



Regency Slots Limited v Njahira (Employment and Labour Relations Appeal E010 of 2021) [2023] KEELRC 2250 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEELRC 2250 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E010 OF 2021
K OCHARO, J
SEPTEMBER 28, 2023**

BETWEEN

REGENCY SLOTS LIMITED APPELLANT

AND

MARGARET MUKUHI NJAHIRA RESPONDENT

(Before Hon. Mr Justice Ocharo Kebira on 28th September 2023)

JUDGMENT

1. The Appeal before me arises from a judgment of the learned trial Principal Magistrate in Milimani Commercial Magistrate’s Court CMEL No 1369 of 2019, which was delivered on 2nd December 2020.
2. Through a Statement of Claim dated 7th August 2019, the Respondent impleaded the Appellant in the above-stated suit praying for a declaration that the termination of her employment was unlawful; payment of House Allowance of Kshs 161, 250; 12 months’ gross salary compensation under the provisions of section 49 of the *Employment Act* for the wrongful termination, Kshs 300,000; Compensation for unutilized leave days Kshs 62, 708; Overtime pay for Public Holiday worked Kshs 78, 388.80; Severance pay for 3 completed years of employment Kshs 37, 500; and the cost of the suit and interest.
3. Upon being served with the summons to enter appearance, the Appellant did enter an appearance and filed a statement of response on the 18th of September 2019. In the statement of response, the Appellant denied terminating the Respondent’s employment unlawfully but contended that the termination on account of redundancy was justified and procedural, as such the Respondent was not entitled to the reliefs sought.
4. At the trial the Appellant presented one witness to testify on its behalf in support of its case, while the Respondent testified in support of hers. Upon the material presented before him, the learned trial



Magistrate rendered himself on the matter through his judgment dated 2nd December 2020. In the said judgment, the learned trial Magistrate held that the Respondent's employment was unlawfully terminated and awarded the Respondent; 3 [three] months' gross salary as compensation for unfair termination Kshs 75,000; Overtime pay Kshs 78,388; interest and the costs of the claim.

The Appeal

5. Aggrieved by the decision of the Learned trial Magistrate, the Appellant filed the instant appeal assailing the judgment on the following principal grounds;
 - i. That the Honourable trial Magistrate erred in law and fact and misdirected himself in finding that the Appellant failed to comply with the redundancy procedure hence the Respondent's termination was unlawful.
 - ii. That the Honourable trial Magistrate erred in law and fact and misdirected himself by awarding the Respondent Kshs 78,388 for overtime when no evidence was led by the Respondent to prove the claim for overtime.
 - iii. That the Honourable trial Magistrate erred in law and fact and misdirected himself by awarding the Respondent Kshs 75,000.00 being 3 [three] months' gross salary as compensation for the unfair termination despite the Appellant having complied with the procedure on termination.
 - iv. That the Honourable trial Magistrate erred in law and fact and misdirected himself by failing to appreciate that the Respondent had unequivocally undertaken that she had no other claim against the Appellant.
 - v. That the Honourable trial Magistrate erred in law and fact and misdirected himself by failing to consider the evidence adduced by the Respondent hence he arrived at an erroneous decision.
 - vi. That the Honourable trial Magistrate erred in law and fact by holding that the Respondent had established her case on a balance of probabilities despite the Court's finding that the Respondent failed to prove her case on house allowance, leave days and severance pay.
 - vii. That the Honourable trial Magistrate erred in law and fact by awarding the Respondent costs of the suit despite the Court's finding that the Respondent failed to prove her case on house allowance, leave days and severance pay

The Appellant's submissions

6. The Appellant filed its written submissions on the 15th of February 2023 distilling five issues for determination thus;
 - i. Whether the learned trial Magistrate erred in law and fact in holding that the Respondent's termination on account of redundancy was unfair.
 - ii. Whether the Learned trial Magistrate erred in law and fact by holding that the Respondent had established her case on a balance of probability.
 - iii. Whether the Learned trial Magistrate erred in law and fact in awarding a claim for overtime.
 - iv. Whether the court should grant the reliefs sought.
 - v. Who should shoulder the costs of this appeal?



