

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT NAIROBI

APPEAL NUMBER E253 OF 2025

GODFREY THIANE KIBAYA.....APPELLANT

-VERSUS

COLUMBIA DEVELOPERS (K)

LIMITED.....RESPONDENT

*(Being an Appeal from the Ruling and Orders of the Hon. R.L. Musiega (SRM)
delivered on 25th July, 2025 in Nairobi MCELRC E1236/2021)*

CORAM

Before Lady Justice J. W. Keli

C/A Otieno

JUDGMENT

1. The Appellant herein, being dissatisfied with the Ruling and Orders of the Hon. R.L. Musiega (SRM) delivered on 25th July, 2025 in Nairobi MCELRC E1236 OF 2021 between the parties filed a memorandum of appeal dated the 4th of August 2025 seeking the following orders:-

- a) The Court allows the appeal

- b) The Court set aside the ruling and order of the Honourable Court delivered on 29th July, 2025 varying the judgment delivered on, 16th August,2024
 - c) The Court reinstate the original judgment in its entirety including the awards for underpayment and house allowance
 - d) The Court awards costs of this appeal to the Appellant.
2. Vide a memorandum of cross-appeal dated 11th August 2025, the Respondent sought the following orders:-
- a) The Honourable Court be pleased to set aside that part of the Ruling of the Honourable Rawlings Liluma Musiega that awarded Godfrey Thiaine Kibaya Kshs. 422,652 as compensation for unlawful termination.
 - b) Costs of the Appeal.
 - c) Such other necessary, incidental or consequential orders, remedies and reliefs as this Honourable Court may deem just and convenient to grant in the circumstances.

GROUND OF THE APPEAL

- (a) The Honourable Trial Magistrate erred in law and in fact by allowing the application for review and varying the judgment delivered in favour of the Appellant.
- (b) The Honourable Trial Magistrate erred in law and fact by not finding that the issues raised in the application went to the merits and should have been addressed in an appeal, not a review.

- (c) The Honourable Trial Magistrate erred in law and fact by partially setting aside the judgment.

GROUNDS OF THE CROSS-APPEAL

3. The Honourable Trial Magistrate misapprehended the applicable principles of law in the circumstances of the subject review application presented before it and in the process arrived at an erroneous decision by awarding compensation for unfair termination when the question as to the nature of termination of the Respondent's employment was not the subject of the review application.
4. The Honourable Trial Magistrate misapprehended the applicable principles of law in the circumstances of the subject review application presented before it and in the process arrived at an erroneous decision as to the facts by awarding compensation for unfair termination when had resigned from employment.
5. The Honourable Trial Magistrate erred in fact and in law by awarding compensation for unfair termination when the Court had recalled and revoked the Judgment and consequential orders of 16th August 2024 in its entirety.
6. The Honourable Trial Magistrate erred in fact and in law and in the process rendered a contradictory decision by awarding compensation for unfair termination when a determination of no fault on the Appellant's part had also been entered.

BACKGROUND TO THE APPEAL & CROSS-APPEAL

14. The Appellant filed suit vide a memorandum of claim dated 28th June 2021 claiming to have been unfairly and unprocedurally dismissed from employment and seeking the following orders:-

- a) Spent.
- b) Compensation for unfair termination Kshs 422,652/=
- c) Underpayment Kshs 1,928,647.80/=
- d) Overtime pay Kshs 2,271,780/=
- e) House allowance due Kshs 377,497.17/=
- f) Unpaid leave days Kshs 437,535/=
- g) Cost of this suit
- h) Interest on (a) to (e) above
- i) Any other relief the court may deem fit and just to award.

15. By a judgment delivered on 16th August 2024, the Honourable Trial Court allowed the Appellant's claim for unfair dismissal, and awarded 12 months' salary as compensation for unfair termination (Kshs. 422,652/-); underpayments (Kshs. 1,928,647.80) and house allowance (Kshs. 377,497.17), plus costs of the suit and a certificate of service (pages 19-23 of ROA dated 11th September 2025).

