

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT BUNGOMA
APPEAL NO. E007 OF 2024

VINEYARD INTERNATIONAL CO. LTD APPELLANT
VERSUS
MATHEW WATINDI MURUNGA RESPONDENT
*(Being an appeal from the ruling in Kimilili Senior Principal
Magistrate’s Court in ELRC Cause No. E003 of 2022 by Hon.
GLADYS ADHIAMBO (SPM) delivered on 2nd April 2024)*
(BEFORE HON. JUSTICE DAVID NDERITU)

JUDGMENT

I. INTRODUCTION

1. In a judgment dated and delivered on 24th November 2023 the lower trial court entered judgment in favour of the respondent in the following terms –

- a) I declare that the dismissal of the claimant was unlawful and unfair.*
- b) I do disallow the prayer for reinstatement of the claimant to previous employment position.*
- c) I disallow the prayer to be paid unpaid salary.*
- d) The claimant be paid 2 months’ salary in lieu of notice that*

is Kshs15968.10 x 2 Kshs191,617.220.

e) Prayer d and f are disallowed.

f) The respondent shall pay the claimant the costs of the claim.

2. Dissatisfied with the judgment, the appellant filed an application dated 11th January 2024 seeking for the following orders –

1) THAT this honorable court be pleased to review its decision of awarding the claimant Kshs31,936 as two months salary compensation in lieu of notice when the contract of employment provided for only one months period termination in lieu of notice which should be Kshs15,968.10/=.

2) THAT this honourable court be pleased to review its decision of awarding the claimant Kshs191,617/= as 12 months maximum compensation and dismiss this suit since the claimants' non-renewable contract was to run for a period of 4 months only that is from 27th August, 2021 and expire on 31st December, 2021 and thus was not on permanent contract terms and his contract had expired at the time this suit was filed.

3) THAT Costs of this application be provided for.

3. In a ruling delivered and dated on 2nd April 2024 the above application was dismissed with costs.

4. Thereafter, the appellant through Nakitare & Co. Advocates, commenced this appeal vide a memorandum of appeal dated 5th April 2024 challenging the above ruling raising the following grounds of appeal –

- 1. The learned trial magistrate erred in law and fact by failing to rule that the respondent was on a non-renewable contract of 4 months that is from 27th August, 2021 and expire on 31st December, 2021 and thus was not entitled to 12 months maximum compensation but as per the contract.**
- 2. The learned trial magistrate erred in law and fact by failing to allow the application seeking to review salary compensation in lieu of notice from Kshs31,936/= to Kshs15,968/= as stipulated in the contract of employment dated 27th August, 2021.**

5. The appellant is seeking for orders that –

- a) This appeal be allowed and the ruling of HONOURABLE GLADYS ADHIAMBO given at Kimilili on the 2nd day of April, 2024 be set aside and the honourable court be pleased to reassess compensation as per the contract of employment dated 27th April, 2021.**

- b) Costs of this appeal be awarded to the appellant.**

6. The appeal is opposed by the respondent appearing through Namatsi & Co. Advocates.

7. By consent, the appeal was canvassed by way of written submissions. Mr. Nakitare for the appellant filed written submissions dated 17th March 2025 while Miss Mulama for the respondent filed submissions dated 26th March 2025.

II. BACKGROUND

8. In a statement of claim dated the respondent pleaded that as at the time of his dismissal he was an employee of the appellant as a winch operator on a six months contract at a monthly salary of Kshs35,458.45. He was summarily dismissed vide a letter dated 28th January 2022 on allegations of theft of fuel from the equipment he operated.

9. The respondent sought for the following reliefs in the cause –

a) A declaration that the dismissal was unlawful and unfair.

b) Reinstatement to previous position.

c) Un paid salary of Ksh35,458.45/=.

d) Staff gratuity (1-month salary x 5 years) of Kshs177,290/=.

e) Salary in lieu of the notice (Kshs35,458 x 2 months) Kshs70,916/=.

f) General and exemplary damages for unlawful dismissal and defamation.

g) Costs.

10. The claim by the respondent was denied in its totality vide a

response dated 23rd May 2022.

11. Upon conclusion of the hearing the lower trial court found in favour of the respondent and awarded reliefs as stated above. As stated above the appellant applied for a review of the judgment but the application was denied and that ruling is now the subject matter of this appeal. The appeal is opposed.

