

**IN THE COURT OF
APPEAL AT NAIROBI**

(CORAM: M'INOTI, KANTAI & LAIBUTA, JJ.A.)

CIVIL APPEAL (APPLICATION) NO. 453 OF

2018 BETWEEN

PAUL KITEMA.....APPLICANT

AND

KENYA POWER & LIGHTING CO. LTD.....RESPONDENT

(Application for review of the judgment of the Court of Appeal dated 10th June 2022 (M'Inoti, Kantai & Laibuta, JJA)

in

Civil Appeal No. 453 of 2018)

RULING OF THE

COURT

1. **The applicant, Paul Kitema** was employed by **the respondent, Kenya Power and Lighting Co. Ltd.,** in 1991 as a clerk. By a letter dated 27th January 2015, the respondent terminated his employment with effect from 9th February 2015 for alleged misconduct. The alleged misconduct was founded on the applicant's alleged failure to report to duty after his annual leave.
2. At the time of termination of his employment, the applicant

was earning a monthly salary of **Kshs 137, 435.97**. The respondent

informed the applicant that it would pay his salary up to and including 9th February 2015, less statutory deductions and the moneys which he owed, and four months salary in lieu of notice. He was advised that any further payments due to him would be paid upon clearance.

3. On or about 30th April 2015, the applicant lodged a claim in the ***Employment and Labour Relations Court (ELRC)*** at Nairobi against the respondent and its General Manager for unfair termination. By way of remedies, he prayed for:

i. reinstatement to his previous job or re-engagement to an equivalent job without loss of benefits;

ii. in the alternative, payment of Kshs. 2,939,631.51 made up of:

Kshs 2,200,000 for unfair termination

Kshs 412,307.91 for unpaid salary from February to April 2015

Kshs 327,333.60 as 4 months salary in lieu of notice

iii. Costs

iv. interest at court rates

v. certificate of service; and

vi. any other relief that the court would deem just to award.

4. In its response to the claim dated 8th June 2015, the respondent denied the applicant's claim and pleaded that the applicant absconded from duty and was requested to show cause on 11th August 2014. He refused to accept the notice to show cause and was summoned vide a letter dated 16th September 2014 to report to the office of the Senior Human Resource Manager, Mt. Kenya South on 24th September 2014. Once again, the applicant declined to attend, as a result of which he was served with a letter dated 4th November 2014 to see the Deputy Regional Manager.
5. On 20th November 2014, the respondent called the applicant for a disciplinary hearing on 27th November 2014, which he refused to attend. The meeting proceeded, and the respondent terminated the applicant's employment vide a letter dated 27th January 2015. On 9th February 2015, the applicant lodged an appeal which was considered by the respondent and dismissed on 24th February 2015. After recovering from his terminal dues **Kshs. 4,204.30** which he owed, the respondent paid the applicant **Kshs. 235,201.00**, leaving a balance of **Kshs. 92,132.60**, which was to be paid upon clearance. The respondent contended that it had

lawfully and procedurally terminated the applicant's

employment, and that he had a history of chronic absenteeism and insubordination.

6. The claim was heard by **Makau J.**, with the applicant testifying on his behalf and the respondent calling three witnesses. By a judgment dated 2nd November 2018, the learned judge found that the applicant's dismissal was substantively and procedurally unfair. He further found that, more than three years having expired since the termination, the remedy of reinstatement was not available. Accordingly, the court awarded the applicant as follows:

Four months salary payment in lieu of notice - Kshs.

422,333.60

12 months compensation for unfair termination -

Kshs. 1,267,000.80

Unpaid salary - Kshs.

36,548.10 Total - Kshs.

1,724,882.50

7. The applicant was aggrieved and preferred an appeal to this Court challenging the ELRC's findings on reinstatement; its refusal to treat the claim as undefended; and the conduct of proceedings, including admission of documents and grant of

adjournments, which he claimed unduly prolonged the proceedings.

8. By a judgement dated 10th June 2022, this Court dismissed the appeal with costs. The Court found that the prayer for reinstatement was pleaded in the alternative and that, having denied that prayer, the ELRC had made awards in favour of the applicant, including for the maximum compensation provided by the law. The Court also noted that, from the record the applicant was not a model employee having previously been dismissed but reinstated to give him a second chance. Lastly, the Court concluded that there was no basis upon which it could interfere with the exercise of the learned judge's discretion as regards the prayer for reinstatement and conduct of the proceedings.
9. On 19th July 2022, the applicant applied for review of the judgment of this Court. The grounds for review are bias against and injustice to the applicant and failure to consider his case. In submissions dated 5th October 2023, the applicant reiterates the same grounds and submits, on the authority of **Benjoh Amalgamated Ltd & another v. Kenya Commercial Bank** [2014] eKLR, that this Court has

jurisdiction to review its

judgments. He also cites **Parliamentary Service Commission v. Wambora & 36 Others** [2018] KESC 74 (KLR) on the parameters for review.

