

REPUBLIC OF KENYA

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI**

ELRC CAUSE NO E362 OF 2023

**KENYA ENGINEERING WORKERS
UNION.....CLAIMANT**

VERSUS

**ASHUT ENGINEERING LIMITED...
.....RESPONDENT**

RULING

Background

1. On 30th June 2025, the court delivered judgment in the cause and found that the Respondent lawfully terminated the services of the Grievant. Further, the court found that save for the claim for a certificate of service, the Grievant was not entitled to the reliefs which he had sought in the claim. As such, it dismissed the suit. Each party was ordered to bear own costs.
2. The Claimant has now filed the application dated 12th July 2025 through which it seeks the following reliefs:-
 - a) That the court reviews its aforesaid judgment.
 - b) That the court grants the Grievant the reliefs which were sought in the Memorandum of Claim to wit: pay for days worked; service gratuity; leave allowance; and compensation equivalent to the salary for the Grievant for twelve months.

- c) That the court orders the Respondent to bear costs of the application.
 - d) That the court issues any other order which it deems fit to grant.
3. The application is premised on the grounds appearing on the face thereof and on the affidavit of Wycliffe A. Nyawata. The affiant contends that in arriving at its conclusions in the impugned judgment, the court relied on *the Employment and Labour Relations Court Act* without regard for the Collective Bargaining Agreement (CBA) between the parties.
 4. The affiant contends that the court erred by declining to award the Grievant service gratuity as the same is provided for in clause 31 of the CBA. The affiant contends that the Claimant is alive to section 35 of *the Employment Act* which the court invoked to decline the claim for service gratuity. However, he contends that the court should not have disregarded the CBA in arriving at the impugned decision.
 5. The affiant contends that the provision in the CBA on service gratuity should apply to the Grievant since to decline to apply it will be discriminatory. The affiant avers that the Respondent has been paying the benefit to other employees even after the Grievant left employment.
 6. The affiant contends that the Grievant did not take leave for 10 months. He contends that the practice is that an employee who takes leave fills leave forms which are kept by the employer. As such, the Respondent should have

produced leave records for the Grievant to demonstrate that he was not entitled to the claim.

7. The affiant contends that the Grievant was entitled to salary for days worked. He avers that the court erred in denying the claim since it is anchored in law.
8. The Respondent has opposed the application. It filed a replying affidavit by one Sheilah Kapekei to anchor its response to the motion.
9. The Respondent avers that the application does not meet the threshold for an application for review. It contends that the application offends the law on review motions.
10. The Respondent avers that the court declined some of the reliefs in the suit because of want of evidence to support them. It contends that by the Claimant asking the court to review the order in respect of these reliefs, it is asking the court to re-evaluate the evidence on record and arrive at a different decision. In the Respondent's view, this is tantamount to inviting the court to sit on appeal against its decision, a matter which is impermissible in law.

Analysis

11. The law on review is now settled. A court will only review its decision if it is demonstrated that: there is an error apparent on the face of the record to warrant review of the decision; there has been discovery of new material which was not within the applicant's knowledge despite the exercise of due diligence at the time the impugned decision was made; and there is sufficient reason to review the decision (**Harun**

Egadwa v Farmers Choice Limited [2000] KEHC 305 (KLR)). In addition, rule 74 (1) (c) of the *Employment and Labour Relations (Procedure) Rules, 2024* provides that the court may review its decision if the decision requires clarification.

12. The court is not entitled to entertain an appeal from its decision under the guise of a review application. It is not entitled to entertain an application which is disguised as a request for review if the application requires it to re-evaluate the evidence on record and arrive at a different decision.
13. It is not a ground for review of a decision that the court erred in its interpretation of the law or evidence. As such, a misinterpretation of the law or evidence cannot be said to be a sufficient reason to warrant a review motion (***Ribiru v Mwaniki & 2 others [2024] KEHC 10417 (KLR)***).
14. Speaking to the foregoing in the case of ***National Bank of Kenya Ltd v Njau [1997] KECA 71 (KLR)***, the Court of Appeal observed 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. It will not be a sufficient ground for review 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 exposition of the law and reached an

erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.... In the instant case the matters in dispute had been fully canvassed before the learned Judge. He made a conscious decision on the matters in controversy and exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise we agree that the learned Judge would be sitting in appeal on his own judgment which is not permissible in law. An issue which has been hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.”

15. In ***Shariff, Administrator of the Estate of Jim Choge (Deceased) & 2 others v Chief Land Registrar & 3 others [2022] KEHC 18084 (KLR)***, the learned Judge expressed himself on the subject as follows:-

“A point which may be a good ground of appeal may not be a ground for an application for review. Thus, an erroneous view of evidence or law is no ground for review though it may be a good ground for an appeal.”

16. The Claimant contends that the court erred by failing to grant the prayer for service gratuity despite the fact that it is provided for under the CBA between the parties. A perusal of the court decision shows that the court explained why this prayer was not granted. The court stated that because the

Grievant was a contributor to the National Social Security Fund, this disqualified him from pursuing this relief.

