



**Donald v Tofada Security Services Limited (Appeal E129 of 2023)
[2025] KEELRC 1346 (KLR) (9 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1346 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E129 OF 2023**

**JW KELI, J
MAY 9, 2025**

BETWEEN

ANTHONY IMBATI DONALD APPELLANT

AND

TOFADA SECURITY SERVICES LIMITED RESPONDENT

(Judgment (Being an appeal from the whole Judgement of Honourable H.M NGANGA delivered on the 8th day of June 2023 in Milimani CMEL Cause E091 OF 2022 the Chief Magistrate's Court at Milimani Commercial Courts.))

JUDGMENT

1. Anthony Imbati Donald dissatisfied with the entire Judgement of Honourable H.M Nganga delivered on the 8th day of June 2023 in Milimani Cmel Cause E091 OF 2022 the Chief Magistrate's Court at Milimani Commercial Courts filed a memorandum of appeal dated 6th July 2023 to this court seeking for the following orders:-
 - a. The trial court's entire judgement be set aside and in its place judgement be entered in line with the memorandum of claim as follows:
 - i. A declaration that the termination of the claimant's employment by the respondent was unlawful, malicious, unprocedural and an infringement on his constitutional rights.
 - ii. Maximum compensation for wrongful dismissal;
 - iii. Special damages
 - iv. One Month's pay in lieu of Notice.....Ksh 17,413.00



- v. Damages for wrongful dismissal.....Ksh 208,956.00
(17,413x12)
- vi. OvertimeKsh 589,896.00
MAY 2018 - MAY 2021
(72-52Hrs x 136.55 x 1.5x 144 wks)
- iv. Public Holidays.....Ksh 127,809.00
2018-12 days (12dys x1hr. x xKh136.55) = 39,36.4
2019-12 days (12dys x1hrxxKh136.55) = 39,36.4
2020-12 days (12dys x1hr x xKh136.55) = 39,36.4
2021-3dys (6dys x12hr x 2 x Kh136.55) = 9,831.60
- v. House allowance.....Ksh 72,672.00
MAY 2018-MAY 2021
(15% of 15,141.95=2,271.30x32months)
- vi. Underpayments.....Ksh 180,512.00
MAY 2018-MAY 2021
(15,141.95-9,500=5,641.00x32 months=
- vii. Annual Leave.....Ksh 17,413.00
DECEMBER 2019
- viii. Service gratuity.....Ksh 10,045.00
17,413/26x15x1
- ix. Unremitted NSSF deductions.....Ksh 4,800.00
400x12
- iv. Interest on the total.
- V. Certificate of Service.
- vi. Costs of the Cause.
- vii. Any other and further relief this Honourable Court may deem fit and just to award under the circumstances.

In line with the prayers contained in the memorandum of claim dated 11th day of August 2021.
- b. Costs of the appeal to be awarded to the appellant.

Grounds Of The Appeal.

2. The learned magistrate erred in law by failing to consider the provisions Section 40 of the [Employment Act](#).



3. The learned magistrate failed to consider section 31 of the Employment Act as read together with regulation 5 of the Regulation of wages protective security services with regard to the issue of house allowance.
4. The learned magistrate failed to consider section 27 of the Employment Act as read together with regulation 6 and 7 of the Regulation of wages protective security services with regard to the issue of overtime.
5. The learned magistrate failed to consider section 27 of the Employment Act as read together with regulation 9 of the Regulation of wages protective security services with regard to working on public holidays.
6. The learned magistrate failed to consider section 28 of the Employment Act as read together with regulation 10 of the Regulation of wages protective security services with regard to the issue of annual leave.
7. The trial court failed to consider the claimant's authorities and submissions touching on the issue of redundancy thereby arriving at a wrong conclusion in law.
8. The trial court failed to consider section 48(1)a and b of the labour institutions act thereby leading to an error whose effect was dismissal of the claimant's special damages.
9. The trial court failed to consider the provisions of section 10 (70 and Section 74 of the Employment Act and placed an unjustified burden of proof on the claimant.
10. The Trial court failed to consider the minimum wage order with regard to basic minimum wage thereby wrongfully dismissing the claimant's prayer for underpayments.
11. The learned magistrate erred in law by failing to properly apply the law to the facts thereby resulting in the dismissal of the suit.

Background To The Appeal.