16. The Respondent reacted to the judgment by filing a Notice of Motion application dated 30th September 2024 seeking the following orders:

- a) This Application be certified as urgent and heard ex-parte in the first instance for reasons to be recorded.
- b) This Honourable Court be pleased to issue an Order of stay execution of the Judgment issued by Hon. Rawlings Liluma Musiega on 16th August, 2024 together with the Decree and all consequential orders arising therefrom pending the hearing and determination of this Application.
- c) The Honourable Court be pleased to review, discharge, vary, and/or set aside the Judgement issued by Hon. Rawlings Liluma Musiega on 16th August, 2024.4.
- d) Such other orders and directions as may appear to this Honourable Court just and convenient to grant under the circumstances.
- e) The costs of this application be provided for
(page 3-25 of the ROA).

17. In response to the application for review aforesaid, the Appellant filed a Replying Affidavit sworn on 10th October 2024 (pages 26-28 of ROA).

18. The Respondent countered the same through a Further Affidavit sworn by BRIAN MWENDA GATOBU on 11th November 2024 (pages 29-31 of ROA).

19. The court issued directions that the application for review be disposed of by way of written submissions. The parties complied (pages 32-55 of ROA)

20. The Trial Magistrate Court delivered its ruling on the 2^{5th} of July 2025, allowing the application dated 30th September 2025 for review of the earlier judgment of the court, for the reason that there was an error apparent on the face of the record, the court having found that the Claimant was employed as a truck driver, rather than a personal driver to the Respondent's CEO, and therefore using the wrong salary scale to tabulate his terminal dues. The Honourable Trial Magistrate reviewed the court's award, and dismissed the claim for underpayments and house allowance. It however upheld the award of 12 months' salary as compensation for unfair termination (ruling at pages 56-59 of ROA).

DETERMINATION

21. The court having perused the memorandum of appeal discerned the ground of appeal to be whether the trial court erred in fact and law in awarding the application for review of its judgment and reviewing its judgment. The court in the cross-appeal found the issue to be whether the cross-appeal was merited,

SUBMISSIONS

22. The appeal was canvassed by way of written submissions.

Appellant's written submissions

23. This appeal is based on the jurisprudence established in Republic v Advocates Disciplinary Tribunal ex parte Apollo Mboya where Mativo, J. held that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it.

24. Vide the ruling dated 29th July 2025, the Honourable court allowed the Respondent's application for review, varying the judgment delivered on 13th August 2024 by Hon. Rawlings Musiega in ELRC cause No. E1236OF 2021 on the basis that the said judgement constituted an error apparent on the face of the record.
25. The learned Magistrate, in allowing the Application, observed that he had failed to sufficiently evaluate the evidence of the Appellants job description, upon which the entire judgement was premised.
26. The learned Magistrate, in determining the application, relied on the merits of the judgment to establish the existence of an error apparent on the face of the record, having ventured into the field of analysis and evaluation of evidence on merit.
27. The learned judge exceeded the scope of review jurisdiction by delving into the merits of the case and basing his ruling on contested issues, a function that squarely falls within the mandate of the appellate courts.
28. From the above set of facts, the following issues are key for determination.
 - i. Whether the issues alluded to by the learned magistrate constituted an error apparent on the face of the record.
 - ii. Whether the review was merited
 - iii. Who should bear the costs of the appeal.

29. The concept of review of a judgment or ruling was espoused in the case of Republic v Public Procurement Administrative Review Board & 2 others [2018] eKLR which was cited in Macharia v Permanent Secretary Ministry of Education and another, 2025 KEELC 877 it was 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 unreasonable delay.”

30. We submit that the application that was filed by the respondent did not meet any of the above tests, consequently, the learned judge erred in law and in fact in her ruling and the consequent orders. We submit on the grounds of appeal below.

a. Whether the issues alluded to by the learned magistrate constituted an error apparent on the face of the record.

i. Application and the consequent ruling was based on the merit/substance of the main suit

31. From the onset, we wish to draw the attention of this honourable court to the jurisprudence on what constitutes an error apparent on the face of the record.
32. We invite this court to the decision in *Levi Outa v Uganda Transport company* that was cited by the court in *R V Advocates Disciplinary Tribunal Ex Parte Apollo Mboya (2019) KEHC 6379, KLR* in which the court explained what a mistake or error apparent on the face of record as;

