



**Mwandoro v Superior Hotels Kenya (Appeal E021 of 2024)  
[2025] KEELRC 732 (KLR) (7 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 732 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E021 OF 2024  
NJ ABUODHA, J  
MARCH 7, 2025**

**BETWEEN**

**VICTOR MWANDORO ..... APPELLANT**

**AND**

**SUPERIOR HOTELS KENYA ..... RESPONDENT**

*(Being an appeal from the Judgment and Order of Hon. Hosea Mwangi  
(SRM) delivered on 18th January 2024 in Nairobi CMEL NO. E878 OF 2021)*

**JUDGMENT**

1. Through the Memorandum of Appeal dated 20<sup>th</sup> January 2024, the Appellant appeals against the whole Judgment of Honourable Senior Resident Magistrate Hosea Mwangi delivered on 18<sup>th</sup> January, 2024.
2. The Appeal was based on the grounds that:
  - i. The Learned Magistrate erred in fact and in law by delivering a judgment that was at gross variance with the proceedings.
  - ii. The trial Magistrate erred in fact and in law in finding that the appellant had not proved his case against the Respondent for wrongful termination whereas there was overwhelming evidence to the contrary.
  - iii. The Learned trial Magistrate erred in fact and in law in failing to make a finding and or an award for unpaid salaries, redundancy notice and compensation for wrongful loss of employment.
  - iv. The trial Magistrate erred in law and in fact by issuing a judgment that is contrary to established case law and precedent cited before him.



- v. The trial Magistrate erred in fact and in law by disregarding the Claimant's evidence, submissions and authorities relied upon thus arriving at an erroneous decision.
  - vi. The Learned Magistrate erred in law and in fact in delivering a judgment that is contrary to the provisions of the law and settled authorities.
3. The Appellant prayed that the Appeal be allowed and judgment of subordinate court delivered on 18<sup>th</sup> January, 2024 be set aside and the Honourable Court enters judgment against the Respondent for:
    - i. A finding that the Appellant termination from employment on account of redundancy was flawed, wrongful and unfair.
    - ii. The Claimant be paid redundancy notice, unpaid salary arrears and compensation for irregular loss of employment with cost of the appeal and interest.
  4. The Appeal was disposed of by written submissions.

### **Appellant's Submissions**

5. The Appellant's Advocates Omongo Gatune & Co. Advocates filed written submissions dated 15<sup>th</sup> November 2024. On grounds 1, 4 and 5 counsel submitted that the Magistrate erred in delivering a Judgment which was at gross variance with proceedings, disregarding evidence before him and contrary to established case law and precedent. That the trial court failed to conduct a comprehensive analysis of evidence in finding that the notice of termination on account of redundancy was valid.
6. Counsel submitted that the Appellant told the trial court that he was the Human Resource Officer and at no time was he informed of any impending redundancy or received any notice whatsoever, the Respondent's memo dated 26<sup>th</sup> March 2020 did not explicitly mention redundancy rather it referred to unpaid leave and contradicts the trial court's conclusion that the memo constituted a valid notice of redundancy.
7. Counsel submitted that the testimony by RW1 raised concerns as no evidence or documentation was submitted in court to verify that the Labour Office was indeed notified or that a list of affected employees existed at all. Counsel relied on the case of Banking Insurance and Finance Union (Kenya) vs Murata Sacco Society Ltd [2010] eKLR and submitted that the inclusion of the union where applicable and labour officer is not optional.
8. On grounds 2, 5 and 6, counsel submitted that the trial court erred in finding that the Appellant had not proved his case yet there was overwhelming evidence to the contrary, disregarding the Appellant's submissions. Counsel submitted that in rejecting the claim, the trial magistrate failed to regard critical evidence placed before him to wit; the lack of notice, absence of meaningful consultations with the Appellant who was the only affected party and failure to demonstrate that the selection criteria for redundancy was based on an objective or transparent process and leaving the Appellant uninformed of any impending redundancy.
9. Counsel submitted that the Appellant's submissions were entirely disregarded and the trial court did not make determination on redundancy and non-payment of salaries due leading to a judgment that overlooked the fundamental arguments presented. That the Appellant testified that upon receiving his termination letter, he lodged an appeal to which he received no response. That the trial court based its findings on unsupported assertions without any material evidence from the Respondent be it a response or minutes to substantiate that an appeal hearing took place.