12. The appellant alleged unfair termination of employment by the respondent in memorandum of claim dated 11th August 2021 and sought for the following orders:-
 - a. A declaration that the termination of the claimant's employment by the respondent was unlawful, malicious, unprocedural and an infringement on his constitutional rights.
 - i. compensation for wrongful dismissal;
 - ii. Special damages
 - iii. One Month's pay in lieu of Notice.....Ksh
17,413.00
 - iv. Damages for wrongful dismissal.....Ksh
208,956.00
(17,413x12)
 - v. OvertimeKsh 589,896.00
MAY 2018 - MAY 2021
(72-52Hrs x 136.55 x 1.5x 144 wks)



- vi. Public Holidays.....Ksh 127,809.00
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- ix. Annual Leave.....Ksh 17,413.00
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- x. Service gratuity.....Ksh 10,045.00
 17,413/26x15x1
- xi. Unremitted NSSF deductions.....Ksh 4,800.00
 400x12
- xii. Interest on the total.
 Certificate of Service.
- xiii. Costs of the Cause.
- xiv. Any other and further relief this Honourable Court may deem fit and just to award under the circumstances.(pages 12-41 of ROA was the claimant’s case).

- 13. The claim was opposed by the respondent who entered appearance and filed response to the claim together with witness statements and documents (pages 38-91 of ROA was the respondent’s case).
- 14. The claimant’s case was heard by the Magistrate’s court on the 16th March 2023 with the appellant as only witness and he was cross-examined by counsel for the respondent, Ms. Auma. The respondent’s case was heard on even date with Calista Ojilo as RW1 and he was cross-examined by counsel for the appellant Mr. Wetaba. (pages 117-123 of ROA was the typed proceedings)
- 15. The parties filed written submissions after the hearing and the trial court delivered its decision on the 8th June 2023, dismissing the claim for unfair termination and issuing an order of Certificate of Service.

Determination.

- 16. The appeal was canvassed by way of written submissions. Both parties complied.
- 17. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co. Ltd* [1968] EA 123 that:- “The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and



the principles upon which the Court of Appeal acts are that the 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 the 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."

18. The court on first appeal is further guided by the principles on appeal decisions in *Mbogo v Shah* [1968] EA De Lestang V.P (as he then was) observation at page 94: "I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion

Issues for determination.

19. The appellant submitted on all the ground of the appeal
20. The respondent identified and addressed the following issues :-
- a. Whether the Appellant was wrongfully dismissed or terminated on account of redundancy from his employment by the Respondent?
 - b. Whether the Appellant is entitled to the grounds of Appeal in their Record of Appeal
21. The court, on perusal of the grounds of the appeal and submissions of the parties was of the considered opinion that the issues placed before the court for determination were as follows:-
1. Whether the Appellant was wrongfully dismissed on account of redundancy from his employment by the Respondent
 2. Whether the trial court erred in failing to award the reliefs sought in the claim.
 3. Whether the Appellant was wrongfully dismissed on account of redundancy from his employment by the Respondent
22. The appellant's services were terminated vide redundancy. The appellant's position was that he was just issued with a letter of redundancy and the procedure under section 40 of the *Employment Act* on redundancy was not complied with and that the reason for the redundancy was not valid. The letter for redundancy was dated 12th May 2021 (page 65 of ROA). The trial court found that the claimant's contract stated that the employment was tied to a third-party contracts and in the event of the termination of the employer's contract for any reason by the 3rd party , the claimant's contract would be automatically terminated. The trial court relied on the decision in *Walwanda v Radar Security Limited* (2022) where it was found that a contract to perform specific work was exempt from requirement of notice under section 35 of the *Employment Act*. (Page 128 of ROA)
23. The trial court stated that the claimant's contract was to terminate automatically when the respondent was not contracted by third parties and that the court could not rewrite the contract (*Shah v Shah* 1988 e KLR) "The court must give effect only to the intention of parties." The trial court concluded that the contract waived the need to give notice of termination on account of redundancy consequently holding the termination was lawful and fair. (pages 127-129 of ROA was the foregoing decision)



Appellant's submissions.

GROUND 1: Section 40 on redundancy.