'An evident error which does not require extraneous matter to show its incorrectness'
33. Further, the court went ahead to state that;...a review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. A review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out
34. It is our submission that what was brought before the learned judge was an Appeal disguised as a review. The position of the law, and rightly so, is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it and no two opinions are possible from it. The trial court in his ruling made references to the witness statements (RW1) as well as the exhibits such as certificate of service that were key when determining the merit of the main suit. We wish to point out first that the duties of the Appellant were a contested question of fact. At paragraph 5 of the Memorandum of Claim (page 62) the Appellant pleaded that he was a

truck driver. The Respondent denied that fact at paragraph 4 of its response (page 104). The Respondent took the position that the Appellant was a driver of a medium-sized vehicle and was a personal driver of the director (page 110). The Respondent did not attach the Appellant's employment contract nor job description. Instead, the Respondent filed the Appellant's application for senior driver position (page 167 and a certificate of service showing that the Appellant was employed as a driver (page 174).

35. The Appellant submitted extensively on the matter (page 180) arguing that the Respondent did not produce the employment contract and urged the court to go with his version of facts. When the Respondent filed the application for review on the matter, the Appellant argued that this is an issue of merit and not an apparent error on the face of the record as it required re-evaluation of the evidence and their weight which could possibly lead to two different opinions.

36. The Magistrate considered the certificate of service which simply reads that the Appellant was employed "as a driver". It does not define with specificity whether the Appellant was a truck driver or a driver of a medium-sized vehicle. The court was left to guess and it accepted the version of facts as presented by the Appellant (see paragraph 15 of the judgment, page 195).The court also set aside the award for house allowance simply because it changed its opinion from the Appellant being a truck driver to being a 'normal driver'. This too was wrong.

37. We submit that the issue was not a glaring error that could be a subject for review as the meaning of 'a driver' as captured in the certificate of service could be interpreted in two different ways. Indeed, the court expressed in the ruling that "the court having failed to sufficiently evaluate the evidence, it resulted in applying the wrong principles". We submit that failure to sufficiently evaluate evidence' is not a basis to review a judgment. It is an issue for appeal. The learned judge's determination on the issue of as to whether the Appellant was a truck driver or a personal driver was misconstrued to be an error apparent on the face of the record as it went deep down into the substance of the main suit.

38. To buttress our position, we invite this court to the decision in National Bank of Kenya v Ndungu Njau,1997 eKLR where the court of Appeal aptly stated that

' A review is a creature of statute, and courts cannot enlarge its scope beyond what is prescribed....It will not be sufficient ground for review where it is thought that another judge could have taken a different view of the matter nor can it be a ground for review that the court proceeded on an incorrect expansion of the law" The question as to whether the Appellant was employed as a truck driver or personal driver formed the key fabric of the main suit which, if it were to be determined on its own merit would possibly invite different views from other judges. Consequently, we submit that the same issue, having been previously determined in the main suit, could only be raised in an appeal and not in a review. It therefore does not, in any way, constitute an error apparent on the face of the record.

ii. There was no new evidence discovered to warrant the review of the judgment

39. We submit that there was no any other new matter discovered that was not within the knowledge of the Respondent.
40. The issue of whether the Appellant was an ordinary personal driver or truck driver was addressed conclusively by both the appellant and respondent submitting on the same. As such, it would be inaccurate for the respondent to claim that the issue was not raised, and has only come to the appellant's attention following the delivery of the judgement in the main suit. We submit that the issue of job description was dealt with in the main suit (not discovered after the judgement) and the court expressed its considered opinion at paragraph 15 of the judgment. If the respondent was dissatisfied with the manner in which it was addressed by the learned judge, lodging an appeal would have been the correct legal procedure.

b. Whether the review was merited

41. It is trite law that for an application for review to be merited, it has to pass the abovementioned tests. In view of the fact that the application did not pass any of the tests above, the law regards that as an appeal disguised as review, and therefore ought to be dismissed. We submit that there was no sufficient reasons and/or grounds for the court to consider the review and consequently set aside the judgement that had already been delivered.
42. We invite this court to the reasoning of Justice Mativo in Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya (supra) where he aptly observed thus; "*...I emphasize that review proceedings are not an appeal. The review must be confined to error apparent on the*

face of the record and re-appraisal of the entire evidence or how the judge applied the law or interpreted the law would amount to exercise of Appellate Jurisdiction, which is not permissible. "We submit that the honourable court exercised an appellate jurisdiction which is neither granted to it by the Constitution nor the statutes.

