section 33 of the *Evidence Act*.



10. The Appellant submitted that the parties agreed to terminate the employment on mutually agreed terms as it is binding on the parties in the absence of fraud, mistake and misrepresentation, and therefore, parties cannot go against the consent terms.
11. The Appellant relied on numerous authorities including Fredrick Kariuki Kamau V Bank of India [2015] eKLR, Pauline Wangeci Warui V Safaricom Limited [2020] eKLR, National Union of Metalworkers of South Africa obo members and another V South African Airways (SOC) Limited (In Business Rescue) and others (J424/20)[2020] ZALCJHB 94, Namibia Wildlife Resorts Ltd V Government Institutions Fund and others (A323/2010)[2014] NAHCMD 370, William Barasa Obutiti V Mumias Sugar Company Limited (2006) eKLR, Godfrey Allan Tolo V Tobias O. Otieno & Another [2022] eKLR, Mr. Matthew Riley V Directline Insurance Group PLC 2023 EAT 118, and James Njuguna Wainaina & Another V East African Building Society HCCC No. 787 of 2003.
12. The Appellant submitted that the trial magistrate disregarded the evidence of the letter for notice for the termination addressed to County Labour office, the letter to the Respondent and cheque dated 7th July 2022 executed by the Respondent as a valid agreement for termination of employment, meetings on the termination held between the Respondent, Appellant and other employees. The Appellant relied on section 64 of the Evidence Act, which provides that all facts, except the contents of documents, may be proved by oral evidence.
13. The Appellant also relied on Section 47(5) of the Employment Act which provides as follows:

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer”
14. The Appellant relied on the case of Kenya Revenue Authority V Reuvel Waithaka Gitahi & 2 others [2019] eKLR where the Court of Appeal stated that the standard of proof is determined by a balance of probabilities rather than beyond a reasonable doubt. Employers need to establish the reasons they genuinely believed existed, that led to the termination of the employee’s services. This assessment is partly subjective.
15. The Appellant submitted that the trial court erred in awarding the Respondent damages for unfair termination, underpayments, overtime, public holidays, severance pay and one month’s salary in lieu of notice. The Appellant submitted that this Honourable Court should set aside the awards and the Respondent failed to prove her case as whoever alleges must prove as provided under Sections 107, 108 and 109 of the Evidence Act. The Appellant also relied on the following authorities, including James Kyama V Muthaiga Golf Club (2022) eKLR, Rogoli Ole Manadiegi V General Cargo Services Limited [2016] eKLR and Patrick Lumumba Kimuyu V Prime Fuels (K) Limited [2018] eKLR in support of that propositions.
16. The Appellant urges this Honourable Court to set aside the Judgment of the trial magistrate and allow the appeal as prayed.

Respondent’s submissions

17. The Respondent submitted that the Appellant failed to prove that there were no minutes showing meetings were held to discuss the redundancy. Also, the County Labour office was notified on 6th July 2022, just one day before the redundancy took effect, and the office acknowledged receipt on the same



day. The Respondent contended that if the redundancy had been anticipated earlier, the Appellant would not have filed the notice to take effect a day before.

18. The Respondent relied on the following authorities, including *Kudbeiha V the Aga Khan University Hospital Cause No. 815 of 2015*, Addah Adhiambo Obiro V Ard Inc (2014) eKLR, Peter Wanjohi Muthee V Bayer East Africa Limited & Bayer Environmental Science SA [2016] KEELRC 1 (KLR), Gerrishom Mukhutusi Obayo V DSV Air and Sea Limited (2018) eKLR and Margaret Mumbi Mwago V Intrahealth International (2017) eKLR emphasized the procedure set out under section 40 of the *Employment Act* by issuing notices either to the individuals or union, labour office and provision for the employer to consider seniority of the employee, their ability and skills, and paying off the dues to the employees.
19. The Respondent submitted that she did not enter into a mutual agreement with the Appellant to declare her job redundant, and the issue was not raised before the trial court and therefore, it is an afterthought brought in mala fides. The Respondent submitted that there is no evidence of the mutual agreement to terminate the employment, and parties are bound to their pleadings.
20. The Respondent relied on the cases of Daniel Otieno Migore V South Nyanza Sugar Co. Ltd [2018] eKLR and Independent Electoral and Boundaries Commission & Anor V Stephen Mutinda Mule & 3 Others (2014) eKLR where court emphasized that parties are bound by their pleadings.
21. The Respondent submitted that she was not given the opportunity to discuss or negotiate her redundancy, as the notice was issued on 7th July 2022, after working hours, leaving no time for discussion. The Respondent argued that she was called after hours to collect her letter and cheque at the office and was informed that her services were no longer needed.
22. The Respondent submitted that the Appellant contravened Sections 40(1), (b) and (c) of the *Employment Act* and prays for an award of 12 months' compensation for the unlawful and unfair termination under redundancy as provided under Section 49(c) of the *Employment Act* amounting to Kshs. 209,782.20/=.
23. The Respondent submitted that she is entitled to Kshs. 338,667.90/= for underpayment as provided under Government legal notice no. 2 of 1st May 2018 and legal notice no. 125 of 1st May 2022. The Respondent also submitted that she is entitled to one month's pay in lieu of notice amounting to Kshs.17,481.90/=. The Respondent submitted that she is entitled to overtime payment and public holidays amounting to Kshs.19,199.96 and Kshs.52,514.80/= respectively. The Respondent submitted that she is entitled to unpaid leave and severance/service pay amounting to Kshs.16,800/= and Kshs.10,085/= respectively.
24. The Respondent urged this Honourable Court to dismiss the appeal and with costs.

