Togom v Radar Limited (Employment and Labour Relations Appeal E003 of 2023) [2024] KEELRC 1205 (KLR) (21 May 2024) (Ruling)

Neutral citation: [2024] KEELRC 1205 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

EMPLOYMENT AND LABOUR RELATIONS APPEAL E003 OF 2023

HS WASILWA, J

MAY 21, 2024

BETWEEN

JACKSON KIPKOECH TOGOM ..... APPELLANT

AND

RADAR LIMITED ..... RESPONDENT

RULING

1. Pursuant to the Judgement delivered by this Court on 1st February, 2024, the Appellant filed an Application, Notice of Motion dated 23rd February, 2024, brought under Section 80 of the *Civil Procedure Act*, Orders 45 Rule 1(a)&(b) and 2(2) of the *Civil Procedure Rules* and all other enabling provision of law, seeking for the following Orders; -

    1. That this Court be pleased to partially Review its Judgement dated 1/2/2024 in the following terms;-

        i. The calculations on overtime and Public Holidays at paragraphs 58 and 61 respectively be reviewed and the same to be substituted as follows;

            a. One and half times the normal hourly rate in respect to the already held hours as overtime (that is 2592), for purposes of overtime.

            b. Twice the normal hourly rate in respect to public Holidays.

        ii. For purposes of (b) above, the number of hours be adjusted from the already established 11 Public Holidays is 11 days X 3 years X, 4 hours, resulting to 132 hours.

    2. That this Honourable Court be pleased to apportion percentage of costs the Respondent ought to bear proportionate to the reliefs he succeeded via a vis the reliefs he had urged the Court.

3. Alternatively, the Court may refer the matter to the Labour Office to make appropriate calculations on the reliefs cited above but guided by the Holding of the number of hours stablished under paragraph 58 and number of days established under paragraph 61 vis a vis the amount they paid to the Claimant.

4. That costs of the Application herein be provided for.

2. The Applicant stated that there is an error on the face of the Judgement in terms of calculation of Overtime and Public Holidays pay, which amount if not corrected will cause prejudice to the Appellant as the amount in question is a huge sum.

3. In the affidavit, the affiant stated that the Court correctly found the number of hours being 2592 for purposes of overtime and 11 public holidays for the three years amounting to 33 days in total public Holidays worked. However, that the Court erroneously made calculations instead of adopting a multiplicand of 1 ½ for the overtime pay and 2 hours for the Public Holidays pay.

4. With regard to hourly pay, the Appellant stated that the monthly pay of Kshs 23,326 ought to be converted to hourly rate and proper calculation made.

5. He stated that the errors above ought to be corrected as provided for under Section 80 of the *Civil Procedure Act* as read with Order 45 of the *Civil Procedure Rules*.

6. On costs, the Applicant stated that since, he had substantially succeeded in the Appeal, he ought to be awarded costs commensurate to the reliefs he succeeded.

7. The Application herein is opposed by the Respondent who filed a replying affidavit sworn on 11th March, 2024 by Beryl Adhiambo Odhiambo, the Human Resource officer of the Respondent.

8. She stated that the current application is a non-starter because the Court cannot review its judgement at this stage and that the only available option for the Applicant is to appeal the decision of this Court.

9. She stated that there is no error apparent on record and that the Court made proper calculation which cannot be reviewed at this stage.

10. On the Costs of the suit, she stated that the issue of costs was determined by the Court after considering all facts on record, hence if the Appellant is not satisfied then, he ought to appeal the same and not seek for review.

11. On refereeing the matter to the labour office, the affiant stated that the matter has already been determined by this Court as such, the same cannot be referred back to the labour office. She explained that only matters that have not been determined by the Court can be referred to the Labour Office.

12. The affiant maintained that the Court was correct in its calculation of overtime and public Holidays award and urged this Court not to interfere with its decision and instead dismiss the Application for lacking merit.

13. In a supplementary affidavit sworn by the Applicant on 21st March, 2024, the Applicant maintained that the arithmetic error of the award in this case require the Court to review its judgment and not a subject of Appeal as urged by the Respondent.

14. He reiterated that the only correction required in the review application is on calculation of Public Holidays pay and Overtime Pay on multiplicand of 2 hours and 1 ½ hours respectively.

