



**Kiamokama Tea Factory Company Ltd v Bikundo (Appeal  
E061 of 2023) [2025] KEELRC 1757 (KLR) (18 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1757 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
APPEAL E061 OF 2023**

**JK GAKERI, J**

**JUNE 18, 2025**

**BETWEEN**

**KIAMOKAMA TEA FACTORY COMPANY LTD ..... APPELLANT**

**AND**

**MOSES ONDICHO BIKUNDO ..... RESPONDENT**

**JUDGMENT**

1. This appeal emanates from the Judgment of Hon. S. N. Abuya CM delivered on 25<sup>th</sup> October, 2023 in Kisii CMCERLC No. 1 of 2023 Moses Ondicho Bikundo V Kiamokama Tea Factory Co. Ltd.
2. The brief facts of the case are that the claimant was employed by the respondent as a Logistics Assistant. While the respondent cited 1<sup>st</sup> January, 2011 and 2<sup>nd</sup> May, 2012 as the date of employment, the appellant cited 1<sup>st</sup> July, 2014, as a Factory Worker and later as Logistics Assistant at a salary of Kshs.75,580.
3. The appellant's case was that sometime in 2022 it implemented a staff rationalization plan which affected some positions including the respondent's and it notified the respondent and the union vide letter dated 1<sup>st</sup> September, 2022 and the respondent was disengaged on 31<sup>st</sup> October, 2022, paid terminal dues amounting to Kshs.1,343,261.23 and acknowledged receipt.
4. The respondent's case was that his employment was terminated unlawfully as no reason was given and he was not accorded notice and sought various reliefs including 3 months salary in lieu of notice, service pay, 12 months compensation, unidentified leave days, bonus and other unidentified emoluments, certificate of service and costs.
5. Both counsels submitted on whether the appellant had a valid reason to terminate the respondent's employment, procedure used and entitlement of the respondent to the reliefs sought.



6. After considering the evidence and submissions the learned trial magistrate found that the appellant did not comply with the provisions of Section 40 of the *Employment Act* in regard to service of notice upon the trade union and selection criteria and awarded the respondent 6 months salary compensation, interest, certificate of service and costs.

This the Judgment appealed against.

The trial is faulted on grounds for having erred in law and fact by

- a. Holding that the trade union was not served with the redundancy notice.
  - b. Holding that service upon the union had to be proved thus applying a standard higher than balance of probabilities.
  - c. Addressing the issue of the criteria used which was not pleaded.
  - d. Holding that termination of employment was unfair despite the evidence on record.
  - e. Holding that the criteria used was not objective and open despite the evidence.
  - f. Holding that termination of employment was unfair despite the evidence on record that requirements of the law were complied with.
  - g. Awarding the sum of Kshs.453,480 despite the fact that the respondent had received the sum of Kshs.1,343,261.23.
7. The appellant prays that the appeal be allowed, trial court's judgment set aside and the respondent's case dismissed with costs.
- Appellant's submissions
8. As to whether the appeal is merited, counsel relied on the provisions of Section 2 and 40(1) of the *Employment Act* to urge that the trial court erred by holding that the claimants trade union was not served with the redundancy notice as the letter was stamped by the County Labour Officer and the claimant was accorded one (1) month's notice.
  9. Counsel submitted that the trial magistrate employed a higher standard of proof than a balance of probabilities citing the decision in *Miller V Minister of Pensions [1947] 2 ALLER 372* on proof on a balance of probabilities namely; more probable than not, to urge that the appellant had complied with the requirements of Section 40 of the *Employment Act*.
  10. Counsel further submitted that the trial magistrate relied on unpleaded issue, namely; criteria used to select affected employees to urge that parties are bound by their pleadings urging that the decision relied upon by the respondent/claimant differed from those in the instant appeal.
  11. Counsel submitted that in the instant case the appellant had shown that the redundancy was a consequence of an unsustainable wage bill and the position held by the respondent was scrapped from the appellant's organization structure.
  12. That the trial court introduced the issue of selection criteria suo motu.
  13. Reliance was further placed on the Court of Appeal decision in *Independent Electoral and Boundaries Commission & another V Stephen Mutinda Mule & 3 others [2014] eKLR* on the essence of pleadings and their binding nature on the parties.
  14. On award of damages, counsel submitted that since the appellant adduced evidence of having paid and the respondent having received Kshs.1,343,261.23 and the separation was lawful in accordance



with the provisions of Section 40 of the *Employment Act*, the award amounted to double payment and unjust enrichment of the respondent.

Counsel urged the court to find the appeal merited.