10. On ground 3, counsel submitted that the Learned Magistrate erred by failing to award unpaid salaries, redundancy notice and compensation for wrongful loss of employment without any reasons whatsoever. That the Appellant's act of voicing his concerns about the unpaid wages was what caused him to be sent on leave. The Respondent failed to provide evidence such as vouchers or clock-in records which could contradict the Appellant's claims.
11. Counsel submitted that the Appellant's contract was renewed amidst the COVID-19 pandemic by a letter dated 23<sup>rd</sup> October 2020, only to be terminated abruptly on 4<sup>th</sup> February 2021 merely five months after raising question whether COVID-19 indeed impacted the Respondent and reason of letting the Appellant go. Counsel questioned why was the Appellant's contract was renewed during this very pandemic?
12. Counsel submitted that the Appellant sought redundancy notice as per section 40 of the *Employment Act*. That the trial court erred by dismissing claim for 12 months compensation without advancing any reason. That despite the Appellant's position of being in the HR department he was never informed of the impending redundancy. That his appeal to the Respondent regarding the failure to follow proper redundancy procedures were dismissed without due consideration. That the trial court failed to consider this issue despite guidance from relevant cited authorities.

### **Respondent's Submissions**

13. The Respondent's Advocates Kimandu & Ndegwa Advocates filed its submissions dated 20<sup>th</sup> December 2024. Counsel condensed the grounds of Appeal into five issues. On ground 1,4 and 5, ground 2 and 6 and 3 of the Memorandum of Appeal respectively.
14. On the proceedings, evidence and case law counsel submitted that the learned magistrate delivered a Judgment in line with the proceedings by evaluating the evidence before him and adopted various established principles from guiding case law and precedent. Counsel relied on section 43 of the *Employment Act* on proof of reasons for termination and submitted that the Respondent was required to prove the reasons for termination and that the reasons at the time of termination are reasons the employer deemed genuinely in existence as in the internal memo dated 26<sup>th</sup> March 2020 and in the termination notice which showed that genuine circumstances that led to termination of the Appellant's employment services existed when termination occurred.
15. Counsel submitted that the termination happened due to collapse of the industry following the outbreak of Covid 19 pandemic which was a matter of judicial notice and that the pandemic adversely affected the hotel/ hospitality industry which the Respondent operates in leading to drastic losses, closures and loss of employment for thousands of workers in the industry. That the Respondent suffered the same fate and had no option but lay off the Appellant on account of redundancy.
16. Counsel submitted that the Respondent complied with section 45 of the *Employment Act* on the definition of unfair termination and that the Appellant's termination was not based on malice but the unprecedented Covid 19 crisis where it was effected. Counsel relied on the case of Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others and submitted on the considerations on redundancy proceedings and that it cannot be mandatory for the employer to consult with all potentially affected employees in making any redundancy decision.
17. On the Appellant's case against the Respondent counsel submitted that the Appellant had not proved his case against the Respondent to the required threshold and the learned magistrate considered the Claimant's submissions and delivered Judgment in tandem with provisions of law. That the trial court considered the Appellant's and Respondent's cases.