15. He stated that in arriving at the hourly pay, to be used in the calculation, then the hourly wage of a person paid Kshs 23,000 in the Wage Order of 2018 should be used, which translates to Kshs 212.60

per hour. Further that the Court should use the the above hourly rate while adopting the 2592 number of Overtime hours already established and 132 hours' number of Public Holidays hours worked for the three years.

16. On refereeing the matter to the Labour Office, the applicant stated that there is nothing stopping the court from referring the matter for arithmetic calculation. He maintained that the labour office will only be tasked with calculation of an award that has already be granted by the Court.

17. He reiterated that the reason for referring the matter to the labour office is to calculate the hourly pay from the Kshs 23,326 paid to the Appellant on a monthly basis, which hourly pay will be used to calculate the overtime and public holidays pay.

18. The Application herein was canvassed by written submission, with the Appellant filing submission on 26th April, 2024 and supplementary submissions on 29th April, 2024. The Respondent on the other hand filed its submission on 29th April. 2024

Applicant's Submissions

19. The Applicant submitted that the Application herein is not challenging the award of overtime and Public Holidays but the arithmetic calculation of the same. Therefore, that it's a review application under Order 45 Rule 1 of the *Civil Procedure Rules* as read with section 80 of the *Civil Procedure Act* and not an Appeal. To support this, the Applicant relied on the case of *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR where the Court held that;-

> " A clear reading of the above provisions shows that Section 80 gives the power of review while Order 45 sets out the rules. The rules restrict the grounds for review. They lay down the jurisdiction and scope of review. They limit review to the following grounds- (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without un reasonable delay... The starting point is that a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established... The Indian Supreme Court In the case of *Aribam Tuleshwar Sharma v. Aribam Pishak Sharmal*, speaking through Chinnappa Reddy, J., (SCC p. 390, para 3) 1 (1979) 4 SCC 389: AIR 1979 SC 1047, made a pertinent observation that is it has to be kept in view that an error apparent on the face of record must be such an error, which must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions."

20. On whether there is an error on the face of the record, the Applicant submitted in the affirmative and stated that the Court has tabulated 108/30 X 23,326 to get 75,576, when the same could have amounted to 84,873. He argued that the first error that is apparent is the conversion of 2,592 (by 24 hours) to arrive at 108 days and the second error is conversion of the 108 days by 30 days.

21. It is argued that the first error is an accidental one because the Court was to assess the "number of working days" and not "days". therefore, the 2,592 as "working hours" is the total number that represents or represented the four-hour overtime in a day. The understandable way of looking at it is

that a day represented 4 hours and NOT 24 hours. Therefore, the number of days will not have been 108 but 2 592/4 = 648 days.

22. The second accidental error is conversion of the number of days by 30 days. This is accidental because in a month an employee does not work for 30 days but 26 days, when 4 rest days in a month are removed. but now that the accurate working days are 648 then the number of months will be 648/26 =24 months.

23. The Applicant argued that the amount he possibly will have obtained is higher and is not an amount that require forfeiting given that he served the respondent for a longtime. He reiterated that the error on calculation here applies only to the amount awarded for overtime and public holidays.

24. To clarify on the method for calculating public holiday award and Overtime award, the Applicant relied on the case of *Kenya National Private Security Workers Union v G4s Kenya Limited & 2 others; Central Organisation of Trade Unions COTU (K) & 4 others (Interested Parties)* [2021] eKLR, where the Court held that; -

> "the foregoing notwithstanding, the Court wishes to clarify that when tabulating hours worked per week, any hours worked overtime must be converted using the formula in the Protective Security Services (Order) 1998 so that any hours worked beyond working hours on a normal working day are deemed to be 1.5 hours, while any hours worked on a public holiday or rest day are converted at 2 hours for every hour worked... the formula for calculation is that Overtime Formula x 1.5 x Overtime hours above 52 per week"

25. Similarly, that having established the overtime hours as 2592 Hours, then the amount payable will be the Hourly pay X 1.5 X 2592. He argued that the only borne of contention is the amount payable on hourly rate and in this he gave two formulae that can be adopted by this Court. The first one is the use of the hourly rate provided for in the Legal Notice number 2 of 2018 that was subsisting at the time the Appellant was terminated which will ne Kshs 212.60.