### **Respondent's submissions**

15. As regards ground 2 of the Memorandum of Appeal counsel submitted that service of the notice of redundancy upon the trade union was not demonstrated and vitiated the redundancy process.
16. Reliance was placed on the decision in *Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others* [2018] KECA 718 (KLR) on the burden of proof on the part of the employer undertaking a redundancy and in particular the reasons for and extent of the redundancy.
17. Concerning ground 3 and 5, counsel submitted that the court addressed the issue of criteria because it had a legal anchorage to urge that having worked for 10 years, the respondent had a survival chance as an employee and the provisions of Section 40(1) of the *Employment Act* are couched in mandatory tone.
18. On grounds 4 and 6 of the memorandum of appeal, counsel relied on the decisions in *Kenya Airways Ltd V Aviation and Allied Workers Union Kenya & another* [2014] eKLR and *Majengo Investments Ltd V Kemunto* [2025] 381 (KLR), to submit that the learned trial magistrate did not err by holding that termination of the respondent's employment was unfair.
19. As regards ground 7, counsel submitted that the respondent was liable to pay compensation as it terminated the respondent's employment without complying with the provisions of Section 40(1) of the *Employment Act*.
20. Reliance was placed on the decision in *Makini Bikeri V Kiamokana Tea Factory Co. Ltd* [2024] eKLR, where the court awarded 1 month's salary as compensation, as was the decision in *Robert Karisa Kadenge V Kenya Kazi Services Ltd* [2014] KEELRC 1242 (KLR), to urge the court to make similar awards.

### **Analysis and determination**

21. The appellants 7 grounds of appeal may be compressed into four namely; service of notice of redundancy upon the union, selection criteria, termination of employment and award.
22. Before delving into the ground it is necessary to re-state the role of the court in a first appeal, which is simply to reconsider, re-evaluate and analyse the evidence and arrive its conclusions but make due allowance for the fact that it neither saw nor heard the witnesses testify as held in *Peters V Sunday Post Ltd* [1958] EA 424 R. G. Patel V Lalji Makanji [1957] EA 314, *Selle & another V Associated Motor Boat Co. Ltd & others* [1968] EA 123 and *Gitobu Imanyara & 2 others V Attorney General* [2016] eKLR, *Mwanasokoni V Kenya Bus Services Ltd* [1985] KLR 931, *Abok James Odera t/a John Patrick Machira t/a Macharia & Co. Advocates* [2013] eKLR.
23. Regrettably, the appellant by default or design did not attach any of the documents filed by the parties in the trial court. The Record of Appeal comprises the Memorandum of Appeal, statement of claim, Verifying Affidavit, witness statement, Memorandum of Reply, Respondent's witness statement, Reply to Memorandum of Reply, submissions for the claimant, and respondent documents, proceedings and the Judgment of the trial court.
24. This is the oldest appeal in the Kisumu ELRC Registry and has been dragging due to unavailability of type proceedings.



25. From the documents filed by the appellant and the oral testimony adduced in court on 15<sup>th</sup> August, 2023, it is clear that the appellant declared the respondent redundant allegedly on account of unsustainable wage bill.
26. The gravamen of the case was whether the appellant complied with the provisions of section 4 of the *Employment Act*.
27. It requires no gainsaying and as explained by Maraga JA (as he then was) in *Kenya Airways Ltd V Anation and Allied Workers Union Kenya & Others* (supra) redundancy is one of the legitimate approaches to separation between an employer and an employee at the option of the employer in circumstances in which the employee is free from blame. Redundancy is based in commercial or business parameters and is typically resorted to to ensure the sustainability of and growth of the business and may be a consequence of adoption of new technology, business re-organization, restructuring or right sizing among others.
28. As held in *Ronald Kipngeno Bii V Unilever Kenya Ltd* [2023] eKLR, redundancy is not an event but a process, has a beginning and an end, and ordinarily characterised by discussions by various organs of the organization and 3<sup>rd</sup> parties as necessary, such as the trade union where unionisable employees are members, local labour officer and the employee, if he/she is not a member of a trade union, and the prescribed legal process complied with.
29. For a redundancy to pass muster, the employer is required to show that it had a valid reason to declare the employee (s) redundant and the process was fair within the meaning of Section 45 of the *Employment Act*.
30. While Section 2 of the *Employment Act*, defines the term redundancy, Section 40(1) of the *Employment Act* prescribes the substantive and procedural processes to be complied with by the Employer and as adverted to elsewhere in this judgment Section 40(1) is couched in mandatory terms to underline its significance.
31. In *Freight In Time V Rosebell Wambui Munene* [2018] eKLR the Court of Appeal expressed itself as follows:

“In addition, Section 40(1) of the *Employment Act* prohibits in mandatory tone the termination of a contract of service on account of redundancy unless the employer complies with the following seven conditions, namely...”
32. These conditions include not less than one month’s notice to the union and the local labour officer, if the employee(s) is a member of the trade union, or notice to the employee and the local labour officer if the employee not a member of a trade union, the notice must set out the reasons for and extent of the redundancy, selection criteria, ensure that where collective agreement prescribe terminal dues payable in cases of redundancy, an employee is not placed at a disadvantage on account of being or not being a member of the trade union, outstanding leave days be paid in cash, one month’s notice or pay in lieu of notice and severance at the rate of not less than 15 days pay for each completed year of service.
33. See *Barclays Bank of Kenya Ltd & another V Gladys Muthoni & 20 others* (supra).
34. In addition to the seven (7) conditions outlined in Section 40(1) of the *Employment Act*, courts have held that consultations is an integral part of the redundancy process.



35. The foregoing is fortified by the sentiments of the Court of Appeal in *Cargill Kenya Ltd V Mwaka & 3 others* [2021] eKLR and *Kenya Airways Ltd V Aviation & Allied Workers Union Kenya & Others* (supra).
36. I will now proceed to determine whether the appellant met the statutory threshold in this instance.
37. As regards the reason, Section 40(1) (a) of the *Employment Act* requires that the notice sent to the trade union and the local labour office must set out the reasons for and extent of the intended redundancy.
38. In this case, the appellant relied on staff rationalization based on allegedly unsustainable wage bill as the justification but availed no evidence of its actual work force nor financial statements to demonstrate that indeed its wage bill was unsustainable.
39. A clear illustration of the state of affairs prior to and effect the staff rationalization and the financial implications would have effortlessly demonstrated that it was necessary to ensure sustainability of the appellant.
40. Equally, from the evidence availed, the court is in agreement with the trial court that the appellant failed to prove on a balance of probabilities that it had a valid reason to declare the respondent redundant.
41. Significantly, RWI confirmed on cross-examination that after the respondent was declared redundant the appellant advertised and hired other persons and neither the advertisement nor the letter dated 19<sup>th</sup> October, 2022 showed that the new employees were casual workers or seasonal employees.
42. Finally, although on cross-examination, RWI testified that 9 positions were to be declared redundant, his written witness statement dated 27<sup>th</sup> March, 2023 was silent on the issue as was the Memorandum of Reply.
43. As regards the notice of the intended redundancy, since the notice to the union was dated 1<sup>st</sup> September, 2022 and the claimant was declared redundant on 31<sup>st</sup> October, 2022, and did not contest union membership, the notice met the requirements of Section 40(1) of the *Employment Act* on the number of days. The claimant's testimony that he was given a notice of less than one (1) month before the redundancy was pertinent. This is because the appellant did not prove that it served the notice of redundancy upon the trade union. The union did not acknowledge receipt of the notice and took no part in the process. RWI confirmed as much on cross-examination without an acknowledgement from the union, service was not proven.
44. The court is in agreement with the trial court that the provisions of Section 40(1)(a) of the *Employment Act* were not complied with and the alleged notice of redundancy was ineffectual.
45. Concerning selection criteria, the trial court was assailed on the premise that the issue it was not pleaded.
46. Section 40(1)(c) of the *Employment Act* requires an employer who is contemplating separation on account of redundancy to have a selection criteria which considers seniority in time, skill, ability and reliability of each employee.  
The appellant did not demonstrate the criteria it applied.
47. Contrary to the appellant's counsel's argument that the learned trial magistrate addressed an unpleaded issue, the requirement of a selection criteria, as contended by the respondent's counsel is a matter of law and need not be pleaded. It is a legal imperative.