7. On the first issue, the Appellant submitted that the reasons for the termination on account of redundancy were fair and valid. Further, the elaborate procedure contemplated by section 40 of the [Employment Act](#) 2007 was duly followed. Submitting on substantive justification, Counsel for the Appellant stated that section 43 of the [Employment Act](#) placed a duty upon the employer, to prove the reason[s] for termination of an employee’s employment. The Appellant had valid reasons to terminate the Respondent’s employment. The reasons for the termination were elaborately brought out in the notice of intended redundancy dated 1st June 2016 was issued to the County Labour Office, and the termination letters that were subsequently issued to the Appellant’s employees, the Respondent inclusive on 2nd July 2019. The termination was due to the economic conditions prevailing then that had caused a significant downturn in the Appellant’s income necessitating a workforce reduction.
8. Considering the foregoing premise, the learned trial Magistrate erred when she found that termination was unfair. To buttress this submission, reliance was placed on the case of [Dennis Leak Ojuok v Population Services Kenya](#) [2022] eKLR where it was held:

“According to Section 40 of the [Employment Act](#), an employer is allowed to terminate employment contracts on account of redundancy. The ILO convention also specifies that employers can terminate employment for reasons of economic, technological, structural and similar nature. The Claimant cited the decision of the industrial court of Kenya Cause No 231 of 2010 between *Kenya Union of Domestic, Hotel Education, Institutions and Allied Workers (KUDHEIHA) v Rabai Road Primary school*, cited in *Jan In Khalechi v Oxford University press committee* (2013) eKLR where it was found the employer to have correctly terminated the contract of an employee for economic reasons but concluded the employer failed on fairness and awarded compensation. In the case of *Tobias Onyaya Auma & 5 others v Kenya Airways corporation* (2007) eKLR thus the court stated:

“It is not the role of any tribunal to prevent an employer from restructuring or adopting modern technology so long as it observed all relevant regulations.”

In *GN Hale & Sons Ltd. v Wellington, Caterers IUW 4* by New Zealand Court of Appeal cited in *Kenya Airways Limited v Aviation & Allied Workers Union Kenya and 3 others* eKLR (Maraga JA) held that “redundancy can be declared if the employer decides to re-organize his business and run it more efficiently and profitability.”
9. On procedural fairness it was submitted that Section 40 of the Act sets an elaborate and mandatory procedure that must be followed by an employer contemplating termination of an employee’s employment on account of redundancy. The requisite notices under section 40[1] [a] and [b] were issued by the Appellant. The notice of intended redundancy was issued to the Labour officer, and a redundancy notice was issued to the Respondent a month after through the termination letter dated 2nd July 2019.
10. The Court was urged to ignore the Respondent’s assertion that the Appellant didn’t bring forth the criteria used in selecting those that were to be affected by the redundancy, as the matter was never raised in her pleadings. The Court was urged to be persuaded by the holding in the case of [Enoch Thiongo Kibathi v Direct Line Assurance Company Limited](#) wherein the cases of [Independent Electoral & Boundaries Commission & another v Stephen Mutinda Mule & 3 others](#) [2014] eKLR and [Adetoun Oladeji \[NIG\] Ltd v Nigeria Breweries PLC](#) S.C 91/2002, and conclude that parties are bound by their pleadings and any evidence at trial which runs counter to the pleadings turns on nothing.



