

Employment Law

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Why fair selection criteria could make or break your redundancy case in Kenya

Many employers navigating restructuring or cost-saving measures understand the basic legal requirements for redundancy under Kenyan law. However, a key aspect which is often overlooked is how employees are selected for redundancy. This can make or break the lawfulness of the process.

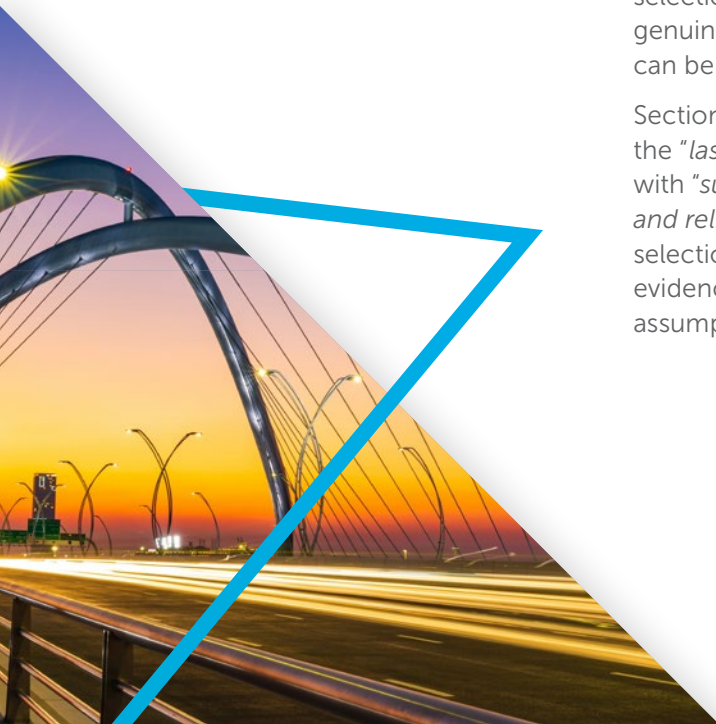
Redundancy in Kenya is governed by section 40 of the Employment Act of 2007 (Employment Act), which outlines both substantive and procedural requirements. While employers are familiar with the statutory obligations to issue notices, consult the labour office and pay severance, courts have consistently held that fulfilling these obligations alone is not enough. Redundancy must also be carried out in a transparent and fair manner, particularly in the selection of affected employees. Indeed, even where genuine reasons for redundancy exist, termination can be deemed unfair if the procedure is irregular.

Section 40(1)(c) of the Employment Act refers to the “last-in, first-out” (LIFO) principle but qualifies it with “subject to all other factors such as skill, ability and reliability”. This means employers must apply selection criteria that are objective, job-related and evidence based. Arbitrary decisions or undocumented assumptions are legally risky and procedurally unfair.

Judicial interpretation of fair selection criteria

Kenyan courts have scrutinised redundancy processes where affected employees were selected without a clear explanation. The Court of Appeal in *Thomas De La Rue (K) Ltd v David Opondo Omutelema* [2013] KECA 492 (KLR) noted that redundancy is a process requiring meaningful consultation and objective justification, not just a managerial decision. In *Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others* [2014] KECA 404 (KLR) the court criticised the employer for failing to show how performance or skills were assessed when selecting staff for redundancy, stating that economic reasons alone were not enough.

In *Kimathi v Ericsson Kenya Limited* [2023] KECA 106 (KLR) the Court of Appeal was categorical that fair and objective criteria must be free of blemishes or stains, clean and pure, unsullied and equitable. It further elaborated that an objective process means uninfluenced by emotions or personal prejudice. In effect, the court raised the standards by emphasising that where a criterion is blemished or sullied even to a lesser degree, then it does not meet the requirements contemplated under section 40 of the Employment Act.



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Another aspect employers should be wary of is trying to disguise redundancy as other forms of termination, such as "retirement" or "retrenchment", to avoid the stricter procedural requirements for redundancy. In *Murata Sacco Society Ltd v Banking Insurance and Finance Union (Kenya)* [2025] KECA 173 (KLR) the court found that an exercise described as "retirement" or "retrenchment" with the reason of "reducing staff outlay" was in fact a disguised redundancy aimed at avoiding the rigorous provisions for redundancy set out in the collective bargaining agreement and the Employment Act. Ultimately, the appellate court upheld the trial court's decision awarding compensation to the aggrieved employees.

Practical steps for fair and consistent selection

To ensure legal compliance and fairness, employers should begin by identifying the roles affected by the redundancy. This means defining specific positions rather than targeting individuals. The next step is to apply fair and consistent selection criteria such as:

- Skills and qualifications relevant to the remaining roles.
- Performance history based on documented appraisals.
- Disciplinary record and attendance.
- Length of service as a tiebreaker, not a primary criterion.

Consultation plays a key role. Employees should not simply be informed of the decision. The employer should explain the business rationale, share the proposed criteria and listen to feedback, especially where unions or staff representatives are involved. Courts have repeatedly

found that where consultation is missing or superficial even a valid redundancy may be struck down. For instance, in *London Distillers (K) Limited v Kenya Union of Commercial Food & Allied Workers* [2025] KECA 216 (KLR), the bench awarded compensation to employees after finding the procedure irregular. The court noted that the employer ignored repeated requests from the union for meetings to discuss the proposed changes, which significantly contributed to the finding.

Adherence to due process and procedure cannot be gainsaid. The *Mwikali v Flame Tree Africa Limited* [2025] KEELRC 1809 (KLR) decision should serve as a stark reminder of the importance of following proper redundancy procedures. In that case, the claimant was served with a redundancy notice on 18 March 2021 but was simultaneously instructed to hand over all company property by the close of business on the same day. Although the notice letter stated a one-month notice period expiring on 18 April 2021, the immediate demand for handover effectively denied her the statutory notice period and any opportunity for consultation. The court unequivocally found that this amounted to no real notice or room for consultation, rendering the redundancy procedurally unfair and unjustified.

Once decisions are made, employers must clearly communicate the outcome, explain the basis of selection and issue proper termination notices and statutory dues, including severance pay. Where possible, support measures such as references or outplacement counselling can soften the impact and preserve the employer's reputation.



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Documentation is your salvation

Employers are encouraged to use a selection matrix, which is a simple tool that allows consistent scoring of all employees in the affected category. This approach not only ensures the decision is backed by documentation but also helps avoid any perceptions of bias. The matrix should be accompanied by written records such as appraisal reports and disciplinary history.

Equally important is the retention of all relevant documentation including internal memos, consultation notes, scoring sheets and evidence used for evaluations. In the event of disputes, this documentation becomes the employer's primary line of defence.

Conclusion

Fair selection is not just good HR practice; it's a legal requirement. Employers must approach it as a deliberate, consultative and evidence-based exercise. When properly implemented, it safeguards the process from legal challenge, supports employee dignity and demonstrates the employer's integrity.

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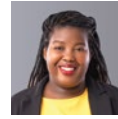
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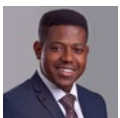
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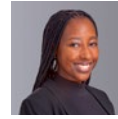
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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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