

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**  
**AT NAKURU**

**ELRC APPEAL NO. E019 OF 2025**  
***(Before Hon. Lady Justice Anna Ngibuini Mwaure)***

**KENYA WOMEN MICROFINANCE  
BANK PLC.....**

**..... APPELLANT**

**VERSUS**

**WINFRED WAMBAIRE WANYIRI.....**

**.....RESPONDENT**

***(Being an Appeal from the Ruling and Order of  
the Honourable Adet Vincent Okello, Principal  
Magistrate, delivered on 21<sup>st</sup> March 2025 in  
Nakuru MCELRC No. 122 of 2020)***

**JUDGMENT**

1. The Appellant, being dissatisfied with the judgment and order of Principal Magistrate Hon. Adet Vincent Okello, filed this appeal vide a Memorandum of Appeal dated 28<sup>th</sup> March 2025, on the following grounds that:

*1. The learned Magistrate erred in law and in fact in dismissing the application dated 7<sup>th</sup> February 2025 on the grounds that the application did not meet the test for review of judgment when the following errors are apparent:*

- i. The Respondent was paid a consolidated salary as per the payslip on record, which encompassed housing allowance*
  - ii. The court calculated the final dues payable based on May 2020 payslip when the Respondent was terminated vide a letter dated 8<sup>th</sup> June 2020, and final dues payable were contained in the final payment benefits declaration form that formed part of the record;*
  - iii. There is a clerical error in basing the calculation on May 2020 in terms of the gratuity payable*
- 2. The learned Magistrate erred in law and in fact in failing to review its Judgment dated 28<sup>th</sup> January 2025 that awarded the Respondent gratuity of Kshs.221,659.89 that had already been paid by the Appellant to the Claimant.*
- 3. The learned Magistrate erred in law and in fact in unjustly enriching the Claimant, who had already been paid her gratuity of Kshs.221,659.89 when her initial 3-year renewable contract came to an end.*

4. *The learned Magistrate erred in law and in fact in failing to review its Judgment dated 28<sup>th</sup> January 2025 for sufficient reason.*

5. *The learned Magistrate erred in law in applying a restrictive interpretation to section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules.*

2. The Appellant prays that:

1. *This appeal be allowed with costs*

2. *This Honourable Court sets aside the Ruling of the Subordinate Court delivered on 21<sup>st</sup> March 2025*

3. *This Honourable Court be pleased to substitute the finding of the Subordinate Court by making granting the orders sought in the application dated 7<sup>th</sup> February 2025.*

4. *Any further relief that the Honourable Court deems fit in the interest of justice.*

3. The appeal was disposed of by way of written submissions.

### **Appellant's submissions**

4. The Appellant relied on **section 80 of the Civil**

**Procedure Act** provides as follows:

***“Any person who considers himself aggrieved-***

- a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or***
- b) by a decree or order from which no appeal is allowed by this court, may apply for a review of judgment to the court which passed the decree or made the order, or the court may make such order thereon as it thinks fit.”***

5. The Appellant also relied on ***section 99 of the Civil Procedure Act***, where the court is empowered to correct arithmetical or clerical mistakes in its judgment, which provides as follows:

***“Clerical or arithmetical mistakes in judgments, decree or orders, or errors arising therein from any accidental slip or omission may at any time be corrected by the court either of its own motion or on the application of any the parties.”***

6. ***Rule 33 of the Employment and Labour Relations Court (Procedure) Rule 2016*** provides as follows:

***“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 order made;***
- b) On account of some mistake or error apparent on the face of the record***
- c) If the judgment or ruling requires clarifications, or***
- d) For any other sufficient reason.”***

7. The Appellant argued that the judgment contains clear errors warranting review, including an arithmetical mistake and issues that, if left uncorrected, would result in unjust enrichment. Specifically, the court had awarded the Respondent Kshs. 356,190/= as house allowance on the assumption that none had been paid, yet the evidence showed the Respondent received a consolidated salary that already

incorporated housing allowance. In ***Charity Wambui Muriuki V M/s Total Security Surveillance Limited [2017] eKLR***, the court stated that:

***“Further, whereas the Respondent claimed her salary did not include housing allowance, she did not produce any of her pay-slips to show her pay did not include housing allowance. Clause 6 of the contract of employment provided that the Respondent was entitled to a consolidated salary payable in arrears at the end of every month. A consolidated salary includes basic salary and allowance payable to an employee, and housing allowance is usually one of them. It was therefore incumbent upon the Respondent to demonstrate by production of her pay-slip that housing allowance was not one of the allowances paid in the consolidated salary.”***

8. The Applicant submitted that the court made several errors in its judgment by wrongly awarding the Respondent unpaid housing allowance and notice pay despite evidence showing she received a consolidated

salary of Kshs.38,300/= (inclusive of housing allowance) plus a travel allowance of Kshs. 4,000/=.

The court also mistakenly relied on the May 2020 pay slip instead of the final payment declaration form, which detailed her actual terminal dues, including gratuity of Kshs. 250,843.11/=, notice pay of Kshs.42,300, and other benefits totalling Kshs.340,941.34/=, with a net payment of Kshs. 213,925.72/=.

By awarding Kshs.356,190/= as an unpaid housing allowance and Kshs.221,656.89/= as gratuity, the Court risked double payment. In ***East African Portland Cement Co. Ltd v Charo [2022] KEELRC 3895 (KLR)***, the Appellant emphasized that non-disclosure of payments in employment disputes undermines justice, and courts have set aside awards to prevent unjust enrichment. Thus, the judgment required review to correct clerical and substantive errors and avoid duplicative compensation.

9. The Appellant submitted that the Respondent was on a three-year renewable contract with gratuity set at 25% after each term. For the 2015–2018 period, she had already received Kshs.145,086.50/= as gratuity upon completion of that contract in April 2018. When

her contract was renewed and later terminated for poor performance, she was again paid gratuity of Kshs.250,843.11/= along with final dues of Kshs.213,925.72/= (net after statutory deductions) in August 2020. The Appellant therefore maintains that awarding gratuity for the earlier period again would amount to double compensation since the entitlement had already been settled.

10. The Appellant maintains that the court should review its judgment because leaving the award intact would unjustly enrich the Respondent through double compensation, causing substantial loss. It is further submitted that since the Respondent's termination was lawful and procedurally fair, awarding costs and interest was erroneous. Overall, the application for review is justified by the errors on record and sufficient cause to ensure fairness. In ***Paul Kipkemoi Kiptoo V NSSF [2019] KEELRC 2584*** emphasized that review should be allowed where sufficient cause exists, guided by the overriding objective principle to ensure just, speedy, and proportionate resolution of cases, while upholding fairness and substantive justice as affirmed in ***Nguruman Ltd V Shompole Group Ranch [2014] eKLR*** and ***Hunter Trading***

**Co. Ltd v ECF/011 Kenya Ltd Civil Application  
No. Nai 6 of 2010(UR3/2010).**

11. The Appellant submitted that the trial court erred by awarding the Respondent gratuity of Kshs.221,656.89/= despite evidence that the amount had already been paid, thereby resulting in unjust enrichment. Equity does not permit double compensation, yet the magistrate failed to consider this fact, exposing the Appellant to substantial loss and injustice. The principle of unjust enrichment, as articulated in **Chase International Investment Corporation & Another V Laxman Keshra & Others (1978) eKLR** and reaffirmed in **Samuel Kamau Macharia V Kenya Commercial Bank Ltd & Kenya Commercial Finance Co. Ltd (2003) eKLR**, requires three elements: that the defendant has been enriched, that the enrichment is at the Claimant's expense, and that it would be unjust to allow retention of the benefit all of which are satisfied here. The Appellant further submitted that the magistrate adopted an unduly narrow reading of **section 80 of the Civil Procedure Act and Order 45 Rule 1**, which grants broad discretion to review judgments for error on the face of the record,

discovery of new evidence, or any other sufficient reason. Courts have interpreted “sufficient reason” to include correcting apparent wrongs in the interest of justice, as seen in ***Paul Kipkemoi Kiptoo V NSSF(Supra)***, where review was allowed to prevent unfairness under the overriding objective principle. By ignoring clear errors such as miscalculated gratuity, double payment, and payroll discrepancies, the magistrate upheld an unjust award contrary **to Article 159(2)(d) of the Constitution**, which requires substantive justice over technicalities.

