



Mwirigi v Cabinet Secretary, Ministry of Gender, Culture, Arts & Heritage & 2 others; Advisory Board (Interested Party) (Employment and Labour Relations Petition E206 of 2023) [2024] KEELRC 1703 (KLR) (4 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 1703 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E206 OF 2023**

**AN MWAURE, J
JULY 4, 2024**

BETWEEN

DR. (ENG.) CHARLES MWIRIGI PETITIONER

AND

THE CABINET SECRETARY, MINISTRY OF GENDER, CULTURE, ARTS & HERITAGE 1ST RESPONDENT

THE PRINCIPAL SECRETARY, STATE DEPARTMENT OF GENDER & AFFIRMATIVE ACTION (MINISTRY OF GENDER, CULTURE, ARTS & HERITAGE) 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

AND

ADVISORY BOARD INTERESTED PARTY

RULING

1. The Petitioner/Applicant filed a Notice of Motion dated 19th March 2024 seeking the following orders that: -
 1. spent
 2. this Honourable Court be pleased to review/rectify and or correct the error in computation of nominal damages it awarded to the Petitioner on its judgment delivered on 13th March 2024 from Kshs 723,060/- to Kshs 1,747,920/- which is equivalent to the Petitioner’s three months’ salary.
 3. costs of this application be provided for.

Petitioner/Applicant's Case

2. The Petitioner/ Applicant avers that this court delivered a judgment on 13/03/2024 in which he was awarded Kshs. 723,060 as compensation equivalent to his three months' salary.
3. The Petitioner/Applicant avers that the said damages were computed wrongly since his gross salary prior to his suspension was Kshs. 582,640 and not Kshs. 241,020 which did not factor his full benefits after suspension; cumulatively the damages payable should have been Kshs 1,747,920.
4. The Petitioner avers that there is an error apparent on the face of the judgment that needs correction and it is only fair and equitable for the Court to review its judgment.

Respondents' Case

5. In opposition to the Application, the Respondents filed a replying affidavit dated 11th April 2024.
6. The Respondents aver that the nominal damages awarded of Kshs (241,020 x3) = 723,060 is sufficient and within the court's discretion.
7. The Respondents aver that the Petitioner is still going to be paid all his withheld salaries and benefits over and above the nominal damages awarded hence he will not incur any losses.

Interested Party's Case

8. The Interested Party avers the court was correct in its wisdom and discretion in awarding the nominal damages as it considered Section 49(2) of the Employment Act for deduction of the statutory deductions.
9. The Interested Party avers that the application for review is unmeritorious as the correct position reached by the court was guided by Section 49(2) of the Employment Act.
10. There are no submissions on record for either party.

Analysis and Determination

11. The main issue for determination is whether the Applicant is entitled to a review of the alleged error in computation of nominal damages awarded to him in the judgment delivered on 13/03/2024.
12. The jurisdiction of this court to review Judgment and or orders is granted by Section 16 of the Employment and Labour Relations Court Act which provides as follows: -

“The court shall have power to review its judgments, awards, orders or decrees in accordance with the Rules.”
13. Rule 33 of the Employment and Labour Relations Court (procedure) rules implements section 16 (supra) in the following manner: -
 - “(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,
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 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”
14. It is the Applicant’s case that there is an error apparent on the face of the judgment as the damages awarded by the court were computed wrongly since his gross salary prior to his suspension was Kshs. 582,640 and not Kshs. 241,020.
 15. However, the Respondent rebutted and maintained that the nominal damages awarded is sufficient and within the court’s discretion as it was based on his basic salary. Further, the Petitioner will be paid all his withheld salaries and benefits over and above the nominal damages awarded hence he will not incur any losses.
 16. Justice Mativo in *Paul Mwaniki v National Hospital Insurance Fund Board of Management* [2020] eKLR held that:

“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.[6]
 17. In *Nyamogo & Nyamogo v Kogo* [7] 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.”

.....

.....

18. The Indian Supreme Court [8] made a pertinent observation that 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. In *Attorney General & O’rs v Boniface Byanyima*,[9] the court citing *Levi Outa v Uganda Transport Company*[10] held that:

the expression “mistake or error apparent on the face of record” refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the record. It may be an error of law, but law must be definite and capable of ascertainment.”

- 19 “There is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by 'error apparent'. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. A review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out.[11]
- 20 The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act. Put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision.
- 21 The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it.....”



22. Further,

“section 49 of the *Employment Act* makes provision for a wide range of remedies. The mode of assessment of those remedies was set out by the Court, in *Co-operative Bank of Kenya Ltd V. Banking Insurance & Finance Union CA No. 188 of 2014* as follows:

“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 loses, 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.”

22. Whenever this Court is called upon to interfere with the exercise of judicial discretion, as in this appeal, it is guided by the principles enunciated in numerous case law from this Court. In the case of *Coffee Board of Kenya vs. Thika Coffee Mills Limited & 2 Others* [2014] eKLR, it was stated that:

“The court ought not to interfere with the exercise of such discretion unless it is satisfied that the judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice.”

22. The court concedes there is an error which the court may have inadvertently overlooked and as per the annexed payslip of March 2023 the petitioner’s gross salary was ksh 584,640/-. So the Court will review the award of kshs 723,060/- and instead replace with kshs 1,749,920/-.

22. The other terms of judgment remain constant.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 4TH DAY OF JULY, 2024.

ANNA NGIBUINI MWAURE

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 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.

ANNA NGIBUINI MWAURE

JUDGE