26. With regard to Public Holidays pay, the Applicant cited the case of *Wycliffe Juma Ilukol vs the Board of Management Father Okudoi Secondary School* [2022] eKLR where the court faced with similar situation applied the provisions of section 2 and 4 of the *Public Holiday's Act* and the established that the number of Public Holidays in Kenya are 11. Therefore, that the number of holidays worked in three years are 33 multiply by the 12 hours worked=396 hours. This 396 hour multiplied by 2 by 212.60 hourly rate pay = 168,379.20

27. On referring the matter back to the labour office for calculation, the Applicant submitted that the same will be send to the labour office for the sole purpose of getting the hourly payment rate. In this, he relied on the case of *Daudi Haji v Kenya Ports Authority* [2013] eKLR where the Court after delivering judgment referred the matter to the labour officer and penned the reasons for reference all follows;-

> "...the overtime should be capable of precise mathematical calculation and I would order that the parties agree on the calculations within 7 days on failure to agree the claimant to furnish the county labour officer with a copy of the respondents memo dated 15 July 2009 and this judgment to enable him tabulate the amount owing and due to the claimant for the 4128 shorthand hours at normal overtime rate. This matter should therefore be mentioned on 19 august 2013 for parties county labour officer to submit to the court the agreed cash equivalent of the 4128 hours."

28. Similarly, that in this case there is apparent misalignment between the payments made to the claimant and the derivative hourly pay that will be attendant thereto, not to mention that the respondent format

may also ran in conflict with the position laid out in the authorities presented. Therefore, that it would be proper if the tabulations are referred to a Labour Officer.

29. On costs, the Applicant submitted that the power to grant costs is discretionary and hence not appealable. It is for the said reason that the party affected by costs may approach the court for reconsideration. He added that the costs probably payable may exceed the amount the claimant will get or may be substantially be higher in that the claimant portion at the end of the day may be a light package. it is on that considered view that the claimant urges that the costs be apportioned. He urged this Court to re-consider, its finding and the costs can be directed to be 50% i.e. that the respondents to only pay 50% of what would have been taxed against it since the appellant (the claimant) substantially succeeded in the appeal.

30. In conclusion, the Applicant prayed that the application be allowed and/or appropriate direction given regarding the tabulation of the amount on public holidays and overtime award.

Respondent's Submissions

31. The Respondent submitted that it is not in dispute that this Court has powers to review its decision as the same is provided for under Section 80 of the *Civil Procedure Act* as read with Order 45 of the Civil Procedure Rules. In this, they cited the case of *Attorney General & Others v Boniface Byanyima* HCMA No. 1789 of 2000 and the case of *Paul Mwaniki v National Hospital Insurance Fund Board of Management* [2020] eKLR.

32. On whether there is an error apparent on record that require correction, the respondent submitted that the Applicant is asking this Court to consider the formula it used in arriving at the award and not merely correcting an arithmetical error as alleged. Therefore, that since the Court is asked to reconsider the formula it used in making the overtime and Public Holidays award, the application moved from a review application to an appeal application. In this, the Respondent relied on the case of *Paul Mwaniki* (*supra*) where the Court held that;-

> "a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review. In *Nyamogo & Nyamogo v Kogo* discussing what constitutes an error on the face of the record, the court rendered itself as follows:-"An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal."

33. Accordingly, that by giving the formula of how the overtime pay and public holidays pay is to be calculated, the error cannot be said to be on the face of the record.

34. On the issue of costs being re-assessed, the Respondent submitted that costs being reassessed is beyond the scope of review as was held in *Omote & Another v Ogutu* [2022] KEHC 16441 KLR, where the Court held that;-

> " The request herein entails a re-appraisal of the evidence and re-analyzing its decision to establish whether or not the applicant is entitled to costs- something which is beyond the scope of review jurisdiction. Accordingly, the supposedly 'mistake or error apparent on the face of the record' is not a misstate or error in the sense of the law for which review may be granted."

35. It was argued further that by dint of section 12(4) of the *Employment and Labour Relations Court Act*, this Court is granted discretion to award costs and since the Applicant partially succeeded, the Court found it fit to deny costs. He added that discretion should not ordinarily be interfered with as was held in *Mbogo and Another v Shah* [1968] EA, where the Court held that;-

> " I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

36. In conclusion, the Respondent submitted that the issue of costs is not subject of review and prayed that the entire application be dismissed with costs.

37. I have considered the averments and submissions of the parties herein. The Respondent submitted that this court cannot review its judgment at this stage but that the matter should be subjected to an appeal.

