

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT NAIROBI

ELRC CAUSE NO. E6585 OF 2020

(Before Hon. Lady Justice Hellen Wasilwa, J)

KENYA ENGINEERING WORKERS UNION.....
.....CLAIMANT/APPLICANT

VS

ASHUT ENGINEERING LIMITED
(PLASTIC DIVISION).....
....RESPONDENT

RULING

- 1 The Respondent/Applicant filed a Notice of Motion dated 14th December 2024 seeking orders that: -
- 1) *Spent*
 - 2) *The Honourable Court deem fit to review her judgment delivered on 11th day of October 2024.*
 - 3) *The Honourable Court deem fit and grant the orders as per the Applicant/Claimant prayers as per her Memorandum of Claim dated 16th December 2020 for prayers of service gratuity and leave allowance.*
 - 4) *Costs of this application be met by the Respondent herein.*
 - 5) *Any other prayer the Honourable Court may deem fit to grant.*

Claimant/Applicant's Case

- 2 The Applicant avers that the court delivered its judgment dated 11th October 2024 of which prayer 4.3(a) and (d) were declined and or not considered. The judgment did not consider the parties' Collective Bargaining Agreement, which was attached to the Memorandum of Claim.
- 3 The Applicant avers that the court erred by declining to award service gratuity as provided for at clause 32 of the CBA and Section 35 of the Labour Relations Act.
- 4 The Applicant avers that the CBA on service gratuity should apply and the refusal to grant the same amounts to discrimination as the grievants colleagues in the same sector and most importantly the Respondent has been paying the same even after the grievant had left. This position has held by this court in review application in ELRC Cause No. 47 of 2019 at Kisumu between the Claimant and the Farm Engineering Industries Limited.
- 5 It is the Applicant's case that the grievant had not taken one annual leave as has always been a practice to fill the leave form before proceeding on leave of which the same is kept by the employer who should have produced the same as evidence to prove that the grievant had indeed taken the entire annual leave.

Respondent's Case

- 6 In opposition to the Application, the Respondent filed a replying affidavit dated 23rd June 2025 sworn by its Human Resource Manager, James Mbugua.
- 7 The Respondent avers that the application does not satisfy the grounds for seeking review as provided under Rule 74 of the Employment and Labour Relations Court (Procedure) Rules.
- 8 The Respondent avers that since the judgment was delivered on 11th October 2024, the court is functus officio, therefore, it cannot review or alter its decision.
- 9 The Respondent avers that this court has no jurisdiction to sit on an appeal against its own judgment and/or decisions.
- 10 It is the Respondent's case that the prayer for review requires re-examination of evidence by the court and if the judgment is corrected it would substantially affect the substance of the judgment, therefore, the trial court would essentially be sitting on an appeal.
- 11 The Respondent avers that if the Applicant is of the view that the trial court failed to consider and/or analyse the pleadings, factual issue, evidence and submissions on an issue that ought to have been deliberated on, then this forms a basis for filing an appeal not review as is being sought.

Applicant's Submissions

12 The Applicant submitted that Rule 74 of the Employment and Labour Relations Court (Procedure) Rules, 2024 states:

“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 a discovery of a new and important matter or evidence which despite the exercise of due diligence was not within the knowledge of the person or could not be produced by that person at the time when the Decree was passed or the Order was 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 if for any other sufficient reason.”

13 The Applicant submitted that her application for review meets the set under Rule 74 (1) of the ELRC Procedure Rules and that the Respondent's argument that rules of this court are clear that where an appeal is allowed but not preferred the aggrieved party can move this court for review which the Claimant has done.

14 It is the Applicant's submission that the letters provided in the application are new evidence which came in place in the year 2021 when the matter had already been filed in the year 2020 hence were not reachable.