43. In light of the above decisions, it is clear that an application for review cannot succeed when it goes deep down into the substance (merit) of the case. When the court is being invited not to 'see' a document but to 'analyze the meaning of the contents' which could mean two different things-either a truck driver or a driver of any vehicle including small cars - that is not an error, especially since the court found in the judgment that there were no employment records and it was therefore in order to go with the Appellant's version of facts. A party cannot pursue an appeal under the guise of a review. We submit that this Appeal should be allowed, judgment delivered on 13th August 2024 be reinstated in its entirety including the awards for underpayment and house allowance, and the costs of the application for review and this appeal be awarded to the Appellant.

Respondent's submissions on appeal

44. The Respondent urges this Court to find that the application was merited. It was based on:

- a. PRINCIPAL ERROR of erroneously presuming that the Appellant was a "truck driver". This principal error was committed in the Judgment delivered on 16th August 2024 at the very outset, i.e., at page 1 of 5 where the trial court observed in passing that-"...the claimant employed the respondent as a truck driver..."b. RIPPLE EFFECTS: The PRINCIPAL error and mistake had the

ripple effect of leading the court to subsequent erroneous and mistaken findings, including that the respondent:

i. put the claimant in a tough financial position.

ii. forced the claimant to seek advances and further that the claimant was -

iii. constructively dismissed

iv. entitled to compensation for unfair termination, and that

v. The assertion that he was a truck driver was not rebutted.

45. Section 80 of the Civil Procedure Act permits any person aggrieved by a decree or order of a Court to apply for a review of the Judgment to the Court that passed the Judgment, and that Court may make such orders as it deems fit. This right is further saved under Order 45 rule 1 of the Civil Procedure Rules which allows an aggrieved person, who, on account of: some mistake, error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, to apply for a review of the Judgment to the Court which passed the decree or made the order. Owing to the Appellant's claim that ours was not a review but an appeal, it behoves us to invite this Honorable Court to revisit the legal definition of a "mistake and error apparent on the face of the court's record. In *Dawa v Kaliisa* (Miscellaneous Application 43 of 2024) [2024] UGHC 470 (21 June 2024) the court considered the definition of

what constitute an error apparent on the face of the record adopted in Edison Kanyabwera Vs Pastori Tumwebaza SCCA No.6 of 2004 where it was noted that -a "mistake or error apparent on the face of the record" must be an evident error which does not require any extraneous matter to show its incorrectness. Further, it must be an error so manifestly clear that no court would permit such an error to remain on the record. The error contemplated under the rule must be such that is apparent on the face of the record and not an error which has to be searched. The error should not require any long-drawn process of reasoning on points where there may conceivably be two options (Paragraph 4 of the judgment)

46. The main error/mistake apparent on the record was a slip of observation- Paragraphs 3 and 4 of the Notice of Motion seeking review pleaded that the issues constituted an error apparent on the face of the record. The main basis was that the Trial Court casually presumed the Appellant to be a truck driver (heavy commercial vehicle) as opposed to the Respondent CEO's personal driver of a small vehicle (cars and light vans). This slip in observation occurred much earlier in the judgment, when the court was summarizing the parties' respective positions. The slip came well before the Court had begun analyzing the parties' evidence. Therefore, the mistake was not a finding or the ratio decidendi of the Court, even though its ripple effects led to a wrongful Judgment as admitted by the Trial Court itself upon review.