12. The Appellant therefore urges this Court to intervene and exercise review powers to correct the record and prevent unjust enrichment.

### **Respondent’s written submissions**

13. The Respondent submitted that an application for review under **section 80 of the Civil Procedure Act** and **Order 45 of the Civil Procedure Rules** can only be entertained on three grounds: discovery of new and important evidence, an error apparent on the face of the record, or sufficient reason.

14. In ***Josiah V Nyaga [2023] KEHC 2054 (KLR)***, the court stated that it has discretion to grant review but

only where the error is self-evident and does not require elaborate reasoning. Still in ***Josiah V Nyaga (supra)***, the court cited the cases of ***Muyodi V Industrial and Commercial Development Corporation [2006] 1 EA 243***, ***Nyamogo & Nyamogo v Kogo (2001) EA 174***, and ***National Bank of Kenya Limited V Ndungu Njau [1997] KECA 71 (KLR)***, clarifying that a mere erroneous decision or differing interpretation of evidence is not an error apparent on the record; such matters fall within the scope of appeal.

15. In the present case, the Respondent submitted that the alleged miscalculation of house allowance, gratuity, and notice pay required a detailed re-evaluation of financial documents and contractual terms, which goes beyond clerical mistakes. Consequently, the learned magistrate rightly held that the issues raised did not amount to an error apparent on the face of the record, and the application for review was properly dismissed.

16. On the issue of house allowance, the Respondent submitted that the employment letter of 11<sup>th</sup> February 2015 provided for a basic salary, not a consolidated

one, and the Appellant's later attempt to classify pay as consolidated was a ploy to avoid liability. The trial court, therefore, correctly awarded the unpaid house allowance, including Kshs.5,745 in *lieu* of notice.

17. Regarding gratuity, the Respondent submitted that the learned magistrate properly calculated the entitlement at Kshs. 472,500/= for the entire period worked, and deducted the Kshs.250,843.11/= already paid, and awarded only the balance of Kshs.221,656.89, meaning no double enrichment occurred.
18. On costs, although termination was procedurally fair, the Respondent submitted that the Appellant failed to pay all terminal dues, justifying the award of costs against it. The principle that "costs follow the event" was reaffirmed in the case of ***Ocean Engineering Works Ltd & Another V SBM Bank of Kenya Ltd [2024] KEELC 4724 (KLR)*** and ***Hussein Muhumed Sirat V Attorney General & Another [2017] eKLR***, which held that a successful party is entitled to costs unless exceptional circumstances are shown. Since none were demonstrated, the Respondent urges dismissal of the appeal with costs.

## **Analysis and determination**

19. Being the first appellate, the court has a fiduciary duty to re-examine the evidence presented, evaluate it independently, and determine whether the trial court's findings align with both the evidence and the law. In ***Selle and Another V Associated Motor Boat Company Ltd & Others [1968] 1EA 123***:  
***“.....this court must reconsider the evidence, evaluate it. itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take into account of particular circumstances or probabilities materially to estimate the evidence.”***

20. In the case of **Abok James Odera T/A A.J Odera & Associates V John Patrick Machira T/A Machira & Co. Advocates [2013] KECA 208 (KLR)**, the Court of Appeal held in part that:-

***“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge, are to stand or not and give reasons either way.”***

21. Having considered the grounds of the memorandum of appeal together with the rival submissions by both counsels, the issue for determination is whether the appeal is merited.

