



Shiamala v Kenya National Private Security Workers Union & another; Kenya National Private Security Workers Union, Nairobi County Branch (Interested Party) (Employment and Labour Relations Cause 1178 of 2018) [2025] KEELRC 2818 (KLR) (21 October 2025) (Ruling)

Neutral citation: [2025] KEELRC 2818 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1178 OF 2018
HS WASILWA, J
OCTOBER 21, 2025**

BETWEEN

JAIRUS KATERE SHIAMALA CLAIMANT

AND

**KENYA NATIONAL PRIVATE SECURITY WORKERS UNION 1ST
RESPONDENT**

JOASH ANDAWA SOITA 2ND RESPONDENT

AND

**KENYA NATIONAL PRIVATE SECURITY WORKERS UNION, NAIROBI
COUNTY BRANCH INTERESTED PARTY**

RULING

1. The Respondents/Applicants filed a Notice of Motion dated 17th January 2025 seeking orders that: -
 1. Spent
 2. Execution of the decree herein be stayed pending the hearing and determination of this application.
 3. The Honourable Court do review it's Judgment of 8th December, 2023, the entire decree thereto and instead dismiss the claimants claim.



Respondents/Applicants' Case

2. The Applicants aver that there is discovery of evidence of the Claimant's previous criminal conviction of theft in Nairobi Chief Magistrate's Court Criminal Case No. 1410 of 2018, Republic Versus Jairus Katere Shamala on 17th January 2023.
3. During the the hearing of this claim, their defence was that the Claimant was dismissed after stealing from a one Akaka, the same complainant he was convicted of stealing from in the aforesaid criminal case.
4. The Applicants aver that they were not aware of the conviction during the hearing of this claim and they could therefore not adduce the same.
5. It is the Applicants' case that new evidence is important in that had it been adduced; the court would not have dismissed the issue of extortion and a finding in favour of the claimant.
6. The Applicants aver that the said conviction discovered late is prima facie material evidence in this matter.

Claimant/Respondent's Case

7. In opposition to the application, the Claimant/ Respondent filed a replying affidavit dated 5th March 2025.
8. The Claimant/ Respondent avers that the principles for review are settled and that Courts have the discretion to allow review on three grounds;- where there is discovery of new and important matter of evidence, where there is an apparent error on the face of the record and where there is sufficient reason to do so. The application for review must be made without undue delay.
9. It is the Claimant/ Respondent's case that the application does not satisfy any of the conditions for review as set out. The application is frivolous, vexatious, scandalous and without any merit. The application is misconceived, misplaced and premised on wrong principles of law and it ought to be dismissed with costs for being an abuse of the court process.
10. The Claimant/ Respondent avers that the Respondents/Applicants squandered an opportunity to appeal against the judgment, now they are coming back with another judgment from a different jurisdiction as new evidence on matters touching of labour and employment rights, and a finding was made to the extent that the termination against the respondent did not pass the fairness test.
11. It is the Claimant/Respondent's case that the Respondents/Applicants wanted to use the finding of the criminal proceedings to argue the principles constituting fairness test in termination, nothing stopped them from applying for a stay of the proceeding pending the outcome of the lower court. In any case, there is no connection between the Judgment delivered on 8th December 2023 by this court and the judgment delivered by the magistrate court on 17th January 2023.
12. The Claimant/ Respondent avers that the application is defective as it was filed late and is affected by inordinate delay. Additionally, the Respondents/Applicants have not disclosed how they became aware of the judgment and who informed them.
13. The Claimant/ Respondent avers that the court's finding in the judgment delivered on 8/12/2023 were purely made in line with the requirements of the Provisions of [Employment Act](#).