11. On the second issue, the Appellant submitted that Section 47[5] of the *Employment Act* placed a burden on the Respondent to prove that the termination of her employment was unlawful. To fortify this point, reliance was placed on the case of *Josephine M, Ndungu & another v Plan International Inc* [2019] eKLR, where the court held;

“Under Section 47[5] of the *Employment Act*, the burden of proving unfair termination lies with the employee. The said burden is discharged once he establishes a prima facie case that, the termination did not fall within the four corners of the legal threshold set out by section 45 of the Act. The said provision bars employers from terminating an employee’s contract except for a valid and fair reason and through a fair procedure.”

The Respondent didn’t discharge the legal burden. The learned trial magistrate therefore fell in error when she held that the Claimant proved her case.

12. On the 3rd issue, it was submitted that the Appellant has demonstrated that the learned trial Magistrate erred in fact and law when she didn’t appreciate that the termination was both procedurally and substantively fair. Consequently, the award on the compensatory relief [three months’ gross salary] should be set aside.
13. The award of compensation for work that the Respondent allegedly rendered during public holidays, but which the Appellant didn’t pay for, was not supported by any evidence. The trial Magistrate erred by granting a relief that was not proved.
14. Counsel submitted that it is trite in law that the remedies provided for under the *Employment Act* are discretionary and the Appellate Court cannot interfere with the exercise of such discretion unless it is satisfied that the trial Court misdirected itself on some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the trial Court was wrong in the exercise of discretion occasioning an injustice. Reliance was placed on the case of *Co-operative Bank of Kenya Ltd v Banking Insurance & Finance Union* [2014] eKLR where it was held:

“Our understanding of the Act is that the prescribed remedies...are discretionary rather than mandatory remedies, to be granted on the basis of the peculiar facts of each case. This is made absolutely clear by the use of the word “may”, which in the context of the provision imports a discretionary rather than a mandatory meaning. That the remedies.....are not a mandatory remedies, is made even clearer by section 49(4) which sets out some 13 considerations which the court must take into account before determining what remedy is appropriate in each case. Those considerations include the wishes of the employee, the circumstances of the termination and the extent to which the employee caused or contributed to it, the practicability of reinstatement or re-engagement, the common law principle that an order for specific performance of a contract for service should not be made save in exceptional cases, the employee’s length of service with the employer, the employee’s reasonable expectation of the length of time the employment was to last but for the termination, the employee’s opportunities for securing comparable or suitable employment, any conduct of the employee that may have caused or contributed to the termination, any action on the part of the employee to mitigate his losses, etc. What all the above means, is that before exercising the discretion to determine which remedy to award, the court must be guided by the above comprehensive list of considerations.”

15. On the last issue, it was submitted that the costs should follow the event. As this appeal has merit and fit to be allowed, the Respondent should be called upon to shoulder the costs. To buttress this point



reliance was placed on the case of *Stanley Kaunga Nkarichia v Meru Teachers College & another* [2016] eKLR.