22. **Section 16 of the Employment and Labour Relations Court Act** provides as follows:

***“The Court shall have power to review its judgements, awards, orders or decrees in accordance with the Rules.”***

**23. Rule 74(1) of the Employment and Labour Relations Court(Procedure) Rules** provide as follows:

***“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.”**

24. In ***Macharia & another v Kenya Commercial Bank Ltd & 2 others [2012] KESC 8 (KLR)***, the Supreme Court stated as follows:

**“The High Court can review its orders, to correct an irregularity or error apparent on the face of the record. The High Court can also review the records of a subordinate court or tribunal to correct irregularities or errors apparent on the face of the record, so that the interests of justice are better served. In undertaking such reviews, the High Court does so upon application by an aggrieved party or on its own motion (suo motu). The High Court exercises some discretionary latitude in reviewing its own orders or the records of subordinate courts.”**

25. In the case of ***National Bank of Kenya Limited V Njau(supra)***, the Court of Appeal stated as follows:

**“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.”***

26. In this instant case, judgment was entered against the Appellant in favour of the Respondent as follows:

- i.* A declaration that the termination of the Claimant’s employment was not unfair.
- ii.* Despite the findings in (i) above, the Claimant is entitled to the following reliefs:

***a. Payment in lieu of notice***

***Kshs.5,745.00/=***

***b. House allowance***

***Kshs.356,190/=***

***c. Accrued leave days***

***Kshs.57,157.24/=***

***d. Gratuity***

***Kshs.221,656.89/=***

- iii.* The Respondent is directed to issue a certificate of service to the Claimant in compliance with section 51 of the Employment Act.
- iv.* The Claimant shall have the costs of the suit and interest.

27. The Appellant filed an application for review on the relief awarded, and the same was dismissed, the trial court stating that the error must be self-evident on

the face of the record. Looking at the house allowance, the court is guided by section 31(1) of the Employment Act, which provides as follows:

***“An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wage.”***

28. Looking at the letter of appointment dated 11<sup>th</sup> February 2015, there is no indication of house allowance, as well as in the Respondent’s pay slip. The court relies on sections **107, 108 and 109 of the Evidence Act** as whoever alleges must prove and **section 74 of the Employment Act** provides that the employer is the custodian of the employee records. Both of the parties did not adduce evidence in support. The trial court awarded Kshs.356,190/= as house allowance so it should be from 2015 to 2020 May when she separated from the Appellant. The court notes the letter of employment issued to the Respondent on paragraph 3 refers to Gross remuneration which then breaks down basic salary

and travel allowance. The Gross salary in the **Court of Appeal Case No. 127 of 2015 Postal Corporation of Kenya -VS- Andre K. Tanui** the Gross salary was defined as follow: -

***“Gross salary would then be the amount calculated by adding up one’s basic salary and allowances, before deduction of taxes and other deductions. Each case must be examined to identify the nature of the allowances given and whether they form part of the gross salary. We affirm the construction made by Ongaya, J. in the Banking Insurance & Finance Union case (Supra) We are not persuaded by the appellant’s argument that ‘gross wages or ‘gross salary’ does not include any allowances and that it is the same as the ‘basic salary’ or basic wages’. The third ground of appeal fails too,”***

29. In any event the Respondent worked for the Appellant from March 2015 to May 2020. All the years she willingly served under the contract and accepted her salary as in the letter of appointment. It is to be unreasonable to raise issue of unpaid house

allowance just after termination five years after receiving and accepting gross salary. In any event the claim for house allowance would partly be locked out by time limitation from 2015 March and the suit was filed on 12<sup>th</sup> August 2020.

30. The court does not find the house allowance should be demanded long after termination of the employee who accepted terms of remuneration and received salary for 5 years only to raise the claim after termination. The court finds that prayer is not deserved and so is rejected as awarded by the trial court.
31. As for the gratuity of Kshs.221,656/89 the court finds the trial court was spots on in his calculations which amounted to Kshs.472,000/= less amounts paid being Kshs.250,843/11. The award of gratuity of Kshs.221,656/= therefore is upheld.
32. The Accrued leave is not also questionable in that the trial court counted the 3 years which were not time barred. The court will retain that prayer for unpaid leave days at Kshs.57,157/22 and payment in *lieu* of notice Kshs.5,745/=is also awarded.

33. The costs will be awarded to the Respondent because Appellant failed to settle the Respondent's dues and hence the necessity of filing the suit and the ensuing costs. Both Costs of the lower court and this Appeal are awarded to the Respondent.

34. Certificate of service to be given to the Respondent within 14 days hereof.

Order accordingly.

**Dated, Signed and Delivered virtually at Nakuru  
this 28<sup>th</sup> Day of November, 2025.**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 Civil 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**