



**Mutua v CTAO Motors Kenya Ltd (Employment and Labour Relations
Petition E065 of 2023) [2024] KEELRC 1704 (KLR) (3 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1704 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E065 OF 2023**

AN MWAURE, J

JULY 3, 2024

BETWEEN

EVELYNE MUNINI MUTUA PETITIONER

AND

CTAO MOTORS KENYA LTD RESPONDENT

RULING

1. The Petitioner filed a Notice of Motion dated 18th March 2024 seeking the following orders that: -
 1. spent
 2. this Honourable Court be pleased to review its judgment dated 9th February 2024 to provide for an award of damages for discrimination.
 3. the costs of this Application be awarded to the applicant.

Petitioner/Applicant's Case

2. The Petitioner/Applicant avers that she filed a Petition dated 4th April 2023 citing unlawful termination and discrimination seeking the following prayers:
 - a. A declaration that the Respondent's termination of her employment was without any proper justification and was stealthily on account of her pregnancy and therefore discriminatory, unfair, unlawful and a violation of the Employment Act, 2007 and the Constitution of Kenya;
 - b. A declaration that Respondent's termination of the Petitioner's employment on alleged grounds of poor performance was a breach of the Petitioner's right to fair labour practices and fair administrative action as per Article 41 and 47 of the Constitution as read with Sections 42 of the Employment Act and Section 2, 3(c), 4(3) and 4(4) of the Fair Administrative Action Act;



- c. An order directing the Respondent to pay the Petitioner compensation for unfair termination as per Section 49 (c) of the [Employment Act](#);
 - d. Pro-rated bonus payment for the financial year 2020-2021 until the time of termination;
 - e. Exemplary damages for violation of the Petitioner's rights as per (a) above;
 - f. Interest on (c), (d) and (e) above from the date of filing this suit until payment in full;
 - g. Costs of this suit; any other relief that this court deems fit and expedient.
3. The Petitioner/ Applicant avers that the court rendered its judgment on 09/02/2024 in her favour and granted prayers a,b and c.
 4. The Petitioner/Applicant avers that by granting prayer a, the court had determined that her termination was characterised by discrimination. Therefore, the court erroneously determined that she had not proven prayer e which sought damages for discrimination.
 5. The Petitioner avers that by allowing prayer a automatically meant that she had met the threshold for grant of damages. Article 23 provides damages as a relief that should be granted in any suit where an allegation of a violation of fundamental rights and freedoms is made.
 6. The Petitioner avers that the court's failure to award damages for discrimination was an oversight that warrants a review of the judgment.

Respondent's Case

7. In opposition to the Application, the Respondent filed grounds of opposition dated 9th April 2024 on grounds that:
 - i. The Applicant's Notice of Motion as drawn is bad in law, fatally defective, mischievous and cannot stand.
 - ii. The Application has not introduced any new evidence outside what was presented before this honourable court for hearing which renders the request for review nugatory,
 - iii. The court did not make any mistake in its judgment delivered on 9th February 2024 given the fact that this is an employment dispute and by law the maximum compensation is 12 months gross pay
 - iv. The supporting affidavit raises no grounds or reasonable grounds to warrant this Honourable Court to grant orders sought.
 - v. The doctrine of *functus officio* states that once the court has made its decision, it is final and conclusive.
 - vi. The application herein is an abuse of court process and the Applicant should move the court by way of appeal if aggrieved and/or unsatisfied with the decision of this honourable court.
 - vii. The present application has been brought in bad faith seeking to enrich the Applicant unjustly given that the court did not make any mistake in its decision.
 - viii. It is therefore just and fitting that the Applicant's application be dismissed with costs.



Petitioner/Applicant's Submissions

8. The Petitioner/Applicant's submitted that by allowing prayer (a) in the Petition, the court automatically meant that the Petitioner had met the threshold for grant of the same and it is indisputable that the court was convinced that the prayer on discrimination was merited.
9. The Petitioner/Applicant submitted that it is evident the court inadvertently failed to award damages for discrimination despite having determined there was discrimination. As such, it ought to exercise its discretion in adequately compensating the Petitioner for the huge economic loss incurred.
10. It is the Respondent/ Applicant submission that jurisdiction is prerequisite to any court process and constitutional petitions are no exception. Therefore, if the Court finds it lacks jurisdiction to hear and determine any constitutional petition it should not hesitate to down their tools as in any other court process.

Respondent's Submissions

11. It is the Respondent's submission that this court became *functus officio* upon delivering the judgment as such, its decision was final and conclusive. It relied on the case of [John Gilbert Ouma v Kenya Ferry Services Limited](#) [2021] eKLR which considered the doctrine as follows:

" *Functus officio* is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon."
12. The Respondent submitted that damages are pecuniary compensation which the law awards to a person wronged by another. Further general damages are given in respect of such damage as the law presumes to result from the infringement of a legal right, where damage is proved but the Claimant cannot quantify the exact items in it. It has been established items in breach of a contract of employment can be quantified and as such general damages are not applicable.
13. It is the Respondent's submission that section 49(c) of the [Employment Act](#) states the maximum awardable compensation for an employee wrongfully terminated is 12 months gross pay and this being an employment dispute should be adjudged as such.
14. It is the Respondent's submission that if the Petitioner was aggrieved by the court's decision and she should have appealed the same.

Analysis and Determination

15. Having considered the application, affidavits and submissions on record, the main issue is whether Petitioner's application for review of judgment is merited.
16. 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."
17. Rule 33 of the [Employment and Labour Relations Court \(procedure\) rules](#) implements section 16 (supra) as follows: -

"(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 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”

18. The court being cognisant of sections 16 of employment and *labour relations act* and section 33 of the employment and labour relations (procedure) rules notes it found the petitioner was indeed discriminated on the basis of her being pregnant.
19. This is contrary to article 27 of the *Constitution* of Kenya 2010.
20. Prayer no 1 of the petition prays for a declaration that the decision to terminate her not only breached the provisions of the *employment act* on procedural and substantive fairness in termination of employment contract but also violated the provisions of article 27 of the *Constitution* and equality and freedom from discrimination.
21. The honourable court in its judgment dated 9th day of February 2024 the court granted the petitioner prayers A, B & C. The court proceeded to award compensation for prayer c.
22. The court declares the amount granted for prayer C is sufficient to cover any breach of unfair labour practice as per prayer B of the petition. The court also concedes to review its judgment and award the petitioner kshs 200,000 for discrimination vide prayer A of the petition.
23. The total award now will be kshs 1,160,000 plus costs and interest as provided in the aforesaid judgment.
24. The other terms of the judgment remain constant.



Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 3RD 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