24. The question of whether or not the appellant was declared redundant is one that is evident from the record given that he was issued with a letter to that effect. At page 121 of the record of appeal the respondents witness testified as follows; I did not explain to him the criteria used to declare him redundant. They appeared to excuse the respondent from the express provisions of section 40 of the Employment Act that sets down the criteria of redundancy. The court also respectfully failed to consider the respondents case was expressly to the effect that while declaring the claimant redundant section 40 that deals with redundancy was not adhered to. The argument that the claimant could be terminated merely because a 3rd party contract had been terminated is not appropriate given the express provisions of section 40 of the Employment Act. The claimant was not tied to a particular contract and the reliance on *Walwanda vs Radar Security Limited* was erroneous as the contract needs to expressly name the 3rd party in question. The argument that termination of an unnamed 3rd party leads to termination of an employee's contract is bad law and is not supported by statute.
25. That Section 2 of the Employment Act defines redundancy.
- “redundancy” means 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:”. In *Abigail Jepkosgei Yator & another v China Hanan International Co. Ltd* [2018] eKLR;
- “21. From the evidence submitted by the claimant, it is apparent that termination of employment was as a result of reduced work.
22. Reduced work has been defined in law as a redundancy. Section 2 of the Employment Act, 2007 provides that;”
26. That the letter dated 12th May 2021 is expressly headed redundancy and is not open to interpretation as to what the respondent was actually doing in letting off the claimant. In the case of *Kenya Airways Limited v Aviation and Allied Workers Union*, the Court referred to the decision in *Thomas De La Rue (K) Limited v David Opondo Umutelema* (2013) eKLR where the Court explained the importance of Section 40(1)(a) and (b) and maintained that it was mandatory to comply with the said sections of the law. They held; “It is quite clear to us that Section 40(a) and 40(b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing to the employee and the local labour officer...”
27. The significance of adhering to Section 40 of the Employment Act was also interrogated in *Francis Maina Kamau V Lee Construction* (2014) eKLR with the court holding:
- “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 becomes unfair termination within the meaning of Section 45 of the Employment Act” The court in *Hesbon Ngaruiya Waigi V Equitorial Commercial Bank Ltd* (2013) eKLR looked at whether it is mandatory to follow section 40 while declaring employees redundant. It held;



"These conditions outlined in the law are mandatory and not left to the choice of the employer. Redundancies affect workers' livelihoods and where this must be done by an employer must be put into consideration the provisions of the law "

Respondent's submissions.

28. On the ground of Redundancy, it is trite law under section 47(5) of the [Employment Act](#) that the burden of proving that a termination was unfair or wrongful rests with the Appellant. The Employer is required to demonstrate that the reasons given for the termination were fair. The Appellant has not discharged this burden at all. Under the employment contract signed by the Appellant on page 4 Clause (f), it was a term that the Appellant's employment was tied to third party contracts which the Appellant by executing the said contract understood that said provision.
29. That the Appellant's claim as pleaded in his memorandum of appeal is that he was summoned and told through a letter informing him that he was being let go due to hard economic times. The letter clearly indicates that the Appellant was let go due to reduction in sales and revenue which led to some of the Respondent's clients (third parties) terminating their contracts with the Respondent. These are valid reasons as the Appellant's contract was hinged on the existence of third-party contracts. Section 35(1) of the [Employment Act](#) exempts contracts for specific work from the requirement of issuing a termination notice. The contract between the Appellant and the Respondent was for specific work i.e. guarding services therefore was exempt from the requirements of issuing a notice as required.
30. The respondent relied on the case of *Walwanda v Radar Security Limited* (Cause 263 of 2018) (2022) where the court held as follows:

"In particular, the Court finds that section 35(1) of the [Employment Act](#), 2007 prescribing giving of a notice prior to termination of a contract of service specifically exempts certain contracts of service from requirement to serve a termination notice when the section starts off thus, "A contract of service not being a contract to perform specific work..." The Court finds that indeed the parties entered a contract to perform specific work, namely, guarding services as may be available when the respondent was contracted by the third parties." The Appellant was not unlawfully or wrongfully dismissed as the reason for him being relieved of his duties as well as the procedure was duly followed.

Decision

31. The trial court in paragraph 15 and 17 found the claimant services as per the respondent terminated on account of redundancy. During cross-examination RW1 told the court it was a case of redundancy and not termination. Redundancy is defined under section 2 of the [Employment Act](#) as follows: "redundancy" means 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 letter of employment of the claimant was that of a guard. Under the termination clause it was stated that the service contract was tied to the employer's contract with third parties and in event that the employer's contract is for any reason terminated by 3rd party, the claimant accepted that his own contract automatically terminated unless re-activated for deployment to a new service contract area elsewhere on similar terms (page 50 of ROA). The trial court relied on the *Walwanda v Radar Security Limited* (Cause 263 of 2018) [2022] KEELRC 1217 (KLR) (13 May 2022) (Judgment) where the claimant was