47. The mistake/error in question was not a ground for appeal as it was not a substantive finding- The Review Application was therefore premised on the Trial

Court's presumption that the Appellant was a truck driver as opposed to the Respondent CEO's personal driver of a small vehicle. The presumption arose as a slip in the Court's observation when it was summarizing the respective positions of the parties before analyzing the case. It was made in respect of the evidence the Respondent produced, but the Court failed to acknowledge it as part of the evidence in the Respondent's list and bundle of documents dated 16th November 2022. As the slip in observation did not require external evidence, it did not need to be searched based on long drawn process; and we submit that it therefore fits into the definition of "mistake or error apparent on the face of the record adopted in *Dawa v Kaliisa* (Miscellaneous Application 43 of 2024) [2024] UGHC 470. Paragraph 5 of the Notice of Motion seeking review provided a detailed contextual explanation of how the errors impacted the final determination by the Court in its³⁷. The fact that the slip in observation was not part of the court's ratio decidendi (ultimate finding of the court) means that it was not an error which went to the merits of the case, warranting correction via an Appeal instead, as the Appellant has sought to allege. It is not true, as the Appellant alleged at Ground 2 of the memorandum of Appeal, that the issues raised in the Application went to the merits.

48. The errors could be corrected by perusal of the Court records- The issues raised by the Respondent/Cross-Appellant as part of the context of the error required simple perusal of the record to determine; they did not require or call for a long-drawn out analysis of evidence to address. The review Court was therefore correct in its analysis when it considered that the issues raised at paragraphs 3, 4 and 5 of

the Notice of Motion seeking review fall within the four corners of what can be regarded as errors apparent on the record as set in *Terra Craft Limited v Waliubah and Another* (Civil Appeal) 126 of 2015 (cited at paragraph 4 of the review ruling).

49. The review application was well anchored in the law -The review application was brought pursuant to the Notice of Motion. The narration of the nature of the obvious mistakes and errors apparent on the record and other sufficient reasons for review, at paragraphs 3 to 9 of the Notice of Motion, informed the Court about the merits of the said Application. The Court was told that the errors and mistakes apparent on the records elicited eight (8) sufficient reasons to review the Judgment of the Trial Court. The Court therefore followed the correct position of the law prescribed at Section 80 of Civil Procedure Act gives the power of review and Order 45 of the Civil Procedure Rules (which the Appellant concedes as the legal foundation of applicable legal principle at paragraph 7 of the Appellant's Submissions) when it considered the obvious mistakes raised in the application for review and other sufficient reasons for reconsideration.

50. Further reply to issues raised in the Appellant's Submissions-Contrary to what the Appellant alleges, a perusal of the Court records does not amount to consideration of extraneous factors. The Appellant, at paragraph 14 of its submissions, concedes that the learned Judge did no more than peruse the evidence on record when considering the review application. The learned judge cannot be faulted for referring to the witness statements (RW1) and exhibits, such as the certificate of

service, as they formed part and parcel of the Court record, and there was nothing extraneous in the referenced documents. At paragraphs 15 through to 19 of the Appellant's Submissions, the Appellant has attempted to raise some of the issues which were contested and were subject to evidence, including rivalling proof in some cases. In response, we wish the Court to note that the matters are not pointers to issues of appeal as alleged by the Appellant since: i. The Appellant has misconceived what the application for review is all about. The application for review was based on two main grounds, as set out at paragraphs 3 and 4 of the Notice of Motion; and Amongst the grounds were eight (8) flaws and oversights in the Court's Judgment, which formed other sufficient reasons over which the court could exercise their review jurisdiction. The ground of sufficient reason is allowable under Section 80 of the Civil Procedure Act and Order 45 rule 1(b). The sufficient reason was particularly pleaded at paragraphs 10 of the Notice of Motion and paragraph 11 of the Supporting Affidavit to the application for review. Contrary to what the Appellant alleges, the Application for review was not premised on the discovery of new evidence. The Appellant's summary of issues at paragraphs 25 to 27 of his Submissions is therefore baseless because -

a. The rival arguments which the Appellant refers to, which were provided only as contexts of the errors of the slip in observation, which formed the basis for the challenge through a Review Application. The Review Court, in paragraph 4 of its Ruling, acknowledged that the explanations were intended to provide context; and

b. Contrary to what the Appellant alleges, the case of Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya should not apply. The reference by the Appellant should be distinguished since the reconsideration of a case during review on account of a slip in observation cannot be equated with the reappraisal of the entire evidence.