48. To that extent, the court is in agreement with the trial court that the issue of selection criteria was due for consideration.  
The trial court did not fall into error.
49. Finally, on consultations it is clear discernible that none took place. The appellant did not provide evidence of having had a meeting with the claimant or the trade union on the process or the options available to the respondent or any other employee.
50. Needless to emphasize, a lawful redundancy is proved by availment of records of meetings, decisions made and the process followed.
51. The court is also faulted for having held that termination of the respondent's employment was unfair. According to the appellant's counsel, the requirements of Section 40(1) of the *Employment Act* were complied with and the redundancy was lawful and fair.
52. Contrary to the counsel's assertion and as found hereinabove, although the reason for the redundancy was mentioned, it was not substantiated by verifiable evidence, the notice was ineffectual for want of service upon the trade union, there was no selection criteria and the respondent availed no evidence that it consulted anyone on the issue, including the respondent.
53. Having failed to prove that the redundancy process was conducted in accordance with the provisions of Section 40(1) of the *Employment Act*, it follows that the purported redundancy transitioned to an unfair and unlawful termination of the respondent's employment.
54. See *Muthina V Maina International Consolidators Ltd* [2024] KEELRC 2359(KLR) *Mohan V CCI Kenya Ltd* [2024] KEELRC 2347 (KLR) and *Solanki V Hard Tech Industries Supplies Ltd* [2024] KEELRC [2024] (KLR) and *Kilonzo V IPAS Africa Alliance* [2024] KEELRC 2210 (KLR) among others.
55. The court is in agreement with the finding of the learned trial magistrate that termination of the respondent's employment on account of redundancy was unfair and unlawful for non-compliance with the provisions of Section 40(1) of the *Employment Act*.
56. Finally, the trial court was faulted for awarding the respondent the equivalent of 6 month's salary as compensation under Section 49(1)(c) of the *Employment Act*, on the premise that the respondent had received the sum of Kshs.1,343,261.23 and thus the Kshs.453,480 awarded as compensation amounted to double payment.
57. Having testified that the respondent was paid the sum of Kshs.1,343,261.23 as terminal benefits which would suggest that it was his accrued benefits by virtue of having been the appellant's employee since engagement, and having found that termination of the respondent's employment on account of redundancy was unfair, the amount of Kshs.453,480 could not be characterised as part of the respondent's terminal benefits.
58. This is simply because it was awarded by the court pursuant to a finding grounded on the evidence availed before it. The court arrived at the sum in exercise of its judicial discretion.
59. The award did not amount to a double payment nor a second benefit as suggested.
60. The respondent deserved compensation for the unlawful termination of his employment by the respondent.



61. In *Le Monde Luggage cc t/a Pakwells Petze V Commissioner G. Dun and others*, Appeal Case No. JA 65/205 adopted in *Hema Hospital V Wilson Makongo Marwa* [2015] eKLR cited in *D K Njagi Marete V Teachers Service Commisison* [2020] eKLR, the South African Labour Court held as follows:

“The compensation which must be made to the wronged party is a payment to offset the financial loss which has resulted from the wrongful act. The primary inquiry for a court is to determine the extent of that loss taking into account, the nature of the unfair dismissal and hence the scope of the wrongful act on the part of the employer. This court has been careful to ensure that the purpose of the compensation is to make good the employee’s loss and not punish the employer”.

62. These sentiments are significant because Sections 193 and 194 of the *Labour Relations Act* of South Africa are worded in similar terms to Section 49(1)(c) of the *Employment Act*.

63. In the instant case, the learned trial magistrate awarded the equivalent of 6 months salary as compensation.

64. However, it is unclear on what basis the court exercised its discretion in awarding the sum of Kshs.453,480.00.

65. It is trite law that judicial discretion must be exercised judicially not whimsically or capriciously.

66. In this case, since the relief of compensation is provided for under Section 49(1)(c) of the *Employment Act*, the court is enjoined to take into account the relevant circumstances under Section 49(4) of the Act, in determining the quantum of compensation to award failing which the appeal court may interfere with the trial court’s exercise of discretion.

67. The principles that govern the instances in which a court may interfere with the exercise of discretion by the trial court have been articulated in various decisions.

68. In *United India Insurance Co. Ltd Kenindia Insurance Co. Ltd & Oriental Fire and General Insurance Co. Ltd V East Africa Underwriters (Kenya) Ltd* [1985] eKLR Madan JA stated as follows:

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere in one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the fact; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account; or fifthly, that his decision, albeit a discretionary one is plainly wrong”.

69. In the instant case, and as adverted to elsewhere in this Judgment, the learned trial magistrate should have taken account of the relevant parameters or factors as enumerated in Section 49(4) of the *Employment Act*, but did not thereby justifying this court interference with the trial court’s exercise of discretion in this instance.

70. Considering that the respondent was an employee of the appellant for about 10 years and 5 months which is not too long, did not contribute to the termination of his employment, had no recorded warning or other forms of misconduct, did not appeal the appellant’s decision and was paid gratuity, severance pay and terminal benefits amounting to Kshs.1,343,261.25, the court is satisfied that the equivalent of 4 months gross salary was fair, Kshs.302,320.



71. Finally, as regards other reliefs, the court is in agreement with the findings of the learned trial magistrate.
72. The upshot of the foregoing is that the instant appeal is partially successful. The award of Kshs.453,480 as compensation is set aside and substituted with Kshs.302,320.00.

Other awards of the trial court are affirmed.

Parties shall bear own costs of this appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 18<sup>TH</sup> DAY OF JUNE, 2025.**

**DR. JACOB GAKERI**

**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 *Civil 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.

**DR. JACOB GAKERI**

**JUDGE**