Respondents/Applicants Submissions

14. The Applicants submitted that one of the thresholds for grant of review orders is discovery of new and important matter of evidence. They relied in Francis Origo & another v Jacob Kumali Mungala [2005] KECA 356 (KLR)
15. It is the Applicants' submission that they have presented evidence of judgment in Milimani Chief Magistrate CR. NO. 1410 of 2018, Republic v Jairus Katere Shiamalla delivered on 17th January 2023 in which the Claimant/Respondent was convicted of stealing by agent contrary to Section 283 of Penal Code.
16. The Applicants submitted that the prosecution case therein was that the Claimant/Respondent embezzled the cheque payments of the terminal dues for Patrick Shikuri and his colleague Mr. George Okaka. In his defense, the Claimant alleged that the cheque of Ksh 23,386 got lost, however, when he was directed to write a statement at the police station, he admitted that he used the cheque and asked for time to pay back, which he never did prompting the criminal charge.
17. The Applicants submitted that the Claimant's testimony in the criminal case confirmed that he had received the cheque of Kshs. 28,214 on behalf of Patrick Shikuri but claims to have misplaced the cheque. He claimed that the lost funds were deducted from his salary but there is no evidence of this.
18. It is the Applicants' submissions that the mere fact that states in his replying affidavit that he repaid the amount, does not amount to conclusive evidence that indeed he did; both Patrick Shikuri and George Okaka denied that Claimant repaid the funds. In any event the repayment or not is not material to this case in terms of the charges he is facing; It would only be relevant as a mitigating factor.
19. The Applicants submitted that the Claimant/Respondent has not denied the existence of this judgment. This judgment was not presented at the trial herein hence it is new as it did not form part of the record.
20. The Applicants submitted that the Claimant was summarily dismissed due to extortion of money from Patrick Shikuri and George Okaka. The Hon. Judge in paragraph 67 of the judgment delivered on 8th December 2023, found that this evidence was not tendered evidence as follows:

“The respondent have failed to prove that the 1st Respondent had a valid reason to summarily dismiss the claimant's employment as there is no concrete evidence that the claimant extorted money from the respondent's members or took member's cheque with intent to steal”
21. It is the Applicants' submission that had the judgment in Milimani Chief Magistrate CR. 1410 of 2018 been placed before the learned Judge, she could have found that the judgment proved the allegations of theft. The learned Judge would have found that the summary dismissal was warranted and would not have granted the respondent herein the equivalent of 5 months' salary in the sum of Ksh 262,500.
22. The Applicants further submitted that the judgment in Milimani Chief Magistrate CR. 1410 of 2018 is important because it would have altered the final judgement, as it is only in the case of unfair dismissal that the Claimant is entitled to a one-month notice. Therefore, the Claimant was not entitled to one month notice payment in lieu.
23. On undue delay, the Applicants submitted that during filing of this claim and throughout the trial they did not know that the Claimant/Respondent had been convicted on the 17th January 2023. A fact which the Claimant/Respondent did not disclose in court. Therefore, they cannot be accused



of inordinate delay or not having not done due diligence; they moved this court on discovery of the conviction.

Claimant/Respondent's Submissions

24. The Claimant/Respondent submitted that the threshold and limitations of review of applications are matters provided and contemplated under Section 80 of *Civil Procedure Act*, Order 45 Rule 1 of the Civil Procedure Rules and Rules 76 of ELRC (Procedure) Rules, 2024.
25. The Claimant/Respondent placed reliance in Republic v Public Procurement Administrative Review Board & 2 others [2018] eKLR wherein the court held: -