The Respondent's submission

16. The Respondent filed her submissions on the 10th March 2023 ventilating four issues for determination thus;
 - i. Whether the Appeal is properly before this Court.
 - ii. Whether there were valid reasons to terminate the services of the Respondent on account of redundancy.
 - iii. Whether due process was followed in terminating the services of the Respondent on account of redundancy.
 - iv. Whether the award of 3 month's compensation and overtime was merited.
17. Counsel submitted that the Appellant's Appeal is not properly before the court and ought to be dismissed. The Appeal was filed outside the requisite period, as it was filed 60 days after the date of the judgment that the Appellant seeks to unseat. The filing as such violated the provisions of rule 8[1] & [2] of the *Employment & Labour Relations Court (Procedure) Rules* that provides:
 - “(1) Where any written law provides for an appeal to the Court, an appellant shall file a memorandum of appeal with the Court within the time specified for that appeal under the written law.
 - (2) Where no period of appeal is specified in the written law under paragraph (1), an appeal shall be filed within thirty days from the date the decision was delivered.”
18. The Appellant sought to remedy the default by applying for extension of time, an application which was not prosecuted. Consequently, there is no order either by consent of the parties or by the Court on the application, extending time in favour of the Appellant. Therefore, the Appeal herein is a non-starter. It should be dismissed.
19. On the second issue, it is submitted that the redundancy was camouflaged and not justified and or sufficiently explained by the Appellant. From the material before the trial Magistrate, it should be noted that it is only the Respondent who was targeted for termination. Of interest to note is the fact that before the termination, a new storekeeper had just been employed. Thus, it cannot be said that the services of the Respondent had become superfluous.
20. For the third issue, the Respondent submitted that the redundancy process was unlawful for the reasons that the Appellant failed to adhere to the strict provisions of section 40 [1] of the *Employment Act* 2007 and in particular, the Appellant failed to issue her with 30 days written notice of the intended redundancy. Further, the Appellant in declaring her redundant didn't at all give due regard to seniority in time and to the skill, ability and reliability of each employee affected by the redundancy and failed to pay her the severance pay. Reliance was placed on the case of *Francis Maina Kamau v Lee Construction* [2014] eKLR as quoted in *Caroline Wanjiru Luzze v Nestle Equatorial African Region Limited* [2016] eKLR in fortification of her submission.
21. The Respondent submitted that the termination letter cannot be tantamount to the notice envisaged under section 40 (1) (b) of the *Employment Act*. Furthermore, the termination letter that was issued to her did not give a notice of 30 days but instead terminated the Respondent's employment immediately.



To buttress this submission reliance was placed on the case of *Thomas De La Rue (K) Ltd v David Opondo Omutelema* [2013] eKLR.

22. The Respondent further submitted that no selection criteria have been exhibited by the Appellant. No reason and or explanation has been advanced by the Appellant to explain why the Respondent was selected for redundancy despite having worked there longer and having more skills and experience than a recently hired employee whom the Respondent herself trained. That the Appellant had the onus of demonstrating the criteria that it used to select the Respondent as the employee to be affected by redundancy, reliance was placed on the case of *Kenya Airways Limited v Aviation & Allied Workers Union Kenya* [2014] eKLR as quoted in the case of *Caroline Wanjiru Luzze v Nestle Equatorial African Region Limited* [2016] eKLR [*supra*]
23. On the last issue, it was submitted that it is clear that the alleged termination of the Respondent's employment on account of redundancy was procedurally and substantively unfair. The Learned Trial Magistrate was justified to award the compensatory relief, under the provisions of section 49 of the *Employment Act*.
24. On the issue of overtime, the Respondent invited this Court to note that from the itemised payslips that were placed before the trial Court, the item pay for overtime only began to appear on 30th October 2018 as a special allowance. It became imperative for the Appellant to provide a record showing that prior to this day, the Respondent didn't work during Public holidays or that he was somehow paid for services rendered during public holidays. Despite the Respondent's evidence on this aspect, the Appellant opted not to provide any evidence to discount the same.
25. It was further submitted that the Appellant being the custodian of the employee's records, the evidentiary burden to prove the fact that the Respondent did not work overtime lay upon them. To support this point, reliance was placed on the case of *Raila Amolo Odinga v IEBC & 2 others* [2017] eKLR as quoted in the case of *Kenya Revenue Authority v Maluki Kitili Mwendwa* [2021] eKLR where the court stated the following regarding the burden of proof on the plaintiff and shift of the evidential burden to the Defendant;

“..... Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and remains constant through a trial with the plaintiff however, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

The foregoing analysis therefore settles the issue of the burden of proof. For clarity, the legal burden of proof in a case is always static and rests on the Claimant throughout the trial. It is only the evidential burden of proof which may shift to the defendant depending on the nature and effect of evidence adduced by the Claimant.”

26. In conclusion, the Respondent urged this Court not to disturb the Judgment by the trial Court but uphold the same, and dismiss the appeal herein with costs.

