



**Mijengo Investment Limited v Kemunto (Employment and Labour Relations Appeal E039 of 2024) [2025] KEELRC 775 (KLR) (7 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 775 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E039 OF 2024**

**AN MWAURE, J**

**MARCH 7, 2025**

**BETWEEN**

**MIJENGO INVESTMENT LIMITED ..... APPELLANT**

**AND**

**REAH KEMUNTO ..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree of the Honourable E. S Soita, Senior Resident Magistrate delivered on 28th November 2023 in Nakuru MCELRC No. E215 OF 2022)*

**JUDGMENT**

1. The Appellant, being dissatisfied by the judgment and decree of Senior Resident Magistrate Hon. E.S. Soita, filed this appeal vide a Memorandum of Appeal dated 29<sup>th</sup> May 2024, where the Appellant came up with 15 grounds, which this Honourable Court condensed as follows that:
  - a. The learned magistrate erred in law and in fact in by declaring the termination of the Appellant’s employment by the Respondent on account of redundancy was substantively unfair and procedurally sound.
  - b. The learned magistrate erred in law and, in fact, by inadequately evaluating the evidence on record, leading to unjustifiable adverse findings contrary to the weight of the evidence presented.
  - c. The learned magistrate erred in law and in fact, by finding that the Appellant failed to adduce evidence for criteria used in redundancy and restructuring.
  - d. The learned magistrate erred in law and, in fact, by awarding her terminal dues, including underpayment and severance pay which was unfounded and excessive.
2. The Appellant prays that:



- a. The appeal be allowed.
  - b. The judgment of Honourable Emmanuel Soita be set aside and substituted with an order of this Court dismissing the appeal.
3. This appeal was disposed of by way of written submissions.

### **Appellant's submissions**

4. The Appellant submitted that the Respondent worked as a general worker and was aware of the happenings at the company and the redundancy process, understanding the need for terminating the employment and all other employees and was part of the consultative process that culminated in terminating her employment.
5. The Appellant submitted that the Respondent consented to the termination of her employment, which she accepted by appending her signature. The Appellant also submitted that the Respondent personally attended all the meetings and was part of the deliberations. The Appellant submitted that the trial court acknowledged the existence of Covid-19 and the ban on logging of forest by the government but still found that there was insufficient evidence to support claims of redundancy and restructuring. Consequently, the trial court concluded that the termination was both procedurally and substantively fair, in accordance with the provisions of section 40 of the *Employment Act*.
6. The Appellant relied on the case of Walter Ogal Anuro V Teachers Service Commission (2013) eKLR, where the court held that:

“... For termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with the establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”
7. The Appellant submitted that the procedure of redundancy has been outlined in Section 40 of the *Employment Act* and relied on the case of Francis Maina Kamau V Lee Construction (2014) eKLR the court held as follows:

“Where an employer declares a redundancy, the conditions set out in section 40 of the *Employment Act* must be observed and where the employer fails to do so, the termination within the meaning of section 45 of the *Employment Act*.”
8. The Appellant submitted that the redundancy process was done transparently by issuing notices to the Nakuru County Labour office on 6<sup>th</sup> July 2022, general notice of termination to the Respondent and other affected employees, and individual notice to affected employees on 7<sup>th</sup> July 2022. The Appellant cited several authorities, including Margaret Mumbi Mwago V Intrahealth International (2017) eKLR, Kenya Airways Limited V Aviation Allied Workers Union of Kenya & 3 others [2014] eKLR, and Republic V E.O.O & Another [2016] eKLR in support of that proposition.
9. The Appellant submitted that there was a mutual consent that was entered to terminate the Respondent's employment, which was binding upon the parties in the absence of fraud, mistake and misrepresentation; thus, the Respondent cannot go against the consent terms. The Appellant relied on several authorities including Fredrick Kariuki Kamau V Bank of India [2015] eKLR, Pauline Wangeci Warui 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



(J424/200[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 and Mr. Matthew Riley V Direct Line Insurance Group PLC 2023 EAT 118 in support of that proposition.

