



REPUBLIC OF KENYA



**KENYA LAW**  
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**Victonell Academy Ltd v Mwangi (Employment and Labour Relations Appeal  
E023 of 2023) [2025] KEELRC 1847 (KLR) (25 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1847 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E023 OF 2023**

**AN MWAURE, J  
JUNE 25, 2025**

**BETWEEN**

**VICTONELL ACADEMY LTD ..... APPELLANT**

**AND**

**FELISTER GATHONI MWANGI ..... RESPONDENT**

*((Being an Appeal from the Judgment and order of the Honourable Dr. Priscah Nyotah,  
Principal Magistrate delivered on 26th July 2023 in Nakuru MCELRC No. E91 OF 2022))*

**JUDGMENT**

1. The Appellant, being dissatisfied with the Judgment and order of the Honourable Principal Magistrate Dr. Priscah Nyotah, filed this appeal vide a Memorandum of Appeal dated 22<sup>nd</sup> August 2023 on the grounds that: -
  1. The learned Magistrate erred in law and in fact in failing to consider the Appellant's response to claim and documentary evidence on record.
  2. The learned Magistrate erred in both law and fact in finding that the Respondent was unfairly terminated, when, in fact, the process was fair and open.
  3. The learned Magistrate erred in law and fact in awarding the Respondent 10 months' salary as compensation for unfair termination, which was excessive considering the Respondent's length of service was only 4 years and 2 months.
  4. The learned Magistrate erred in law and fact, improperly calculating severance pay.
  5. The learned Magistrate erred in law and fact in failing to consider the Appellant's written submissions and attached authorities.
2. The Appellant prays that:



1. The judgment and decree of the Honourable Dr. Priscah Nyotah issued on 26<sup>th</sup> July 2023 in Nakuru CM ELRC E91 of 2022 be reviewed or set aside.
2. Costs of this appeal be borne by the Respondent.
3. Both parties canvassed the appeal by way of written submissions.

### **Appellant's submissions**

4. The Appellant submitted that it is not in dispute that the Respondent was paid her terminal dues, which include severance pay. Section 40 (1) (e), (f), and (g) of the *Employment Act* provides that an employer cannot terminate an employee due to redundancy without meeting specific requirements. These include paying any outstanding leave in cash, providing at least one month's notice or one month's wages in lieu of notice, and offering severance pay of at least fifteen days' wages for each year of service.
5. The Appellant submitted that the termination letter dated 12<sup>th</sup> March 2020, cited redundancy as the reason for termination, noting that management had taken over accounts receivable and front office duties. The Appellant submitted that the Respondent did not contest the termination and accepted all dues without objection, indicating acquiescence. Since redundancy is defined under Section 2 of the *Employment Act*, the Respondent's compensation was deemed unjustified, as she had already received severance pay, preventing unjust enrichment. The Respondent acknowledged in court that she was informed of the decision in a meeting with the manager and that her dues were fully settled. The Appellant also stated that they did not notify any Union, as they were unaware of the Respondent's membership.
6. The Appellant submitted that severance pay should be calculated strictly based on completed years of service and not prorated. The learned magistrate erred in awarding severance for partial years, as this contradicts legal principles. Since the separation was due to redundancy, not normal termination, compensation was unwarranted. Additionally, the Respondent accepted her full settlement without objection, making the lawsuit an abuse of the court's time and improperly entertained.
7. The Respondent relied on the case of *Coastal Bottlers Limited V Kimathi Mithika* [2018] KECA 523 (KLR), the Court of Appeal stated as follows:

“It did not matter that the amount thereunder would be inadequate. As it stood, the agreement was binding contract between the parties.”
8. Also, in *Trinity Prime Investment Limited V Lion of Kenya Insurance Company Limited* [2015] KECA 793 (KLR), the Court of Appeal observed as follows:

“The execution of the discharge voucher, we agree with the learned judge, constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other. The appellant was thus fully discharged”.
9. At paragraph 23 of the judgement quoted herein above, the court held that;

“Giving effect to the parties' intention meant that ELRC could not entertain the suit filed by the Respondent. This is because the Respondent had waived his rights to make any further claim in relation to his relationship with the appellant”.



10. The same is reiterated in the cases of Gilbert Mugambi V Michimikuru Tea Factory Limited [2018] KEELRC 606 (KLR), Jevase Kariuki Nyingi V M/S Eagle Watch Co. Limited & another [2020] KEELRC 448 (KLR), and Barasa V Giza Systems Integration Kenya Limited t/a Giza Systems Smart Solutions [2023] KEELRC 231 (KLR).
11. The Appellant submitted that the learned magistrate erred in failing to recognize the fairness and transparency of the termination process. The Respondent had worked for 4 years and 2 months, and severance pay for 4 years had already been settled. During cross-examination, the Respondent admitted receiving full payment, leaving no pending claims. As no prejudice was demonstrated, awarding additional compensation and severance pay would result in unjust enrichment.
12. The Appellant urged this Honourable Court that the judgment dated 26<sup>th</sup> July 2023, be set aside in its entirety and the Respondent's suit dismissed with costs.