Analysis and determination

27. Before I delve into the issues for determination, it is imperative to state that the appeal before me is a first appeal, I am enjoined to scrutinize the evidence and material before the trial Court and draw my conclusions.



28. In the case of *Prudential Assurance Company of Kenya Limited v Sukhwinder Singh Jutley and another* [2007] eKLR on the role of a first Appellate Court, the Court of Appeal stated:

“As a first appellate court, it is our duty to treat the evidence and the material tendered before the superior court to a fresh and exhaustive scrutiny and draw our own conclusion bearing in mind that we have not seen or heard the witnesses and giving due allowance for this - *Selle v Associated Motor Boat Company Limited* [1968] EA 123.”

29. In *The German School Society v Helga Ohany* as Consolidated with Civil Appeal No 324 of 2018, [2023] KECA 894[KLR] stated;

“28. We have considered the records for the two appeals, the parties’ submissions and the law. This being a first appeal, we are cognizant that our primary role is to re-evaluate the evidence before the ELRC and draw our own conclusions. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is open for reconsideration both on questions of fact and law. The judgment of the Appellate Court must reflect this court’s conscious application of its mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of this Court. The first appellate court has jurisdiction to reverse or affirm the findings of the trial court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its reasons for arriving at a different finding. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair and independent consideration of the evidence at the appellate stage.”

30. I have carefully considered the evidence and the material that was placed before the Learned trial Magistrate and the submissions, and, first, conclude that grounds of appeal as set out in the memorandum of appeal filed herein are unnecessarily over split, and second, distil only two central issues for determination in this appeal namely; whether the termination of the Respondent’s employ on account of redundancy was legal and fair; and whether the Respondent deserved the reliefs that were awarded in her favour by the trial Court.

31. I now turn to address the legality and fairness or otherwise of the termination of the Respondent’s employment on grounds of redundancy. Undoubtedly, the employer is generally allowed to terminate employment where there is redundancy. This right is in alignment with the principle that the social balance struck in the context of a constitutional regime in which the right to fair labour practices is a fundamental right is to afford an employee the right not to be unfairly dismissed and the employer the right to dismiss an employee for a fair reason provided a fair procedure is followed. See this Court’s decision in ELRC Cause No 2007 of 2016- *Waitthera Mbage v Hillcrest Investment Limited*.

32. Sections 2 of both the *Employment Act*, 2007 and the *Labour Relations Act*, 2007, define redundancy as;

“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 are commonly known as the abolition of office, job or occupation and loss of employment.”



33. A termination of an employee’s employment can only be said to be fair where there is substantive justification in the decision to terminate and procedural fairness in the process leading to the termination. In regard to this the Court of Appeal in the case of *Kenya Airways Limited v Aviation & Allied Workers Union* stated;

“..... for any termination of employment under redundancy to be lawful, it must be both substantively justified and procedurally fair.....”.

34. Counsel for the parties have addressed this Court on the provisions of Section 40 of the *Employment Act*, rightly submitting that the provision elaborately provides the procedure that must be followed by the employer contemplating terminating an employee[s]’ employment on the grounds of redundancy. However, and with great respect to counsel, their submissions are not very clear to me, more specifically on the issuance of the requisite notices under the section.

35. Lack of fault on the part of the employee is the defining characteristic of termination of an employee’s employment on the grounds of redundancy. It is for this reason, that the *Employment Act*, of 2007 has given a detailed procedure to be adopted in such whenever the employee contemplates terminating an employee’s employment on redundancy. In my view, the statutory procedure set in the section leaves no residual space for the employer to operate outside the procedure to whatever extent.

36. The section provides;

“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.”



37. There is no dispute that through its letter dated 2nd July 2019, the Appellant wrote to the Respondent;

“Termination letter

This letter of termination of employment is to inform you that your employment with us has been terminated as from 02nd July 2019; this decision is final and will not be modified.

You have been terminated for the following reasons;

Recent economic conditions have caused a significant downturn in our income, necessitating a workforce reduction at our Company.