70. In sum, Ground 2 of the Appellant's Memorandum of Appeal, which alleged an error in not finding that the issues raised in the Application went to the merits is misinformed and out to be dismissed as baseless by this Appellate Court. Other principles of review application were met. We submit that paragraphs 10 to 14 of the Notice of Motion seeking review informed the Trial Court of the merits of the said Application, to wit -

a) The Court was informed that the Application was brought without delay

b) The Court was also informed that this was the first Application for review in respect to the impugned decision of the Honorable Court delivered on 16th August 2024; and

c) Fairness and justice principles required that the Application be considered. The Ruling on the application for review was thus a determination necessary, in the main, to ensure good order.

71. For these reasons, the Application for review was merited, and, is clear that the learned Magistrate correctly interpreted the law when, on the record, it found the Application for review had merit. For the stated reasons, Ground 2 of the Appellant's Memorandum of Appeal cannot stand.

Decision on the appeal

72. The application for review before the trial court was determined under rule 33 of the ELRC(Procedure rules) which states ‘(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.’ The rules were amended in 2024, but the content was retained in rule 74.
73. The trial court relied on decision in Terra Craft Limited vs. Waliubah & Another (2024) eKLR to effect that errors apparent included insufficient evaluation of evidence. The trial held that it had failed to sufficiently evaluate evidence before it reaching wrong conclusion the Respondent was a truck driver and not ordinary driver.
74. The court recognized that whether the Respondent was a truck driver or an ordinary driver was in dispute. The court then re-evaluated the evidence to determine that the Respondent was an ordinary driver. The Appellant cited the decision in Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] KEHC 6379 (KLR), where Justice Mativo (HC, as he then was) stated, ‘The power of review is available only when there is an error apparent on the face of the record. I emphasize that review proceedings are not an appeal. The review must be confined to error apparent on the face of the record, and re-

appraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of appellate jurisdiction, which is not permissible.’’

75. The trial court had initially held for lack of an employment contract; it relied on the claimant’s version of events. On review, the trial court relied on the appellant’s application for the job of driver and certificate of service as produced by the respondent as evidence that he was an ordinary driver. The outcome of the review decision was setting side of award of underpayment and house allowance.

76. This being a first appellate court, it was held in Selle v Associated Motor Boat Co. [1968] EA 123 that:- *“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 the 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 account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”*

77. Further in on principles for appeal decisions in Mbogo V Shah [1968] EA Page 93 De

Lestang V.P (As He Then Was) Observed At Page 94:

“I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

78. The application for review was by way of Notice of Motion dated 30th September, 2024. On the issue of occupation, the Respondent raised ground of review to effect that the Appellant had not produced prove of employment as a truck driver against evidence by Respondent produced of letters by previous employers of Appellant as ordinary personal driver dated 26th March 2019 where the Appellant sought employment as an executive driver and certificate of service to controvert the allegation of being a truck driver.

79. In the judgment the trial court held in paragraph 15: “I agree with the Claimant that where the employer fails to produce records as it is therein statutory duty than the court would go with the Claimant’s version. In this case, I am inclined to believe the Claimant was a truck driver as the same has not been rebutted.”

80. In review in paragraph 5 (page 58) the trial court held - ‘ 5. *In the circumstances, the court is in agreement with the Applicant that it has been proved, contrary to the earlier*

holding of this court that the Claimant was not a truck driver but a personal driver of the Company CEO. I agree with the Applicant that if this court had carefully perused the record, it was very clear through a letter of promotion that the claimant was referred as the transport manager. Therefore in my view, that position is not similar to that of a tuck driver. I also agree with the applicant that based on the recommendation letters presented by the Claimant in respect to his previous engagements 2005, the previous employers hired him as a personal driver to the CEO. The court was wrong in finding that the evidence of the Claimant that he was a truck driver was not rebutted. It was very clear from the evidence of Rw1 that that position was controverted. Rw1 was very firm that the claimant was assigned to driving a personal car. In addition, it was very clear from the Certificate of Service and which formed part of the exhibits in the case, that the Claimant was an ordinary driver.’’

