

REPUBLIC OF KENYA

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT
MOMBASA**

CAUSE NO. E073 OF 2022

TSUMA GONA MWANGEA 1ST CLAIMANT

EDGAR HAGYO 2ND CLAIMANT

ABU SHEE 3RD CLAIMANT

KENNETH MASHA 4TH CLAIMANT

VERSUS

KENYA PORTS AUTHORITY RESPONDENT

RULING

The 1st and 2nd claimants, Tsuma Gona Mwangea and Edgar Hagyo, filed an application dated 20 January 2026 under the provisions of sections 1A, 1B and 3A and 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules and seeking orders:

- a. *Spent.*
- b. *In the interests of justice, the court is to review and vary the judgment delivered on 30 October 2023 and, in particular, on the finding that the 1st and 2nd claimants/applicants had contravened section 44(4) of the Employment Act.*
- c. *In the interest of justice, the court be pleased to review the award for notice pay where the court interchanged what was entitled to the 2nd and 3rd claimants in the claim.*
- d. *In the interests of justice, the court does make a finding on compensation for the unfair term Anton.*
- e. *The court be pleased to issue any other orders that the court may deem just and appropriate.*
- f. *The costs of the application be awarded.*

The application is supported through the Affidavits of the 1st and 2nd claimants on the grounds that on 30 October 2023, the court delivered judgment with respect to the claimant's amended Memorandum of Claim dated 18 April 2023. There exists an error apparent on the record where the award of notice pay for the 2nd claimant was interchanged with that of the 3rd claimant. Under the amended Memorandum of Claim, the 2nd claimant was earning Ksh. 93,541.15, but the judgment awarded Ksh. 73,499.49 while the 3rd claimant was noted as earning such an amount, but was awarded Ksh. 133,114.46.

In the supporting affidavits, the claimants aver that the court, in analysing the evidence, held that they faced a serious case of theft and that they had since been charged with it. The court held that theft constitutes gross misconduct under section 44(4) of the Employment Act, and therefore, no compensation is due. The finding was primarily based on the ongoing criminal

proceedings, which concluded on 28 February 2025 with an acquittal under section 210 of the Criminal Procedure Code, meaning the claimants were found not guilty.

The claimants are entitled to an award of compensation in the given circumstances. This should be reassessed and the judgment reviewed to this extent.

In reply, the respondent filed Grounds of Opposition, contending that the application is fatally defective for failing to apply the correct provisions of the law applicable in the court. The application was filed, inviting the court to depart from its findings in the judgment; hence, the application is tantamount to an appeal, and the court lacks jurisdiction. The matters raised in the application were fully addressed at the hearing. The absence of any new and important matter or evidence which was not prosecuted makes the court *functus officio* and the application defective.

The claimants are inviting the court to depart from the rule that administrative disciplinary processes and criminal procedures are independent and that neither binds the other. The court lacks the requisite jurisdiction to hear and determine the application, which is defective to this extent.

The respondent objects to the application on the grounds that it was filed with undue delay. It has been close to 2 years since the judgment was delivered. Seeking a review at this stage is an abuse of the court process and forum shopping, since the claimant has raised similar issues before the Magistrate's court in a separate suit, MCCC E140 of 2026.

Parties attended and made oral submissions, which are analysed, and the single issue for determination is whether the court should review, vary or correct an error apparent on the face of the record with regard to the judgment herein delivered on 30 October 2023.

An applicant seeking to review, variation or correction of errors in the judgment or orders of the court is regulated under Rule 74 and 75 of the Employment and Labour Relations Court (Procedure) Rules.

To move the court under any other law or rules of procedure is inapplicable; hence, the application is incompetent to this extent.

A review application must recognise the principles for a review outlined by the Court of Appeal in Civil Appeal No. 2111 of 1996, National Bank of Kenya Vs Ndungu Njau, the Court held that;

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-evidence and should not require an elaborate argument to be established. It will not be 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 proceed on an incorrect expansion of the law.

In this case, the claimants assert that there is an error in the allocation of notice pay where there is an interchange between them, and that the error is apparent on the face of the record.

The error is noted insofar as the 2nd claimant was wearing Ksh. 93,541.15 but was awarded KSh. 73,499.49

The 3rd claimant was earning Ksh. 73,499.49 but was awarded KSh. 133,114.46.

The interchanges thus apparent, the error being discernible from the pleadings, the need for correction under Rule 75 of the Employment and Labour Relations Court (Procedure) Rules is imperative.

The respondent offered that, indeed, the claim for payment of Ksh. 93,541.15 for the 2nd claimant and Ksh. 73,499.49. For the 3rd claimant, the claim is well applied based on the last salary earned while in employment, which would be higher than the amount claimed. However, as noted above, the claimants have moved the court under the wrong provisions of the law. The rules of procedure adopted do not apply to the court.

However, on the pleadings, the noted error is hereby corrected.

Judgment herein shall be corrected with the following allocation:

- a) 2nd claimant notice pay Ksh. 93,541.15.
- b) 3rd claimant notice pay Ksh. 73,499.49.

On the review with regard to findings that there was gross misconduct contrary to section 44(4) of the Employment Act and that this should be reviewed upon the acquittal of the 1st and 2nd claimants from the criminal proceedings on 28 February 2025, an application for review is not an appeal. Where the court has addressed itself with regard to the law, the interpretation of fact thereof, any matter arising thereof is not an error to be corrected through a review application.

Indeed, as the respondent submitted, criminal proceedings are ongoing under Mombasa Criminal Case No. E1891 of 2021, which was completed on 28 February 2025, post the judgment herein, has no bearing on the internal disciplinary procedures of the employer. Where the employer genuinely believes there are justified grounds to invite the employee to a disciplinary process, the outcome thereof cannot be used to challenge ongoing criminal proceedings against the employee. See **Ministry of Interior and Coordination of National Government & another v Kimaru [2025] KEELRC 3591 (KLR)** and **Nzau v Attorney General [2023] KEELRC 919 (KLR)**.

Hence, the court has emphasised that in **James Mugeria Igati v Public Service Commission of Kenya [2014] eKLR**, there is nothing in the law to suggest that a disciplinary process is in any way tied to a criminal process arising from the same facts. This position was affirmed by the Court of Appeal in its decision in **Attorney General v Andrew Maina Githinji [2016] eKLR**.

To move as herein sought by the 1st and 2nd claimants would be to sit on appeal. The court is since *fuctus officio*.

The claimants have also failed to account for the matter under Mombasa MCCC EE140 of 2026, raising similar facts as herein. As noted above, the employee cannot assert a claim

outside the employment relationship regarding a matter that has been addressed in a final manner. The cause of action arose on 15 August 2022, upon termination of employment. Under section 89 of the Employment Act, any claim arising therefrom must be addressed within 3 years, and any alleged continuing injury must be addressed within 12 months.

This shall suffice.

The delay in moving the court is noted and is inordinate. Sitting back and waiting to complete criminal proceedings to conclude is not diligent. Such indolence cannot justify a claim for costs.

There shall be no orders on costs.

Save for the allocation of notice pay interchanged in error in the judgment delivered 30 October 2023, the application dated 20 January 2026 is allowed in the following terms only:

- a) 2nd claimant notice pay Ksh. 93,541.15.**
- b) 3rd claimant notice pay Ksh. 73,499.49.**
- c) Each party to meet its costs.**

Delivered in open court at Mombasa, this 19th day of March 2026.

M. MBARŪ
JUDGE

In the presence of:

Court Assistant: Omar

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