III. SUBMISSIONS BY COUNSEL

12. In his written submissions counsel for the appellant argued the appeal on two grounds –

i. Whether the respondent was entitled to 12 months compensation when his non-renewable contract had expired as at the time he came to court.

ii. Whether the respondent was entitled to Kshs31,936/= as awarded when the contract for employment provided for 1 months salary of Kshs15,968/- in lieu of notice.

13. On the first issue it is submitted that the respondent was as at the time of dismissal on a non-renewable fixed-term contract of four months running from 27th August to 31st December, 2021. It is submitted that as at the time the respondent filed the claim in court the fixed-term contract had expired. In the circumstances, it is submitted that the award of salary equivalent to 12 months' gross salary was excessive and punitive to the appellant. It is further submitted that in any event the respondent did not avail evidence that

he did not or could not secure employment after the dismissal as to warrant such huge award in compensation.

14. On the second issue it is submitted that the contract provided for one months' salary in lieu of notice and hence it was wrong and unlawful for the lower trial court to have awarded Kshs31,936/= which is equivalent to two months' salary of what the respondent earned as at the time of dismissal. Counsel cited ***David Gichana Omuya V Mombasa Maize Miller Ltd (2014) KEELRC 526 (KLR)***.
15. The respondent's counsel identified the main issue for determination in the appeal to be – *Whether the appellant has made out a good case to justify the grant of orders for review.*
16. It is submitted that the application by the appellant failed to meet the conditions set in ***Order 45 of the Civil Procedure Rules***. It is submitted that the contract now relied upon by the appellant was not availed in court during the trial in the lower court and no explanation was offered as to why the same was not availed in evidence alongside the other filed documents. It is submitted that the said contract was clearly an afterthought manufactured to deny the respondent the fruits of a lawful judgment. It is further submitted that the said contract was not subjected to cross-examination and the authenticity of the same cannot be confirmed at this stage in this appeal.
17. It is further submitted that during the trial in the lower court the

respondent availed pay slips in his evidence confirming that his gross monthly salary was Kshs35,458/= and as such the award of the said sum only covered one months' salary in lieu of notice.

18. Citing ***Republic V Advocates Disciplinary Tribunal Ex parte Apollo Mboya (2019) eKLR*** it is submitted that the appellant has not availed evidence in support of any of the grounds of review enlisted in ***Section 80 of the Civil Procedure Act or Order 45 of the Civil Procedure Rules***. It is submitted that no error apparent on face of record has been established or proved and the evidence allegedly relied upon by the appellant – the contract – was ostensibly always in their possession and no reason is advanced as to why the same was not produced during the trial.
19. Further citing ***Muyodi V Industrial & Commercial Development Corporation & Another (2006) 1 EA 243*** it is submitted that an application for review should not call upon the court to rigorous examination of the facts and evidence of the trial as the error should be apparent on the face of record or the reason advanced should be so obvious for the court to see and discern. It is submitted that an application for review should not be an appeal through the back door.
20. Further citing the Supreme Court in ***Parliamentary Service Commission V Martin Nyaga Wambora & Others (2008) eKLR*** which followed the reasoning in ***Mbogo & Another V Shah (1968) EA***, it is submitted that the following principles guide exercise of

discretion in applications for review –

- i. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited bench of this court.*
- ii. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the court;*
- iii. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.*
- iv. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.*
- v. During such review application, in focus is the decision of the court and not the merit of the substantive motion subject of the decision under review.*
- vi. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:
 - a. as a result, a wrong decision was arrived at; or*
 - b. it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.**

21. It is submitted that the appeal herein is challenging the judgment of the lower trial court in disguise of an appeal against the ruling on the application for review. The court is urged to dismiss the appeal with costs.

VII. ISSUES FOR DETERMINATION

22. The court has perused the record of appeal, including the proceedings in the lower trial court, the memorandum of appeal, and the submissions by counsel for both parties as summarized above. Overall, the issues that commend themselves to the court for determination in this appeal are -

- a) Whether the dismissal of the application for review by the lower trial court was correct and lawful.*
- b) Is there a reason(s) for this court to interfere with the decision of the lower trial court as prayed by the appellant?*
- c) What appropriate orders should this court make in regard to the above issues and on costs?*

VIII. DETERMINATION

23. As the first appellate court, this court is obligated to re-evaluate the evidence on record and arrive at its own conclusions.