10. The Appellant argued that the trial court wrongly found the Respondent's termination unlawful, as the Appellant adhered to fair labor practices outlined in the *Employment Act*, and therefore prayed that the judgment of the trial court be set aside. The Appellant relied on the case of *James Njuguna Wainaina & Another V East African Building Society HCCC No. 787 of 2003* where the court stated that for an accord and satisfaction to take place, there must be a dispute regarding the amount owed, and the amount owed must be greater than what the debtor offers. The debtor must clearly indicate that the payment is intended as a full settlement of the debt. Meanwhile, the creditor must accept this payment, which can be done by negotiating the instrument, cashing the check, or through another means of acceptance. When these conditions are met, the claim is considered settled.
11. In *H,B.F Dalgety Ltd V Morton (1987) 1 NZLR 411*, Hillfer J held at page 416-417:

“If the question is one of fact, there will be accord and satisfaction only if there is a meeting of two minds, or if one of the person involved acts in such a way as to induce the other to think the money is taken in satisfaction of the claim.”
12. The Appellant submitted that this Honorable Court should reconsider the evidence, evaluate and draw the conclusion that the Respondent was lawfully, fairly and procedurally terminated from employment. The Appellant relied on the case of *Selle V Associated Motor Boat Co. [1968] EA 123* where the court held that in appeals from the High Court, the Court of Appeal conducts a retrial by reconsidering and evaluating the evidence independently. The Court must be mindful that it did not see or hear the original witnesses and should allow for this. The Court is not bound by the trial judge's findings if they failed to consider specific circumstances or made an impression inconsistent with the overall evidence.
13. The Appellant submitted that the trial magistrate misapplied the evidence in arriving at the impugned decision and relied on Section 64 of the *Evidence Act*, which provides for all facts except the contents of documents that may be proved by oral evidence. The Appellant also submitted that there was no sufficient evidence to prove the criteria used for selection for redundancy and restructuring. The Appellant cited Section 47(5) of the *Employment Act*, which states 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. In *Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 Others [2019] eKLR*, the Court of Appeal stated as follows:

“The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it “genuinely believed to exist,” causing it to terminate the employee's services. That is a partly services test.”
15. The Appellant submitted that the trial court misdirected itself in awarding the reliefs sought, including compensation for unfair termination, underpayments, severance pay, and one month's salary in lieu of notice; thus, the Appellant prays that this Honourable Court set aside the relief sought.



16. The Appellant urged this Honourable Court to allow the appeal as prayed.

### **Respondent's written submissions**

17. The Respondent submitted that the Appellant failed to show that any meetings occurred and that there were no minutes or notices related to the impending redundancy. The Respondent relied on several authorities including *Bernard Misawo Obora V Coca Cola Juices Kenya Limited* [2015] eKLR, *Addah Adhiambo Obiro V Ard Inc* (2014) eKLR, *Peter Wanjohi Muthee V Bayer East Africa Limited & Bayer Environmental Science SA* [2016] KEELRC 1(KLR), *Gerrishon Mukhutsi Obayo V Dsv Air and Sea Limited* (2018) eKLR and *Margaret Mumbi Mwago V Intrahealth International* (2017) eKLR in support of that proposition.
18. The Respondent submitted that the notices were issued to her and the County Labour Officer less than a month prior to her termination. Furthermore, the letter of termination dated 7<sup>th</sup> July, 2022, was issued on the same day and took effect after working hours. The Respondent contended that due process was not followed, as outlined in Article 47 of *the Constitution*, Section 4 of the Fair Administrative Actions Act, and Section 45 of the *Employment Act*. As a result, she claimed that the Appellant's decision to terminate her was not fair, unjust, and equitable. The Respondent relied on the case of *Faiza Mayabi V First Community Bank Limited* [2019] eKLR where the court held that the termination was unfair and unjustified as the whole process was irregularly undertaken and awarded the Claimant 12 months' salary as compensation for the unlawful redundancy.
19. The Respondent submitted that there was no consent agreed upon between her and the Appellant to terminate her employment mutually, as the same is false and misleading. The Respondent argued that this issue is new; however, it was not raised in the trial court and appears to be an afterthought brought in mala fides.
20. The Respondent submitted that there was no evidence brought to the trial court to show a mutual agreement to terminate her employment. The Respondent relied on the case of *Daniel Otieno Migore V South Nyanza Sugar Co. Ltd* [2018] eKLR where the court stated pleadings serve as the foundation upon which all proceedings are built. Therefore, any evidence presented in a case must align with the pleadings. Any evidence, no matter how compelling, that contradicts the pleadings should be disregarded. The Court of Appeal case of *In Independent Electoral and Boundaries Commission & Another V Stephen Mutinda Mule & 3 others* (2014) eKLR cited the Supreme Court of Nigeria in *Adetoun Oladeji(NIG) vs Nigeria Breweries PLC SC 91/2002* where Adereji, JSC expressed himself as follows:
- “...it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded...
- .... In fact, that parties are not allowed to depart from the pleadings is on the authorities basis as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”
21. The Respondent submitted that she was not paid her terminal dues, and therefore, she is entitled to the prayers sought.
22. The Respondent submitted that she is entitled to costs in the appeal and lower court and thus prayed that the appeal be dismissed with costs.