18. Counsel submitted that in compliance with Section 40 (b) of the *Employment Act*, which requires the Respondent to notify the employee personally in writing and also the labour officer counsel submitted that the Respondent copied the letter dated 4<sup>th</sup> February 2021 to the County Labour Office, the letter dated 4<sup>th</sup> February 2021 also offered to pay the Appellant one month's pay in lieu of notice, any accrued entitlements of leave days not taken, severance pay and any other dues.
19. Counsel relied on the case of Thomas De La Rue (K) Ltd v David Opondo Omatelema [2013] eKLR where the court explained the importance of sections 40(1)(a) and (b) on the importance of different kinds of redundancy notifications depending on whether the employee is or not a member of a trade union.
20. On the issue of Consultation and Dialogue, counsel submitted that the consultation requirement was met to satisfaction by the appeal hearing between the HR Manager and the Appellant. Counsel relied on the case of German School Society & another v Ohany & another (Civil Appeal 325 & 342 of 2018 (consolidated) [2023] on consultations prior to redundancy.
21. Counsel submitted that the Appellant was afforded a chance to be heard pursuant to an appeal. That the Appellant filed an appeal and was granted the opportunity to be heard. That request for appeal was received by the Respondent. That Section 41 of the *Employment Act* that deals with notification and hearing before termination on grounds of misconduct is not applicable to the Appellant's case as he was terminated on account of redundancy.
22. On the issue of the selection criteria employed, counsel submitted that the selection criteria employed for redundancy were based on an objective transparent process. That Section 40(1)(c) provided that where the employer decides to lay off employees on account of redundancy the employer shall have due regard to seniority in time, skill, ability and reliability of each employee of the particular of class of employees affected which the Respondent complied with.
23. Counsel relied on the case of Abigael Jepkosgei Yator & anor v China Hanan International Co. Ltd [2018] eKLR on the procedure for termination on account of redundancy. That the Respondent's witness (DW1) told the trial court that she had been in the department longer than the Appellant and therefore the issue of seniority, reliability and skill of employee did not apply which was not controverted by the Appellant nor demonstrated that the proviso of this section was not followed. Counsel further relied on the case of Mercy Wangari v Total Kenya Limited (2020) eKLR where it was held that the Appellant had a responsibility to demonstrate failure by employer to adhere to section 40(1) (c) of the Act.
24. On the issue of applicable awards, counsel submitted on the awards of accrued leave days, wages in lieu of notice, severance pay, service pay and certificate of service. That there was no pending leave as confirmed by the Appellant who never claimed any leave on his pleadings. That the Respondent was willing to pay the one-month salary in lieu of notice. That the Respondent offered to pay the Appellant 51 days as severance pay which he rejected.
25. Counsel submitted that the Respondent offered to pay the Appellant service pay over severance pay at 51 days having worked for three years which the Appellant rejected. That the Respondent was willing to issue the Appellant with certificate of service as per section 51 of the Act which the Appellant has refused to collect despite being offered the same with his dues.
26. Counsel submitted that the payment the Respondent was to pay under redundancy to the Appellant but he rejected, was Kshs. 330,000/= and went on to file this appeal to unjustly enrich himself at the Respondent's expense.



## **Determination.**

27. The court has considered the grounds in the Memorandum of Appeal, the record of appeal and submissions filed by the parties and notes that the principles which guide this court as the first appellate were well set out in the locus classicus of *Selle & Another v Associated Motor Boat Company Ltd & Others*, [1968] EA 123, Sir Clement De Lestang, Vice President of the Court of Appeal for East Africa stated those principles as follows: -

“An appeal to this Court from a trial by the High Court is by way of a 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.”

28. The Judgment of the trial court was that the dismissal of the Appellant by the Respondent was fair and lawful and the Appellant was awarded terminal dues in the sum of Kshs 330,000 with interest with no orders as to costs. The Appellant was aggrieved by the entire judgment hence this appeal.
- a. The issue in this appeal is therefore mainly whether the trial court erred by finding that the termination of the Appellant on account of redundancy was fair and lawful and as a corollary, whether the trial court erred in awarding the Appellant Kshs. 330,000/= as terminal dues while disallowing the other reliefs.