- 15 The Applicant submitted that Ladyship the service gratuity is merited and as per the Parties Collective Bargaining Agreement (CBA) clause 32 which states gratuity benefits for long serving employees shall be paid at the rate of 19 days' pay for a completed year of service.
- 16 The Applicant further submitted that clause 32 of the CBA cuts all over all unionisable employees leaving service by termination, redundancy, dismissal and or resignation and if it is declined it shall amount to discrimination in breach of Article 27 of the Constitution as their colleagues who left after them as per the letters attached to the application were paid service gratuity.
- 17 The Applicant submitted that the payment for annual leave should not have been declined as the Respondent being the employer is mandated for keeping employment records under section 74 (f) Of the Employment Act which states:-
- "An employer shall keep a written record of all employees employed by him with whom he has entered into a contract under this Act which shall contain the particulars (f) of an employee annual leave entitlement, days Taken and days due Specified in Section 28."**
- 18 The Applicant submitted that the Respondent did not file any document/evidence to disprove the grievant's claim on annual leave hence the court erred by declining the same on grounds that the claim was not proved rather

than finding that the Respondent did not disprove the same.

Respondent's Submissions

- 19 The Respondent submitted that in the Memorandum of Claim sought for unpaid leave days, however, the Claimant did not, in their oral testimony, articulate or substantiate the basis upon which the claim for annual leave pay was founded.
- 20 The Respondent submitted that the court observed that the claim for annual leave pay was not granted on the basis that it had not been sufficiently proved; as the Claimant merely quoted a lump sum figure in support of the claim without tendering any evidence demonstrating how the amount was computed or establishing that the entitlement had accrued and remained unpaid.
- 21 The Respondent submitted that the court under paragraphs 14 and 15 of ***Kisumu ELRC NO. 47/2019 Kenya Engineering Workers Union vs Farm Engineering Industries Ltd***, held:

"The Union had prayed for Kshs 25, 728/- on account of the grievants' accrued leave and Kshs 6, 432/- as eared wages. The Court declined to award the claims because the Union had not placed an evidential foundation for the heads of the claims."

- 22 The Respondent placed reliance in ***Nairobi ELRC No. 989/2018 Monica Imali Muliango vs Catherine Masaka***:

"The potential scenario was considered by Odunga J. (as he then was) in HA V LB (2022) eKLR, where the learned Judge stated as follows; ". . . But to apply for review with the intention of opening up fresh fronts for litigation on appeal against the order emanating from the review and an appeal against the order sought to be reviewed amounts in my view, to an abuse of the process of the court. It would also contravene the overriding objective as provided under Sections 1A and 1B of the Civil Procedure Act . . . To find otherwise would amount to giving the courts seal of approval to persons who wish to play lottery the judicial process. Accordingly, I associate myself with the decision in The Chairman Board of Governors Highway Secondary School V William Mmosi Moi Civil App. No. 277 of 2005 that both options cannot be pursued concurrently or one after the other."

- 23 On service gratuity, the Respondent submitted that the Claimant seeks to rely on documents specifically, letters accepting resignations which purport to show that, at the point of severance of the employment relationship, the respective employees were granted gratuity as indicated therein. However, these documents ought to be expunged from the record as they were not formally adduced in evidence during trial.

24 The Respondent submitted that the documents do not meet the threshold of newly discovered evidence that was unavailable at the time of the hearing. The letters produced by the Applicant are dated 2021, while the hearing took place on 9th May 2024. Therefore, the documents were readily available to the Claimant well before the hearing date and it has not offered any explanation to justify the failure to produce them during the hearing. In the circumstances, the documents should be disregarded in their entirety.

25 The Respondent submitted that the Claimant, acting on behalf of its members, did not tender any evidence whether oral or documentary during trial to establish a contractual or legal entitlement to gratuity. Accordingly, and in the absence of such proof, the claim cannot succeed.

26 The Respondent relied in ***Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another Civil Appeal No. 345 of 2000 [2005] 1 EA 334***, the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the Evidence Act, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to

believe in its existence which is captured in Sections 109 and 112 of the Act."

- 27 I have examined all the averments and submissions of the parties herein. The applicant seeks a review of this court's orders and judgment of 11/10/25 on the ground that certain prayers were not inconcluded in the main judgment.
- 28 The grounds upon which court can review court's judgment are set out in this court's rules cited in this judgment and this does not extend to filling in gaps in a judgment which has been rendered. Where a court fails to consider evidence and submissions, I believe this is a matter for appeal and outside the province of review.
- 29 In the circumstances of this application, I do not find the ground upon which the applicants seek review plausible. I decline to sit an appeal on my own judgment and dismiss the application accordingly. There shall be no order of costs.

Dated, Signed and Delivered Virtually at Nairobi this 21st Day of October 2025.

**HELLEN WASILWA
JUDGE**