24. *Section 80 of the Civil Procedure Act* provides as follows –

Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this

*Act, but from which no appeal has been preferred; or
(b) by a decree or order from which no appeal is allowed by
this Act, may apply for a review of judgment to the court
which passed the decree or made the order, and the court
may make such order thereon as it thinks fit*

25. The above law is expounded in **Order 45 of the Civil Procedure Rules** setting the conditions and circumstances under which an application for review may be allowed. The Supreme Court restated those terms, conditions, and circumstances in **Parliamentary Service Commission V Martin Nyaga Wambora & Others (supra)** as stated in the summary of the submissions by counsel above.
26. The court has gone through the application for review in the lower trial court by the appellant dated 11th January 2024 in regard to the judgment dated 20th November 2023. The court has also carefully gone through the ruling by the lower trial court dated 2nd April 2024 dismissing the said application.
27. Upon detailed analysis of the application, the supporting affidavit, the replying affidavit, and the applicable and relevant law as cited above, the lower trial court found and held that the appellant had “*not demonstrated discovery of new and important matter or evidence which after exercise of due diligence was not within his(sic!) knowledge or could not be produced by him(sic!) at the time when the decree was passed or order made or that there is an error*

or mistake apparent on the face of the record.”

28. The learned trial magistrate held that what the appellant intended to do through the application was introduction of new evidence through the back door. The lower trial court found and held that no reason had been advanced as to why the purported contract dated 27th August 2021 between the parties had not been availed and produced as evidence alongside the other documentary evidence filed. The lower trial court found and held that the said contract was all along in the possession and reach of the appellant and no reason had been given for failure to adduce the same.
29. The lower trial court then found and held that the application did not meet the threshold set by the provisions of the law above and proceeded to dismiss the application with costs.
30. A critical look into the foregoing discloses that the sole foundation upon which the application was made was a purported contract that was not availed and produced as evidence during the trial. It was not explained in the application why the same was not filed and adduced as evidence alongside the other documents by the appellant. The logical and reasonable presumption, and the lower trial court was right and correct on this, is that the contract was all along in the possession of the appellant as no other explanation was advanced in the supporting affidavit to the application. That is not what is envisaged as discovery of new material or evidence in the above law.

31. The adduction, admission, and reliance upon the said contract in the lower trial court at review should have occasioned great prejudice to the respondent who deposed that he had not seen the same and was not party thereto.
32. While the appellant had the right to either appeal the judgment of the lower trial court or apply for review as it did, this court shall not countenance an appeal through the back door. What is before this court is an appeal following a denial of an application for review and not an appeal against the judgment of the lower trial court. As noted above, there is no explanation advanced, logical and or reasonable, as to why the appellant failed to avail the said written contract during the trial.
33. In the circumstances, this court finds no reasonable or logical cause for interfering with the exercise of discretion on the part of the lower trial court. The appellant discovered no new material or evidence that was not available to it at the time of the trial had it exercised due care and diligence. There was no other or further reason(s) advanced in the application to justify the application for review.
34. This court agrees and is in concurrence with the lower trial court that the application for review by the appellant failed to meet the threshold for review as set out in the foregoing paragraphs as per the law cited above.
35. It matters not that this court may have arrived at a different

conclusion had it conducted the trial or had the matter before this court have been an appeal challenging the judgment and the decree of the lower trial court. The fact of the matter is that what is before this court is an appeal against an order that denied an application for review. And this court finds no reason, factual or legal, for interfering with the discretion exercised by the lower trial court in dismissing the impugned application for review.

36. The court has said enough in demonstrating that the appeal herein is without merit and the same is hereby dismissed.

IX. ORDERS

37. Flowing from the foregoing, the court makes the following orders –

- a) This appeal is hereby dismissed for lack of merits.*
- b) Costs for both the appeal and the entire trial in the lower trial court to the respondent.*

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT
BUNGOMA THIS 26TH DAY OF SEPTEMBER, 2025.**

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DAVID NDERITU
JUDGE