17. The court relied on section 35 (6) (d) of *the Employment Act* to arrive at this conclusion. The provision states as follows:-

“ This section shall not apply where an employee is a member of the National Social Security Fund.”

18. Section 35 of the Act entitles employees who leave employment upon notice of at least 28 days to service pay. However, the aforesaid proviso excludes employees who are members of the National Social Security Fund from pursuing this benefit.

19. It is, inter alia, on the aforesaid basis that the court disallowed the prayer. The court observed that although clause 31 of the CBA between the parties makes provision for the benefit, that clause cannot override section 35 (6) (d) of *the Employment Act* which excludes employees who are contributors to the National Social Security Fund from claiming the benefit.

20. The court also observed that the aforesaid section limits payment of service pay to an employee who has left employment upon notice of at least 28 days to terminate his contract. However, the Grievant was summarily dismissed from service without notice which disentitled him to this benefit.

21. From the foregoing, it is clear that the court considered and declined the request for service gratuity on specific grounds.

It is also apparent that the court explained why it could not rely on clause 31 of the CBA to grant the relief.

22. The Claimant now contends that it was wrong for the court to decline to grant the relief because under section 18 (4) & (5) of *the Employment Act*, an employee whose contract of service is summarily terminated is entitled to all his accrued benefits. This contention is flawed since it ignores the reality that pursuant to section 35 of the Act, service pay is only payable to employees whose contracts of service have been terminated on notice of at least 28 days thus expressly excluding those whose contracts have been summarily closed from claiming the benefit.
23. The Claimant further contends that it has come across new evidence which shows that some employees received this benefit after they retired from service. It relies on various letters which show that the benefit was paid to some employees who had retired.
24. The evidence which the Claimant relies on to anchor its application for review is not helpful to its case. First, unlike the Grievant whose contract was summarily terminated, the employees who are said to have received the impugned benefit were retired from service. The CBA expressly states that employees who exit from service through retirement are entitled to the benefit.
25. Second, there is nothing in the letters which the Claimant has placed before the court which shows that the employees who benefited from service gratuity upon retirement were

registered contributors to the National Social Security Fund. As such, there is no evidence to demonstrate that they fell in the categories of employees who are excluded from claiming service pay by section 35 (6) of *the Employment Act*.

26. If the Claimant was aggrieved by the court's finding on whether the Grievant was entitled to claim service gratuity, the right procedure was for it to appeal against the decision. The Claimant cannot invite the court to re-evaluate the evidence on the matter with a view to arriving at a different decision. That is tantamount to asking the court to sit on appeal on its judgment.
27. The Claimant also prays that the court reviews its decision in order to grant the Grievant: pay for days worked; leave allowance; and compensation equivalent to the salary for the Grievant for twelve months. A perusal of the court decision demonstrates why the court declined to grant these reliefs.
28. On the reliefs for leave allowance and pay for days worked, the court noted that although the Claimant alluded to the reliefs in the Memorandum of Claim, it did not tender evidence to anchor them. The court underscored the fact that the Grievant did not mention the reliefs either in the witness statement which he adopted as his evidence in chief or in his oral testimony. Therefore, the court was of the considered view that the claims, although pleaded in the Memorandum of Claim, were not anchored on evidence that was tendered in the cause and could not be granted.

29. The law is that pleadings are not evidence. As such, a party who pleads a claim should speak to it in his evidence. If he does not, the claim is considered unproven (**Robert Ngande Kathathi v Francis Kivuva Kitonde [2020] eKLR**).
30. From the foregoing, it is apparent that the court declined the two claims because they were not supported by the evidence. The Claimant was entitled to contend that the court misapprehended the law in arriving at this conclusion. However, if it desired to challenge the decision, the proper way to do so was through appeal but not through a motion for review with a view to asking the court to re-evaluate the evidence on the matter in order to arrive at a different decision. That would be an appeal disguised as an application for review.
31. The Claimant also asks the court to set aside its decision refusing to grant the Grievant compensation and substitute it with an award for compensation. Yet, in declining this relief, the court was guided by its finding that the decision to terminate the services of the Grievant was lawful.
32. If the Claimant considers that the Grievant should have been granted this relief, it ought to have appealed against the finding that the decision to terminate his services was lawful. Instead of doing so, it (the Claimant) applied for review, essentially inviting the court to sit on appeal on its judgment.
33. Finally before I pen off, it is necessary to comment on the court decision in the case of **Kenya Engineering Workers**

Union v Farm Engineering Industries Ltd (unreported) which the Claimant has urged the court to rely on to review its decision. The Claimant contends that the court in that case agreed to review its decision on grounds which are similar to those raised in the application before me.

34. That decision is however distinguishable. It was based on a different CBA from the one in the case before me. Importantly, that decision is not binding on this court.

Determination

35. Having regard to the foregoing, the court finds that the Claimant's motion does not satisfy the threshold for a review application. In the court's view, the application is an appeal disguised as a request for review.
36. The law does not permit the court to sit on appeal from its decision or the decisions of courts of concurrent jurisdiction. This being the case, the instant application fails.
37. Costs of the application are granted to the Respondent.

**Dated, signed and delivered on the 19th day of March,
2026**

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Applicant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI