



REPUBLIC OF KENYA



**Deloraine Estates Limited v Shikuku (Employment and Labour Relations Appeal E020 of 2022) [2025] KEELRC 342 (KLR) (12 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 342 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E020 OF 2022  
AN MWAURE, J  
FEBRUARY 12, 2025**

**BETWEEN**

**DELORAINE ESTATES LIMITED ..... APPELLANT**

**AND**

**JOHNSON KIDIGA SHIKUKU ..... RESPONDENT**

*(Being an Appeal from the Judgment of Honourable B. Ochieng, Chief Magistrate delivered on 18th August, 2022 in Nakuru MCELR Case Number E316 of 2019)*

**JUDGMENT**

1. The Appellant being dissatisfied with the Judgment of Honourable B. Ochieng, Chief Magistrate, filed this appeal vide an amended Memorandum of Appeal dated 15<sup>th</sup> September 2022 on grounds that: -
  - i. The learned trial magistrate erred in law and fact in holding that the Respondent was coerced into drawing the resignation letter.
  - ii. The learned magistrate erred in law and fact by holding that the Respondent was declared redundant by the Appellant.
  - iii. The learned trial magistrate erred in law and fact by making unjustified inferences from discrepancies between the resignation letter and the acceptance letter and using the said inferences to conclude that the respondent was declared redundant.
  - iv. The learned magistrate erred in law and in fact in making awards for compensation for unlawful termination, one month's salary in lieu of notice, public holidays, annual leave and severance pay when there was no legal basis and evidential basis for the said award.
2. The Appellant prays that:



- a. The appeal be allowed and a declaration be made to the extent that the Respondent voluntarily resigned.
  - b. A declaration to be made to the extent that the Respondent was declared redundant by the Appellant.
  - c. A declaration be made setting aside the order awarding the Respondent a total sum of Kshs.380,426/= as compensation for unfair termination, one month's salary in lieu of notice, public holiday, annual leave and severance pay.
  - d. In the alternative to the order above in (c), this Honourable Court be pleased to substitute the award for compensation with a reasonably lower amount.
  - e. The costs of appeal be granted to the Appellant against the Respondent.
3. Both parties canvassed the appeal by way of written submission.

### **Appellant's submissions**

4. The Appellant submitted that this Honourable Court being a first appellate court needs to re-evaluate so that it can come to its own conclusion.
5. The Appellant relied on the case of China Zhongxing Construction Company Limited V Ann Akuru Sophia [2020] eKLR citing the case of Selle V Associated Motor Boat Company Ltd [1969] EA 123 where Sir Clement De Lestang. V.P stated that the appellate court must re-examine and evaluate the evidence to draw its own conclusions. However, it should remember that it did not see or hear the witnesses directly. The appellate court is not required to follow the trial judge's findings if it believes the judge overlooked important details or if the judge's impression of a witness's behavior does not match the overall evidence.
6. The Appellant argued that the trial magistrate's judgment stated that the resignation letter indicated the resignation would take effect from 1<sup>st</sup> August 2017. However, the acceptance letter showed that the resignation would be effective a week earlier, on 20<sup>th</sup> July 2017. This discrepancy, combined with the delay of over two years in resolving the claimant's dues, supports the claimant's claim that he was coerced into resigning. As a result, the trial court determined that the Claimant had been declared redundant by the Respondent.
7. The Appellant relied on Section 40 of the [Employment Act](#) which provides the procedure on 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 to an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service.

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

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

8. The Respondent submitted that there was no sufficient evidence to prove that the appellant issued any notice to the labor office regarding his redundancy thus making the declaration erroneous. Furthermore, the Respondent submitted that his supervisor informed him that due to the drought, there was no longer any work available. As a result of financial constraints, the appellant advised him that he would be called in, leading to his termination on the grounds of redundancy.

9. The Appellant submitted that the Respondent's decision to file the claim after resignation was an afterthought and the Respondent did not adduce any sufficient evidence to show he was declared redundant. The Appellant relied on section 107 of the *Evidence Act* which provides that he who alleges must prove and the same was enunciated. In the case of *Evans Otieno Nyakwana V Cleophas Bwana Ongaro* [2015] eKLR, Justice Majanja stated that:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(1) of the *Evidence Act* (Chapter 80 of the Laws of Kenya), which provides: 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...”

10. The Appellant submitted that the Respondent voluntarily resigned on his own volition. In response to the resignation letter, the Appellant expressed appreciation for the Respondent's diligence, honesty



and high level of integrity while working and informed him that his dues will be paid plus a certificate of service will be issued.

11. It is in the Appellant's submissions that there was no sufficient evidence to prove that the Respondent was coerced into drawing and signing the resignation letter as he collected his dues in 2019 approximately two years after leaving the company. Therefore, the Respondent's argument that he was coerced to signing the resignation letter does not hold water. The Respondent contended that a notice of resignation is a notice of resignation given by an employee to the employer.
12. The Appellant relied on Section 35 of the *Employment Act* which requires that an employee resigning is to issue a notice to the employer and/or pay the employer an equivalent to the salary the employee would have earned during the notice period. The Respondent also relied on the case of Nairobi ELRC No. 622 of 2017 Niraj Dharmadhikari V Professional Media Africa where the court held that in law, an employee's resignation takes effect immediately when the notice of resignation is issued or on a later date specified by the employee.
13. The Appellant urged this Honourable Court to find that the Respondent had resigned from his employment in accordance to Sections 35 and 36 of the *Employment Act*.
14. The Appellant submitted that the Respondent is not entitled to the compensation for unlawful termination, one month's salary in lieu of notice, public holidays, annual leave and severance pay as the Respondent had voluntarily resigned and therefore not declared redundant.
15. In conclusion, the Appellant urges this Honourable court to set aside the judgment and find that the Respondent had voluntarily resigned and he is not entitled to the reliefs sought.