You will receive your final payments from the accounts office.

You are requested to return any company property that is in your possession.

Although we regret the situation, this act is compulsory.

Regency Slots Ltd. Wishes you the best in your future endeavours..... “

38. From the material placed before the trial Magistrate, I discern that this letter was not preceded by any other addressed to the Respondent informing her of the Appellant’s intention to right-size its workforce as a result of the alleged income downturn and therefore, through a redundancy process. In her evidence under cross-examination, and the trial Court rightly captured it in his judgment, the Appellant’s witness admitted that indeed there was none that preceded the termination letter.

39. In my view, this letter heavily sounds like a summary dismissal letter. As shall come out hereinafter shortly, it lacked all the ingredients contemplated by the law, of a redundancy notice.

40. The Appellant contended before the trial Court and submitted before this Court that it did certify the stipulations of section 40 of the *Employment Act*, as on the 1st June 2019, it did issue a notice of intended Redundancy to the Labour officer and a month after a termination letter to the Respondent. It is clear from the evidence by the parties, and a reading of the letter, that the same was just addressed to the labour officer. It was never given to the Appellant. Clear also is the fact that the letter did not mention the number of employees who were to be affected and their names.

41. Having said this, I now turn to consider whether the letter to the Respondent took the character of the notice envisaged by section 40 [1] [b] of the Act. I see no difficulty in stating outrightly that it didn’t.

42. In *Thomas De La Rue [K] Ltd v David Opondo Omutelema* [2013] eKLR, the Court of Appeal stated;

“It is quite clear to us that sections 40 [a] and 40[b] provide for two 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 and to the employee and the local labour officer. Section 40[b] does not stipulate the notice period as is the case in 40[a], but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice”

43. Undeniably, therefore, the Respondent was entitled to a one month’s redundancy notice, notice which she was not served with. It cannot be enough that the Labour Officer was served. The law required that the notice be served to both the Respondent and the Officer.



44. The notice to the employer, trade union, and the Labour Officer contemplated under sub-section [a] and [b] births the event of consultation before a redundancy is declared. In the Kenyan situation, consultation is a must and its essence cannot be downplayed. This was emphasized by the Court of Appeal in *Kenya Airways Limited v Aviation & Allied Workers Union & 3 others* [2014] eKLR, thus;

- “ a. Consultation is implicit in the *Employment Act* under the principle of fair play;
- b. Consultation gives an opportunity for the other avenues to be considered to avert or to minimize the adverse effects of terminations;
- c. Consultations are meant for the parties to put their heads together and is imperative under Kenyan law;
- d. Consultations have to be a reality not a charade
- e. Opportunity must be given to stakeholders to consider;
- f. Stakeholders must have and keep an open mind to listen to suggestions, consider them properly, and then only then decide what is to be done; and
- g. Consultation must not be cosmetic.

45. In Civil Appeal No Nai. 325 of 2018, *The Germany School Society v Helga Ohany* Consolidated with Civil Appeal No 342 of 2018, *Helga Ohany v The German School Society*, the Court of Appeal Stated;

- “ 61. Having regard to the legislative intention of the provisions of section 40 of the *Employment Act*, the International Law, and decided cases, we find that consultation on an intended redundancy between the employer and employee is implied by section 40[1][a] and [b] of the *Employment Act*. Moreover, consultation is now specifically required by Article 47 of the *Constitution* and the *Fair Administrative Action Act*. Article 47 and Section 4[3] of the *Fair Administrative Action Act* provide that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give notice to the person affected by the decision. [see *Cargill Kenya Limited v Mwaka & others*, para 35-37].
- 62. The scope of the consultation in a redundancy process was explained in *Kenya Airways Limited and Aviation & Allied Workers Union Kenya & others* [supra]:

- 52. "The purpose of the notice under section 40[1][a] and [b] of the *Employment Act*, as is also provided for in the *ILO Convention No 158- Termination of Employment Convention*, 1982, is to give the parties an opportunity to consider “ measure to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment”. The consultations, therefore, meant to cause the parties to discuss and negotiate away 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."