## Analysis and determination

23. Having considered the record of appeal and the submissions by both parties, the issue for determination is whether the appeal is merited and if Respondent was terminated fairly and procedurally.
24. As this is a first appeal, the court has the mandate to thoroughly re-examine all the evidence and make its own conclusions, considering that it did not have the chance to see and hear the witnesses directly. This duty is outlined in the case of *Selle V Associated Motor Boat Co.* (Supra).
25. In *Thomas De La Rue (K) Ltd v David Opondo Omutelema* [2013] KECA 492 (KLR), the court held as follows:

“Section 40 of the *Employment Act* sets out seven conditions which the employer must comply with before declaring an employee redundant. These are:

- a. if the employee to be declared redundant is a member of a union, the employer must notify the union and the local labour officer of the reasons and the extent of the redundancy at least one month before the date when the redundancy is to take effect;
- b. if the employee is not a member of the union, the employer must notify the employee personally in writing together with the labour officer;
- c. in determining the employees to be declared redundant, the employer must consider seniority in time, skill, ability, and reliability of the employees;
- d. where the terminal benefits payable upon redundancy are set under a collective agreement, the employer shall not place an employee at a disadvantage on account of the employee being or not being a member of a trade union;
- e. the employer must pay the employee any leave due in cash;
- f. the employer must pay the employee at least one month’s notice or one month’s wages in lieu of notice; and
- g. the employer must pay the employee severance pay at the rate of not less than 15 days for each completed year of service.”

26. In *Freight In Time Limited V Rosebell Wambui Munene* [2018] KECA 148 (KLR), the Court of Appeal held as follows:

“There is no evidence on record led by the appellant to justify the grounds of termination cited in the notice of termination as restructuring of the Rwanda office; no evidence was led to prove that the appellant followed the procedure for redundancy as stipulated in Section 40 (1) (b) (c) and (g) and Section 45 of the *Employment Act*. Further, the appellant led no evidence to justify and prove the alleged redundancy. The requirement to issue a separate notice to the Labour Officer, simultaneously with the termination notice, is mandatory. Failure to issue renders the redundancy unlawful. On record, there is no evidence to prove that a separate notice was issued to the Labour Officer. A relevant dictum is discernible in *Hesbon Ngaruiya Waigi – v- Equatorial Commercial Bank Limited* [2013] eKLR, where the trial court, while finding that a contract of employment was unfairly terminated, held that the respondent had not demonstrated that there was redundancy despite relying on it as a



ground for dismissal. Persuaded by the foregoing, we find that the appellant's termination of the respondent's contract of employment on account of redundancy was unfair due to non-compliance with procedural requirements and failure to justify and prove the redundancy."

27. In this instant appeal, the trial court held that the Respondent was unfairly terminated as the redundancy process was not followed. This Honourable Court agrees with the trial court as the Appellant did not avail minutes to show it held meetings to prepare the Respondent for the redundancy process, and also there is no sufficient evidence to show that the Respondent had mutually agreed on termination of employment. There was no notice to the labour office of one month to inform them of the redundancy process.

The letter to the labour office was issued on 6<sup>th</sup> July 2022 and the appellant did not indicate the names of the employees they were considering to terminate on basis of redundancy. The termination letter was issued the following day and is dated 7<sup>th</sup> July 2022.

There was no criteria provided as to what considerations the Appellants employed in order to determine who of their staff they would terminate on basis of redundancy.

28. The court is persuaded by the provisions of Sections 40 of the *Employment Act* and the case of Freight In Time Limited -Vs- Rosebell Mambui Munene (Supra) where the court held: -

"Persuaded by the foregoing we find the Appellant's termination of Respondent's contract of employment on account of redundancy was unfair due to non-compliance with procedural requirements and failure to justify and prove redundancy."

29. The court holds the trial magistrate was right to find the Respondent was unfairly terminated on an account of redundancy.
30. The appeal is found not to be with merits therefore and is dismissed accordingly.
31. The awards are also upheld as the court finds the trial magistrate diligently put due consideration in awarding the same. The awards are upheld.
32. The costs of the appeal as well are awarded to the Respondent.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 7<sup>TH</sup> DAY OF MARCH, 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**