“Section 80 gives the power of review and Order 45 sets out the rules. The rules restrict the grounds for review. The rules lay down the jurisdiction and scope of review limiting it 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”
26. The Claimant/Respondent submitted that Court of Appeal in Pancras T. Swai v Kenya Breweries Limited [2014] eKLR cited with approval the case of Sarder Mohamed v. Charan Singh Nand Sing and Another (1959) EA 793 where the High Court held that Section 80 of the *Civil Procedure Act* conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate.
27. The Claimant/Respondent submitted that application does not meet the threshold for review. There is no evidence on record that the Respondents ever intended to use the decision from other courts to argue the case of unfair termination against the Claimant which was pending before this court awaiting its conclusion resulting in a judgment delivered on 8th December 2023. Additionally, it is evident that by the time this court delivered the its judgment, the referenced decision from the magistrate court, being Nairobi Chief Magistrate’s Court Criminal Case No. 1410 of 2018, had already been delivered.
28. The Claimant/Respondent submitted that the judgment in Nairobi Chief Magistrate’s Court Criminal Case No. 1410/2018 was delivered on 17th January 2023, when the proceeding in this suit were still active and pleadings open and the judgment in the instant suit was delivered more than ten (10) months later.No material evidence has been tendered by the Respondents to demonstrate how they were prevented from bringing to the attention of this court the decision in Nairobi Chief Magistrate’s Court Criminal Case No. 1410 of 2018; which information was available to them.
29. The Claimant/Respondent submitted that the application for review has been made two years later after the lower court’s judgment was delivered and more than a year later after the impugned judgment was delivered. Additionally, immediately after the delivery of the impugned judgment, the Respondents/ Applicants were granted 45 days stay of execution, and this court has not been told what exactly was done during the pendency of the stay. Thus, there is clear evident of inordinate, substantial and unexplained delay.
30. The Claimant/Respondent submitted that the Applicants have not disclosed to this court the time and how they became aware of the decision in Nbi Magistrate Court, Criminal Case No. 1410/2018. Additionally, there is no nexus between the impugned judgment herein and the judgment by the magistrate’s court.



31. It is the Claimant/Respondent's submission that the Applicants Respondents are misleading this court by insinuating that this Court's judgment was premised solely on or for lack of evidence of the Claimant's criminal proceedings in Nairobi Chief Magistrate's Court Criminal Case No. 1410 of 2018. The Claimant submits that the court made a finding under paragraphs 76, 77 & 78 of the impugned judgment, that the Claimant's termination did not pass the fairness test contemplated under the statute and the court precedents.
32. The Claimant/Respondent submitted that the judgment in Nairobi Chief Magistrate's Court Criminal Case No. 1410 of 2018 is neither new evidence nor relevant or important evidence in the circumstances, as such, it has no known legal relevance to affect or interrupt the judgment delivered on 8th December 2023.
33. It is the Claimant/Respondent's submission that application was only initiated by the Respondents/Applicants after it became apparent that taxation in respect of the Claimant's Bill of Costs was headed for a ruling by the taxing master and yet their last opportunity to put in a reply and/or submission had lapsed after granted several opportunities to put in a response. Thus, the application is an afterthought.
34. I have examined all the averments and submissions of the parties herein. The applicant seeks review of this court's judgment made on 8th December 2023 on the ground that there is discovery of new evidence not presented to court at the time the judgment was made. The applicants seek reliance on a judgment of the lower court in Nairobi Chief Magistrate's Court Criminal Case No 1410/2018 which judgment was delivered on 17/1/2023 convicting the respondent herein of theft. Rule 74 of the Employment and Labour Relations Court (procedure) rules, 2024 state as follows:
 - (1) 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 a new and important matter or evidence which, despite 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 sub rule (1) 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.



35. I think the operative word in this rule is “ within reasonable time”. The judgment was delivered in December 2023. Since then, the applicant respondents did not move this court for any review despite the existence of the lower court’s judgment from January 2023.
36. This application was only filed this year 2025 in January (2) two years since the judgment in question was delivered. Based on this ground alone, I do not find the discovery of this judgment a good reason to review the judgment of this court. The respondent applicants are approaching this court very late in time and I do not see any correlation between the Chief Magistrates judgment to this court’s judgment. I decline to grant orders sought and I dismiss this application with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21ST DAY OF OCTOBER 2025.

HELLEN WASILWA

JUDGE