10. The respondent opposed the application vide a replying affidavit sworn by its Legal Manager, Jude Ochieng, on 13th May 2025. It was the respondent's contention that the applicant had not established a basis for review of the judgment; that review is available in exceptional circumstances to rectify evident errors on the face of the record; that the application was a disguised appeal asking the Court to sit on appeal against its own judgment so as to vary or modify it to the applicant's satisfaction; that the applicant had not presented any evidence of bias; and that the applicant had misrepresented the proceedings before the ELRC.

11. We have carefully considered this application. While this Court has jurisdiction to review its decisions, that jurisdiction is exceptional and has to be exercised sparingly and with circumspection, otherwise disaffected parties will routinely seek a second bite of the cherry by inviting the Court to sit on appeal from its own judgment. In **Benjoh Amalgamated**

Ltd &

another v. Kenya Commercial Bank Ltd (supra), this Court expressed itself as follows regarding that jurisdiction:

“The jurisprudence that emerges from the case-law from the aforementioned jurisdictions shows that where the Court is of final resort, and notwithstanding that it has not explicitly been statutorily conferred with the jurisdiction to reopen a decided matter, it has residual jurisdiction to do so in cases of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice. As shown in the various authorities, this is jurisdiction that should be invoked with circumspection and only in cases whose decisions are not appealable (to the Supreme Court).”
(Emphasis added).

12. In **Mukuru Munge v. Florence Shingi Mwawana** [2016] eKLR,

the Court stated:

“The residue power of the Court to reopen its decisions is therefore a circumscribed power to be exercised in

exceptional cases. That power is not intended to circumvent the principle that, save in those cases where the Constitution allows an appeal to the Supreme Court, decisions of this Court are otherwise final.”

13. The exceptional nature of the review jurisdiction was also emphasised in **Standard Chartered Financial Services Ltd & another v. Manchester Outfitters** [2016] eKLR where the Court stated as follows:

“We reiterate that position and stress that this Court is clothed with residual jurisdiction to reopen and rehear a concluded matter where the interest of justice demands, but that such jurisdiction will only be exercised in exceptional situations where the need to obviate injustice outweighs the principle of finality in litigation.”
(Emphasis added).

14. The applicant invites the Court to exercise its residual and exceptional jurisdiction on the ground that it was biased, failed to evaluate his evidence and to address the grounds of appeal that he preferred. The allegation of bias is not backed by any concrete evidence or cogent reasoning other than the fact that the Court found against the applicant. The test of

bias is an

objective test as stated in **Kalpana H. Rawal v Judicial Service Commission & 2 Others** [2016] eKLR, requiring the court to satisfy itself that the circumstances relied upon give rise to reasonable apprehension in the mind of a reasonable, fair-minded and informed member of the public, that the judge or judges did not apply their minds impartially. We are satisfied that the applicant has not reached anywhere near that threshold.

15. As for the allegation of failure to consider evidence, we are equally satisfied that the Court carefully considered the evidence on record against the exercise of discretion by the trial court. It is not the duty of a first appellate court, as the applicant appears to assume, to merely regurgitate all the evidence on record to make a party believe that everything has been considered. In short, in this application, the applicant is merely asserting that the judgment of the Court was wrong in its conclusion, which is not a sound basis for exercising the residual and exceptional review jurisdiction.
16. Ultimately, we have concluded that this is not a proper and fit case to invoke the residual and exceptional review jurisdiction

of this Court. The applicant has not laid any basis for doing so. He is merely inviting the Court to sit on appeal against its judgment, which he is unhappy with. For those reasons, the application dated 19th July 2022 has no merits and is hereby dismissed with costs to the respondent. It is so ordered.

Dated and delivered at Nairobi this 5th day of December 2025.

K. M'INOTI

.....
JUDGE OF APPEAL

S. ole KANTAI

.....
JUDGE OF

APPEAL DR. K. I.

LAIBUTA

.....
JUDGE OF APPEAL

*I certify that this is
a true copy of the
original.*

Signed

DEPUTY REGISTRAR.