### **Respondent's submissions**

13. The Respondent submitted that she was employed as an accounts clerk/receptionist on 18<sup>th</sup> January 2016, and worked diligently until her termination on 12<sup>th</sup> March 2020, due to redundancy, without notice or explanation. The Respondent argued that the termination was unlawful, violating Sections 40 and 41 of the *Employment Act*, as her termination letter only stated that her services were no longer needed without further reasoning. Additionally, she was not informed of the selection criteria for redundancy, being the only affected employee.
14. The Respondent submitted that the Appellant maintained the termination was lawful and in compliance with section 40(1)(e), (f), and (g) of the *Employment Act*. The trial court had to determine whether the termination adhered to these legal provisions. The Respondent submitted that her termination was unfair and unlawful, and the trial court was justified in entering subsequent judgment in her favour.
15. The Respondent relied on the case of Kenya Airways Limited Vs Aviation & Allied Workers Union Kenya & 3 others (2014) eKLR, the court held that a lawful redundancy termination must meet two key requirements: substantive justification and procedural fairness. The Respondent submitted that since no reasons for termination were given in her letter dated 12<sup>th</sup> March 2020, her termination on account of redundancy was valid and fair.
16. The Respondent relied on Section 40(1) of the *Employment Act* stipulates that employers must meet before terminating an employee due to redundancy. These include notifying the trade union and labour officer for unionized employee, providing written notice to non-unionized employees, considering seniority, skill, and reliability in redundancy selection, ensuring no disadvantage due to union membership, paying any outstanding leave in cash, granting at least one month's notice or wages in lieu, and providing severance pay of at least fifteen days' wages per completed year of service.
17. The Respondent emphasized that all conditions in Section 40 of the *Employment Act* are mandatory and must be fully applied by employers. The Respondent submitted that in this case, the Appellant failed to provide evidence proving compliance with Section 40(1)(b) of the *Employment Act*, which requires written notification to both the Respondent and the labour officer regarding redundancy. Furthermore, during cross-examination, the Appellant admitted to not issuing this notification, reinforcing the argument that the termination was procedurally flawed.



18. In *Kenya Airways V Aviation & Allied Workers Union Kenya & 3 Others* (supra), Maraga JA (as he then was) while making reference to Section 40 (1) (a) and (b) of the *Employment Act*, stated as follows;
- “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, ....”
19. The court further observed in the above case that;
- “The initial notification is intended to alert the parties of the situation. It is not the same thing as termination of the employment. No decision has been made, and the employer is simply inviting the social partners to discuss a possible redundancy situation. The second phase involves consultation before and during the retrenchment exercise, which is mandatory, i.e the employees are consulted individually and through their trade union”.
20. In *Gerrishom Mukhutsi Obayo V DSV Air and Sea Limited* [2018] KEELRC 1292 (KLR), the court held that redundancy must follow a structured process, requiring at least one month’s prior notice to both the employee (or union) and the labour officer to ensure compliance with legal preconditions such as reasoning, extent, and selection criteria. This period allows disputes to be resolved, consultations to occur, and negotiations to take place before redundancy is effected. In this case, the employer failed to provide proper notification under Section 40(1)(a) of the *Employment Act*, as the employee only received a termination letter without prior redundancy notice. Consequently, the court found the redundancy procedurally unfair.
21. Also, in *Margaret Mumbi Mwago V Intrahealth International* [2017] KEELRC 129 (KLR) the court clarified that under section 40(1)(a) and (b) of the *Employment Act*, redundancy notice must be issued simultaneously to the employee (or their trade union) and the labour officer, followed by a separate termination notice in line with the employment contract.
22. The Respondent submitted that the Appellant failed to comply with Section 40(1)(b) of the *Employment Act* by not issuing a proper redundancy notice to the Respondent, making the termination procedurally flawed. The Appellant failed to provide evidence that the labour office was notified of the redundancy, violating Section 40(1)(b) of the *Employment Act*. Additionally, there was no consultation with the Respondent before termination, as she was abruptly served a termination letter without explanation.
23. The Respondent also submitted that the Appellant claimed redundancy was due to low business turnout caused by the COVID-19 pandemic, but the termination occurred three days before Kenya officially announced the outbreak, and no proof was provided showing the business impact. The Appellant also failed to justify the selection criteria under Section 40(1)(c) of the *Employment Act*, as no evidence was presented explaining why only the Respondent was affected while junior employees remained in employment.
24. In *Hesbon Ngaruiya Waigi V Equitorial Commercial Bank Limited* [2014] KEELRC 926 (KLR), the court held that redundancy must strictly follow Section 40 of the *Employment Act*, ensuring both procedural fairness and lawful justification. Failure to comply renders any termination unfair and unprocedural, and if the criteria for selecting affected employees do not align with legal requirements, the redundancy is deemed wrongful.
25. The Respondent submitted that her termination due to redundancy was unfair and unlawful, violating sections 40, 41, 43, and 45 of the *Employment Act*. Further, the trial court was right in finding that