issued a termination letter but not redundancy. The court held:- ‘However, the Court finds that the parties were entitled to contract as per clause 8.3 of the temporary employment contract as it was within the statutory minimum terms and conditions of service. In particular, the Court finds that section 35(1) of the *Employment Act*, 2007 prescribing giving of a notice prior to termination of a contract of service specifically exempts certain contracts of service from requirement to serve a termination notice when the section starts thus, “A contract of service not being a contract to perform specific work...” The Court finds that indeed the parties entered a contract to perform specific work, namely, guarding services as may be available when the respondent was contracted by the third parties. While the situation looked like and was in fact manifestly a redundancy, the specific clause 8.3 was a legitimate overriding term and condition of service contemplated under section 35(1) of the Act. The Court therefore finds that the termination was within that contractual term rather than a termination on account of redundancy.” This court finds the case is relevant on the interpretation of the contract. However it is distinguished as in that case the employer just invoked the clause to issue termination letter while in the instant case the employer issued redundancy letter thus brought itself within the confines of section 40 of the *Employment Act* on the procedure of termination on account of redundancy as held in *Francis Maina Kamau V Lee Construction* (2014) eKLR with the court holding:- “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 becomes unfair termination within the meaning of Section 45 of the *Employment Act*” The *Employment Act* is binding on the employer and once the employer issued the letter of redundancy on account of decline of revenue as some clients had terminated services with them, it was bound to comply with the law of the land of Kenya.

32. The procedure under section 40 of the *Employment Act* is as follows:- ‘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;
 - (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.” Consequently, since it was not in dispute the procedure under section 40 of the Employment Act was not complied with the court holds there was no procedural fairness.

33. The Court found the decision in *Walwanda v Radar Security Limited* (Cause 263 of 2018) [2022] KEELRC 1217 (KLR) (13 May 2022(supra) came to the aid of the respondent on the validity of the reasons for the redundancy due to reduced work. Indeed the appellant relied on the decision in *Abigael Jepkosgei Yator & another v China Hanan International Co. Ltd* [2018] eKLR;”21. From the evidence submitted by the claimant, it is apparent that termination of employment was as a result of reduced work. 22. Reduced work has been defined in law as a redundancy. Section 2 of the Employment Act, 2007 provides that;” The court finds the reason for the redundancy was thus valid.

Whether the trial court erred in failing to award the reliefs sought in the claim.

34. The court held that the reasons for the termination on ground of redundancy were valid on account of reduced work consistent with the condition under the appellant’s contract of service. There was no procedural fairness for non -compliance with the provision of section 40 of the Employment Act and the appellant is awarded compensation equivalent of 1 month’s salary for the unfairness.
35. The court finds that on termination on the ground of redundancy, the claimant was entitled to payment as stated in section 40 (1) of the Employment Act as follows:-
- (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.” The court on perusal the record found the claimant had proceeded on leave. The overtime and public holidays claim was not proved. Extra hours worked beyond the normal ought to be proved strictly.
36. On claim for House allowance the same is statutory right under section 31 of the Employment Act. RW1 admitted housing not paid or provide. The claimant was paid below minimum wages of 2018 and the prayer is awarded as prayed for Kshs. 72672.
37. Claim for Underpayment . The claimant stated his salary was Kshs. 9500. The respondent told the trial court that the salary of the claimant was Kshs. 10100 . At trial this evidence was not shaken and the only issue was underpayment . The minimum wage (2018 Regulation of Wages Order) was Kshs 15,141.95 . The claim for underpayment was for 32 months thus 161,342.40 which is awarded.
38. Severance pay is awarded under section 40 of the Employment Act for 15 days of each complete year. The claimant was employed on the 23rd February 2017 and exited on 12th May 2021. He thus completed 4 years. Thus award of Kshs. $17413 / 2 \times 4$ thus Kshs 34826.

Conclusion.

39. The appeal is allowed. The Judgement of Honourable H.M NGANGA delivered on the 8th day of June 2023 in Milimani Cmel Cause E091 OF 2022 is set aside and substituted as follows-
Judgment is entered for the claimant against the respondent as follows:-



- a. A declaration that the termination on basis of redundancy was based on valid reasons but procedurally unfair.
- b. Notice pay of 1 month salary of Kshs. 17,413
- c. House allowance of Kshs 72,672
- d. Underpayments of Kshs. 161,342.40
- e. Service pay of Kshs 34,826.

Total sum 286,253.40 payable with interest at court rate from date of filing suit until payment in full.

- f. Costs of the suit

40. The appellant is awarded costs of the appeal.

It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 9TH DAY OF MAY , 2025.

**J.W. KELI,
JUDGE.**