46. I have carefully considered the tone of the Appellant's letter dated 2nd July 2016, it is in nature one that expressed a predetermined end, the Respondent had to exit, and it didn't provide room for consultation. The notice was therefore one that could not and did not achieve the purpose for which the notice to an employee under section 40 of the Act is provided.
47. Section 45 [2] of the *Employment Act* places upon the employer an obligation to prove that the termination of an employee's employment was procedurally fair, otherwise the termination shall be deemed unfair by operation of the law. The totality of the premise above is that the Appellant failed to discharge the legal burden under the section. The termination was procedurally unfair. The Learned Magistrate didn't fall into any error.
48. The above-stated letter brought out the reason for the termination of the Respondent's employment income downturn which necessitated rightsizing of the Appellant's workforce. The Respondent maintained throughout that the Appellant didn't have any valid or fair reason to terminate her employment. According to her the reason was a sham the evidence before the trial Magistrate by the Appellant, didn't address sufficiently and to the requisite standards that it was suffering from financial constraints to an extent that downsizing of its employees was necessary. All that the Appellant did was make general statements. General assertion cannot be sufficient evidence to enable a party to discharge its legal burden. To this end, I conclude that the Appellant failed to discharge its statutory burden under section 43 of the Act.
49. The Appellant's witness confirmed that at around the time of the alleged termination of the Respondent's employment, a new storekeeper had just been recruited. It is apparent that it is the new employee that the Respondent was directed to hand over to. The Witness further confirmed that at the time she was testifying, there was an employee discharging the functions that the Respondent used to discharge.
50. It is at this point that one should ask the question, how did the Appellant settle on the Respondent as the employee to be let go? What was the criteria used? The Appellant did not tender any evidence to demonstrate this. This goes to fortify the fact that substantive justification was absent. The Appellant's counsel submitted that this issue was not pleaded. With respect, I do not agree. The Respondent pleaded that the termination was procedurally and substantively unfair, explanation/evidence thereon was for during the hearing.
51. In sum, I am not convinced that the trial Court erred in law and fact when it found in favour of the Respondent that the termination was unfair.
52. The Appellant argued that the trial Court ought not have granted the Respondent costs, as she had failed to prove entitlement to some of the reliefs she had sought. I have found considerable difficulty in fathoming out what informs this line of thinking. It is trite law that costs follow the event, consequently, where a party has succeeded partially in the agitation of her or his claim, the court has discretion to award costs in his or her favour, and such party can only enjoy the costs only to the extent of the success. For instance, in the instant matter, the Respondent would only benefit in terms of



costs computed only on the awarded sums pursuant to the stipulations of the *Advocate's Remuneration Order*.

53. I have carefully considered the rival positions taken by the parties herein on the award of overtime. Considering that payslips of the Respondent started to contain the item for overtime worked as a special allowance way after the commencement of his employment, and her insistence upon the basis of this fact that the Appellant never used to compensate her for overtime worked, it became onus upon the Appellant to lead evidence to demonstrate either, that the Respondent never worked overtime or that she did she was fully compensated. The Appellant didn't provide any evidence in these lines. The evidence of the Respondent was not discounted.
54. By reason of the foregoing premises, I find the Appellant's appeal lacking in merit. I hereby dismiss the same with costs.
55. Orders accordingly.

READ, SIGNED AND DELIVERED THIS 28TH DAY OF SEPTEMBER, 2023.

.....

OCHARO KEBIRA

JUDGE.

In presence of:

Mr. Oduyo for the Appellant

Otieno for the Respondent.

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 15th March 2020 and subsequent directions of 21st 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.

.....

OCHARO KEBIRA

JUDGE.