Analysis and determination

25. As a first appellate court whose mandate is to re-evaluate the evidence before the trial court as well as the judgment and arrive at an independent judgment on whether or not to allow the appeal as provided in *Selle & Another V Associated Motor Boat Co. Ltd.& Others* (1968) EA 123. Which states as follow:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow



the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

26. The court has considered the record of appeal as well as the submissions by both parties, the issues for determination are as follows:

- i. Whether the Respondent followed the procedure of redundancy as set out in Section 40 of the *Employment Act*.
- ii. Whether there is a mutual agreement in relation to the termination of the Respondent’s employment.
- iii. If (ii) above is in the affirmative, whether the Respondent is entitled to the reliefs sought.

27. Section 40(1) of the *Employment Act* provides as follows:

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

- a. where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;
- b. where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;
- c. the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;
- d. where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;
- e. the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;
- f. the employer has paid an employee declared redundant not less than one month’s notice or one month’s wages in lieu of notice; and
- g. the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.”

28. The instant case the court find some of the above provisions have not been fulfilled.

29. In *Freight In Time Limited V Rosebell Wambui Munene* [2018] KECA 148 (KLR), the Court of Appeal held that the appellant did not present any evidence to justify the termination cited as restructuring of the Rwanda office. Additionally, no evidence was provided to show that the appellant followed the redundancy procedure required by Section 40 (1) (b), (c), and (g) and Section 45 of the *Employment Act*.



30. In this instant case, upon perusing the record of appeal, the court found there is no evidence to show that the Appellant had communicated to the County Labour office or union if employee was a member notifying them of the redundancy on account of the financial constraints it was facing due to the effects of the COVID-19 pandemic. This notice is supposed to be one month or more. If employee is not a member to any union he should be informed of the intended redundancy in person.
31. The appellant's letter to the respondent dated 7th July 2022 simply informed her of the termination due to Covid-19 pandemic. The termination was immediate.
32. There is also no evidence to show that there was a mutual agreement between the Appellant and Respondent to show that the employment was mutually terminated by the parties themselves as alleged by the appellant.
33. The appellant also claims they had meetings with the respondents and agreed on separation. He that alleges must prove as provided in Section 107 and 108 of the *Evidence Act*. There is no such evidence provided in court.
34. In view of the foregoing analysis this court finds the trial magistrate did not err at all in entering judgment in favour of the Respondent, as there is no proper evidence availed by the Appellant to support its case on having complied with Section 40 of the *Employment Act*.
35. In view of the foregoing, this Honourable Court finds that the appeal lacks merit, and it is therefore dismissed.
36. However the court pokes holes on some of the reliefs awarded. The following are the reliefs this court will award in place of the reliefs awarded by the trial court –
 - a. One month salary in lieu of notice - Kshs.8,000/=
 - b. Compensation for unlawful Termination at equivalent of 6 months salary - Kshs.48,000/=
 - c. There is no basis for the award of underpayment, overtime and public holidays and they all are set aside as they are no specifics.
 - d. The severance pay is enhanced to 15 days for the 6 years worked - Kshs.24,000/=Total awarded is - Kshs.80,000/=
 - e. The said amount will attract interest at 14% per annum from date of this judgment till full payment.
 - f. Respondent will be awarded costs of both the lower court proceedings and this appeal based on this award

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 14TH DAY OF FEBRUARY, 2025.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions



of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