### **Respondent's submissions**

16. The Respondent submitted that the trial court came to the conclusion that he was coerced into writing the resignation dated 16<sup>th</sup> July 2017 which was accepted by the Appellant vide a letter dated 20<sup>th</sup> July 2017. The Respondent also submitted that the resignation letter took effect on 20<sup>th</sup> July 2017 and subsequently Appellant paid his dues.
17. The Respondent submitted from the evidence adduced before the trial court, it considered the evidence and came to the conclusion that the trial court's finding that he was coerced into writing the said resignation letter was correct.
18. The Respondent defined redundancy as provides under Section 2 of the *Employment Act* 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". The Respondent reiterated Section 40 of the *Employment Act* in the preceding part of this judgment.
19. The Respondent relied on the case of Mary Nyawira Karimi V Pure Circle (K) Limited [2018] eKLR where the court held that notices under Section 40(1) of the *Employment Act* are mandatory and must last for 30 days. While the Act does not explicitly state the purpose of the notice or require consultation between employers and employees before deciding on redundancy, the court found that consultation is implied in the law. Also in Kenya Airways Limited versus Aviation and Allied Workers Union Kenya and Others [2014] eKLR the Court of Appeal held that where the redundancy is followed the employer must ensure substantive justification and procedural fairness is followed.



20. The Respondent submitted that the Appellant unfairly declared him redundant failing to follow the procedure in Section 40 of the *Employment Act*.
21. The Respondent submitted that it is trite law that the employer keeps records for its employees as provided under Section 74 of the *Employment Act*. The Respondent submitted that no documents were availed by the Appellant to prove that he was given notice of the impending redundancy, paid severance pay, did not work on holidays or attended leave.
22. The Respondent submitted that the awards given by the trial court were reasonable and therefore urged this Honourable to find that the appeal lacks merit and should be dismissed with costs.

### **Analysis and determination**

23. The court has considered the record of appeal together with the submissions by both parties, the issue for determination is whether the appeal is merited.
24. The Black's Law Dictionary 9<sup>th</sup> Edition defines resignation as follows:

“ A formal notification of relinquishing an office or position.”
25. In *Mutinda V Lavington Security Limited* [2023] KEELRC 3332 (KLR) the court held that the appellants voluntarily resigned from the respondents' employment.
26. In this instant case, the Respondent resigned vide a letter dated 16<sup>th</sup> July 2017 and the Appellant acknowledged receipt on 20<sup>th</sup> July 2017. The Appellant stated that the resignation would take effect on 20<sup>th</sup> July 2017 and undertook to pay the Respondent's final dues.
27. The Respondent, on the other hand, stated that he was coerced to draw and sign the resignation letter. This Honourable Court relies on Section 107 of the *Evidence Act* which has been reiterated in the preceding part of this judgment. In view of the foregoing, this Honourable Court finds that the Respondent voluntarily resigned from his employment or else he would have tendered evidence that he was coerced to resign from his employment.
28. The trial court came to the erroneous conclusion that the Respondent was declared redundant. In *Prideinn Hotels & Investment Limited v Madzungu* [2022] KECA 764 (KLR) the Court of Appeal cited the case of *Tobias Ongaya Auma & 5 Others -vs- Kenya Airways* (2007) eKLR where the court emphasized that employers can declare redundancy as a valid reason for terminating employment, as long as it is based on the employer's operational needs and follows a fair procedure.
29. From perusing and going through the record of appeal, there is no evidence that the claimant was terminated on account of redundancy. What is on record is the respondent's resignation letter dated 16<sup>th</sup> July 2017 where he wrote “I have decided to resign from the work as from 1<sup>st</sup> August 2017.” There is no evidence in that letter of any coercion or threats to the respondent to resign from work.

The Appellant accepted the resignation letter on 20<sup>th</sup> July 2017 and said it would take effect the same day.
30. The trial magistrate found the Appellant declared the respondent redundant irregularly. But there is no mention anywhere in these proceedings, that the respondent was terminated vide redundancy.

The court cannot act on presumption but is guided by facts. The factual position in this matter is that the Respondent resigned from his employment. It is regrettable the appellants took long to pay his dues. They should compensate him for that inordinate delay.



31. In the case of Hassanath Wanjiru -vs- Vanela House of Coffee 454 N of 2009 the court held that a claimant having resigned from employment the only issue for determination is whether she is entitled to the prayers sought.

The court found the claimant was not entitled to the prayers sought.

32. In the instant case the court holds the trial court erred in finding the claimant was irregularly terminated vide redundancy whereas he had resigned from his employment.

The court finds the appeal is merited and is granted accordingly.

33. The court orders interest be paid to the respondent at 14% per annum from 20<sup>th</sup> July 2017 to 2019 (Date is not clear from the letter in the court file of his terminal dues. The appellant to calculate the interest payable and settle the same).

34. Otherwise, the judgment delivered by Hon. B. Ochieng on 18<sup>th</sup> August 2022 is set aside.

35. Each party will meet their respective costs of the appeal and of the lower court proceedings.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 12<sup>TH</sup> 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

**ANNA NGIBUINI MWAURE**

**JUDGE**