81. The trial court thus found an apparent error or mistake on record due to the failure to consider the promotion letter for the transport manager. The previous employment record before the court indicated that the Appellant was a personal driver. Pages 118–119 contained recommendation letters for the Appellant, confirming he was a personal driver. At page 167 (ROA), there was an application for the position of Senior Driver with the independent Policing Oversight Authority. At page 173 (ROA), the Applicant indicated he was a transport manager. At page 174, the certificate of service showed the Appellant was employed as a driver, with Nairobi as his usual place of employment (page 174 of ROA). The court finds this certificate was a record from the employer and was not rebutted. It is unreasonable to expect truck drivers to be confined to Nairobi. The Appellant produced a recommendation from an employer indicating his role as head of transport, overseeing

drivers of trucks and machinery in the firm, among other duties. None of these duties included being a truck driver.

82. The court concluded that the trial court was correct in identifying its own mistake on the face of the record for failing to evaluate the evidence properly, which led to the incorrect conclusion that the Appellant was a truck driver. There was no evidence indicating that the Appellant was a truck driver. I find that the basis for review—specifically, the trial court's failure to recognize that the Respondent had presented evidence to rebut the Appellant's claim of being a truck driver—was before the trial court, and the trial court erroneously failed to consider it. I believe this is a valid ground for review. (Mbogo vs. Shah)
83. The appeal is held to be without merit and dismissed with costs to the Respondent.

Decision on the cross-appeal

84. The appellant did not submit on the cross-appeal. The court on perusal of the record found there was no evidence of the cross-appeal having been admitted by the court. The court presumed that was the reason why the appellant never submitted on the same. The court nevertheless considered the cross-appeal and the submissions. The cross-appeal faulted the trial court for upholding the award for compensation. The grounds of the cross-appeal were-
- a. The Honourable Trial Magistrate misapprehended the applicable principles of law in the circumstances of the subject review application presented before it and in the process arrived at an erroneous decision by awarding compensation for

unfair termination when the question as to the nature of termination of the Respondent's employment was not the subject of the review application.

- b. The Honourable Trial Magistrate misapprehended the applicable principles of law in the circumstances of the subject review application presented before it and in the process arrived at an erroneous decision as to the facts by awarding compensation for unfair termination when had resigned from employment.
- c. The Honourable Trial Magistrate erred in fact and in law by awarding compensation for unfair termination when the Court had recalled and revoked the Judgment and consequential orders of 16th August 2024 in its entirety.
- d. The Honourable Trial Magistrate erred in fact and in law and in the process rendered a contradictory decision by awarding compensation for unfair termination when a determination of no fault on the Appellant's part had also been entered.

85. The trial court in the impugned ruling held as follows- *‘Therefore the court having failed to sufficiently evaluate the evidence, it resulted in applying the wrong principles in making awards as the monthly salary was and is the backbone of the terminal dues as it is used in tabulation throughout the claim. I would therefore not be wrong in finding that the failure to sufficiently evaluate the evidence led to mathematical errors in this case and which I find to have fallen under what is considered by courts as a mistake and error apparent on the face of the record.*

In view of the above analysis it is very clear that failure to sufficiently evaluate evidence led to miscalculation of terminal dues and this was indeed unfair to the respondent

The upshot of the forgoing is that the application dated 30th of September 2024 is merited and it's allowed. The judgment and the consequential orders issued on the 16th of August 2024 do not therefore hold and stand recalled and revoked.

The award to the plaintiff is reviewed as follows-

The claim for underpayments is unjustified as the same is dismissed

The claim for house allowance is also dismissed

The claimant is awarded 12months compensation for unlawful termination kshs 422, 652/=

The award on c above shall be subjected to statutory deduction

Since it was no fault of the respondent, I make no orders as to costs.’’

86. Taking into account the grounds of the cross-appeal, I find the issue of whether or not there was unfair termination, the respondent/appellant having stated he resigned due to frustrations, was not an error apparent on the face of the record. Only the appellate court could decide whether the trial court erred in finding constructive dismissal. Secondly, on review, the trial court was clear on its decision in the following paragraph after recalling its decision. Applying my mind to the grounds of the cross-appeal, I find no merit in the same. The cross-appeal is dismissed. I make no order as to costs on the cross-appeal as the respondent/ appellant did not submit on the same, albeit for the reasons aforesated.

87. In the upshot, the appeal is held to be without merit and dismissed with costs to the Respondent.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 13TH DAY OF MARCH, 2026.

J. W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Appellant: Mr. Odhiambo

Respondent: absent