38. I would address this submissions by referring to the *ELRC (Procedure) Rules 2016* at rule 33 which state as follows:-

> " Review
>
> (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling-
>
> (a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
>
> (b) on account of some mistake or error apparent on the face of the record;
>
> (c) if the judgment or ruling requires clarification; or
>
> (d) for any other sufficient reason.

(2) An application for review of a decree or order of the Court under subparagraphs (b), (c) or (d), shall be made to the judge who passed the decree or made the order sought to be reviewed or to any other judge if that judge is not attached to the Court station.

(3) A party seeking review of a decree or order of the Court shall apply to the Court by way of notice of motion supported by an affidavit and shall file a copy of the Judgment or decree or Ruling or order to be reviewed.

(4) The Court shall, upon hearing an application for review, deliver a ruling allowing or dismissing the application.

(5) Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.

(6) An order made for a review of a decree or order shall not be subject to further review."

39. Indeed, under this rule this court can review its own decree or orders accordingly and the submissions by the Respondent that this court lacks the requisite jurisdiction for review is erroneous.

40. That said and done, the applicant seeks review on account of an error on the record citing miscalculation at paragraph 58 and 61 of its judgment. The error according to the applicant is the calculation of overtime and for public holidays pay which the applicant aver was calculated using a wrong multiplier which ought to be a multiplier of 1 ½ pay for each overtime pay and 2 times for public holiday pay.

41. At page 58 of the judgment the court found that overtime pay was 2592 hours.

42. It is true that overtime pay is calculated at 1 ½ the normal pay as per section 6 of the *Regulations of Wages (General) Order* which provides as follows:-

"6. Overtime shall be payable at the following rates-

(1) (a) for time worked in excess of the normal number of hours per week at one and one-half times the normal hourly rate.

(b) for time worked on the employee's normal rest per day or public holiday at twice the normal hourly rate."

43. Section 7 of the *Regulations of Wages (Protective Security Services) Order* on the same provides as follows:-

"An employee who works for any time in excess of the normal hours of work specified in paragraph 6 shall be entitled to be paid for the overtime thereby worked at the following rate-

a) One and half times his normal rate of wages per hour in respect of any time worked in excess of the normal hours of work; and

b) Twice the normal rate of wages per hour in respect of any time worked on a rest day."

44. Section 6 (2) of the *Regulation of Wages (General) Order* states as follows:-

"For the purpose of calculating payments for overtime in accordance with subparagraph (1) the basic hourly rate shall, where the employees are not employed by the hour be deemed

to be not less than one two hundred and twenty fifth of the employee's basic minimum monthly wage."

45. It is apparent that in calculating the amount payable in case of the overtime pay and the holiday pay, this court by error employed a multiplier of 1 instead of 1 ½ and 2 respectively. In the circumstances the application for review has merit and is allowed and a review of this court's judgment made in terms of paragraph 58 of the judgment to read as follows:

"within this period, I find the overtime payable is25th November 2018 to December 2019 = 120 hoursJanuary 2020 to December 2020

= 24 hours x 52 weeks

= 1248hours
January 2021 to November 2021

= 24 hours x 51 weeks

= 1224 hours

Total overtime = 2592 hours

= 2592 = 108 days pay

24

This translates to salary = 114, 04 divided by
225 hourly rateX 2592 hours = 295.591Approximately = 296,000/=

46. This is informed by section 6 of the Regulations of Wages (General order) which states as follows:-

6.(1) Overtime shall be payable at the following rates-

(a) for time worked in excess of the normal number of hours per week at one and one-half times the normal hourly rate.

(b) for time worked on the employee's normal rest per day or public holiday at twice the normal hourly rate.

47. Paragraph 6 of the judgment is also reviewed as follows:

Holiday pay
= 114.04 hourly rate x 33 x 12 hours dailyX 2= 792 x 114.04 hourly rate = 90,319.68

48. Paragraph 67 is therefore reviewed to readOvertime = 296,000/-Holiday Pay = 90,319.68/-Total = 386,319.68/-Less statutory deductions

48. The rest of the judgment remains unchanged.

RULING DELIVERED VIRTUALLY THIS 21ST DAY OF MAY, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of: -*

Maragia for Claimant – Present

Mitei holding brief Mr. Nyenge for Respondent – Present

Court Assistant - Fred