the termination lacked both substantive justification and procedural fairness, making the judgment justified.

26. The Respondent submitted that her termination due to redundancy was unlawful and unfair, justifying the trial court's decision to award 10 months' salary in lieu of the termination amounting to Kshs.272,700/=under Section 49 of the *Employment Act*. The Respondent also submitted that the Appellant failed to present valid reasons for an appeal review. Additionally, the trial court rightfully awarded her severance pay of Kshs.62,930/=, with an outstanding balance of Kshs.8,415/=.
27. The Respondent urged this Honourable Court to dismiss the appeal with costs.

### **Analysis and determination**

28. The court has considered the record of appeal together with the rival submissions of both counsels. The issue to determine is whether the appeal is merited.
29. 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 of 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 day's pay for each completed year of service.
30. In *Kenya Airways Limited Vs Aviation & Allied Workers Union Kenya & 3 Others (Supra)* which has been reiterated in the earlier part of the judgment two key element requirements is required to be applied that is substantive justification and procedural fairness. Further, Section 40 (1) (a) and (b) of the *Employment Act* needs to be complied with.



31. In Barclays Bank of Kenya Ltd & another V Gladys Muthoni & 20 Others [2018] KECA 718 (KLR) the Court of Appeal stated as follows:

“There is a heavy burden of proof placed upon the employer to justify any termination of employment. As stated earlier, the appellants here ought to have given the “the reasons and the extent of the redundancy” but there is no evidence on record sufficient to discharge that burden. It was further contended by the respondents that the Labour Officer was not served with any letter or reasons as required under section 40 but the appellants merely made a bare assertion that service was made and reasons given for redundancy. In the absence of proof, we must find that there was no service and therefore the notice was invalid.

Furthermore, consultation was necessary before the redundancy notices were issued. Article 13 of Recommendation No. 166 of the ILO Convention No. 158 - Termination of Employment Convention, 1982 - provides:

“When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:

- (a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;
- (b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.”

That law is applicable in this country. The purpose of the provision as Maraga, JA emphasized:

“is to give the parties an opportunity to consider “measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.” The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable. This means that if parties put their heads together, chances are that they could avert or at least minimize the terminations resulting from the employer’s proposed redundancy. If redundancy is inevitable, measures should be taken to ensure that as little hardship as possible is caused to the affected employees. In the circumstances, I agree with counsel for the 1<sup>st</sup> respondent that consultation is an imperative requirement under our law.”

32. In this instant suit, the Respondent was issued with a termination letter dated 12<sup>th</sup> March 2020 stating that “your services are no longer needed.” She was informed the termination was with immediate effect.
33. The case referred hereinbefore Hezbon Ngaruiya Waigi -VS- Equatorial Commercial Bank Ltd (Supra) the court held that redundancy must strictly follow Section 40 of the [Employment Act](#).

In this case the Applicant did not give notice of the planned redundancy to the labour officer. Respondent was also not given notice though she was paid one month salary in lieu of notice.



34. The criteria used to decide who was to be terminated on basis of redundancy was also not disclosed to the court.

The court is therefore persuaded proper procedure for termination on the basis of redundancy was not followed in accordance with Section 40(1) of the Employment Act.

The court is in agreement with the trial court therefore that the Respondent proved that her termination was unfair as some of the requirements under Section 40 of the Employment Act were not complied with.

The appeal is therefore not merited and it is dismissed.

35. The compensation for unlawful termination of 10 months equivalent is however excessive since the Respondent had worked for the Appellant for only 4 years, 2 months. I will Replace that award with

- a. 5 months equivalent Kshs.136,350/= plus Kshs.8,415/= severance pay  
Total Kshs.144,765/=.
- b. Interest will be at 14% per annum from date of this judgment till full payment.
- c. Costs of the lower court case and of this Appel will be awarded to the Respondent.

36. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 25<sup>TH</sup> DAY OF JUNE, 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.