## **Whether the trial court erred by finding that the termination of the Appellant on account of redundancy was fair and lawful.**

29. The events leading to the termination of employment of the Appellant points out to a termination on account of redundancy. Section 2 of the *Employment Act* defines redundancy as at the initiative of the employer with the employee not being at fault. The trial court took judicial notice of the Covid 19 effect on the hotel industry. The termination on account of redundancy must however still comply with section 40 of the *Employment Act*. Termination of an employee on account of redundancy and retrenchment without justification is wrong hence unfair termination if not done in accordance with the law. In the case of *Kenya Airways Limited V Aviation & Allied Workers Union Kenya & 3 Others* [2014] eKLR it was held that termination of employment on account of redundancy is justified if there is substantive justification for declaring redundancy and there is procedural fairness in the consequent retrenchment.
30. The Appellant was issued with a termination letter dated 4/2/2021 stating that as per an outcome of a review on the evolution and ways of conducting business owing to the Covid 19 pandemic, the Appellants employment contract was terminated on account of redundancy for the company to stay afloat.
31. The court notes that before the termination, the Appellant was sent on unpaid indefinite leave on 26<sup>th</sup> March, 2020 while stating that the same should not be construed as redundancy or termination. The Appellant’s contract was then renewed on 23<sup>rd</sup> October, 2020 while the Covid 19 was ongoing and around 4 Months the Respondent terminated his contract on account of redundancy due to Covid 19.



32. This Court will as the trial court, take judicial notice of business and financial disruption Covid-19 caused to business when it was declared a global pandemic. To this extent, there were valid grounds for terminating the appellant's service on account of redundancy. This ground of appeal therefore fails.
33. Concerning the process of termination, it was common ground
34. As for the procedure for the declaration redundancy where the Respondent is required to notify the employee personally in writing and also the labour officer, it was in evidence that the Respondent copied the letter dated 4<sup>th</sup> February 2021 to the County Labour Office, the letter dated 4<sup>th</sup> February 2021 also offered to pay the Appellant one month's pay in lieu of notice, any accrued entitlements of leave days not taken, severance pay and any other dues. This came to Kshs. 330,000/- which the trial Court awarded him despite dismissing his claim for unlawful redundancy. The appellant was not a unionisable employee hence the notice to him and the labour office of the intended redundancy was sufficient. The Court therefore finds that the respondent followed proper procedure in declaring the appellant redundant.

**Whether the trial court erred in awarding the Appellant Kshs 330,000/= as terminal dues while disallowing the other reliefs.**

35. This court agrees with the order of the trial Court that the appellant be paid the offered terminal dues of Kshs 330,000/= which included notice pay, severance pay and service pay.
36. On the issue of salaries arrears, Appellant's prayers in the lower court included an outstanding salary arrears amounting to the total of Kshs. 375,000). This prayer is successful since the Respondent did not produce any evidence (section 74 requirement) of payment of the same. The trial court did not address this issue nor did the Respondent submit on it at this Appeal stage. The prayer therefore succeeds.
37. On the question of payment for the remainder for the contractual period, the court finds that payment for salaries for an unexpired period of contract are not due as the law does not provide for anticipatory income. In the case of Peter Wesonga Opaka v Hilltop Preparatory School & another [2019] eKLR the court held as follows;

“I agree with the respondent's submissions that the claimant is not entitled to payment of the unexpired term of the contract as the contract does not provide for the same.

38. In conclusion the Appellant's appeal hereby succeeds as follows: -
- i. Terminal dues of notice, severance and service pay offered by the Respondent.....Kshs. 330,000/=
  - ii. Unpaid salary arrears ..... Kshs 375,000/=
- Total Kshs. 705,000
- iii. There will be no order as to costs in the lower court since the respondent had made an offer to settle the matter the terms of which the trial court merely adopted.
  - iv. The appellant shall however have the costs of the appeal at the lower court scale.
39. It is so ordered.

**DATED AT NAIROBI THIS 7<sup>TH</sup> DAY OF MARCH, 2025**

**DELIVERED VIRTUALLY THIS 7<sup>TH</sup> DAY OF MARCH, 2025**



**ABUODHA NELSON JORUM**  
**PRESIDING JUDGE-APPEALS DIVISION**

