



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gwaro v Kenya Revenue Authority (Civil Appeal E257 of 2023)  
[2025] KECA 1120 (KLR) (20 June 2025) (Judgment)**

Neutral citation: [2025] KECA 1120 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL E257 OF 2023  
SG KAIRU, FA OCHIENG & AO MUCHELULE, JJA  
JUNE 20, 2025**

**BETWEEN**

**ELIUD NYAEGA GWARO ..... APPELLANT**

**AND**

**KENYA REVENUE AUTHORITY ..... RESPONDENT**

*(An appeal from the Ruling of the Employment & Labour Relations Court  
at Nairobi (Mbaru, J.) dated 31st May 2021 in Civil Case No. E298 of 2020)*

**JUDGMENT**

1. Before us is an appeal from the ruling of the Honourable Lady Justice Monica Mbaru rendered on 31<sup>st</sup> May 2021 in Nairobi Employment and Labour Relations Court (ELRC) Cause No. E298 of 2020. The learned judge dismissed the appellant's application for review of her judgment dated 29<sup>th</sup> March 2021, which had dismissed the appellant's claim for unlawful termination.
2. The appellant's case was that he was employed by the respondent, Kenya Revenue Authority (KRA), in the Customs & Border Control Department until 31<sup>st</sup> August 2018, when his employment was terminated on the grounds of negligence and gross misconduct related to the alleged diversion of 15 motor vehicles.
3. The appellant claimed that his termination was based on unfounded allegations. He contended that he was discriminated against, that the procedure leading to his termination was unfair and unlawful, and that the respondent's conduct was extremely harsh. He also claimed that he was not provided with all the relevant documents or a proper opportunity to defend himself during the disciplinary process.
4. The appellant sought a declaration that his termination was unfair and unlawful; an order for his immediate reinstatement; an order that he be adequately compensated for lost time; costs of the suit;



and any other relief. In the alternative, the appellant sought damages for unlawful termination, costs; and any other relief.

5. The respondent's case was that the appellant was terminated due to negligence and his alleged involvement in the diversion of 15 transit motor vehicles to Uganda through the Busia Border Station, which it considered to be a breach of the KRA Code of Conduct. The respondent maintained that the disciplinary process, including the issuing of a show-cause letter, a disciplinary hearing, and an appeal process, was conducted lawfully and fairly, and that the termination was justified under the *Employment Act*.
6. The learned judge dismissed the appellant's suit on 29<sup>th</sup> March 2021 on the grounds that: there was procedural fairness under Section 41 of the *Employment Act*, and the termination of employment was justified; and that there was no evidence of discrimination against the appellant.
7. Subsequently, on 13<sup>th</sup> April 2021, the appellant filed a review application under Order 45 of the Civil Procedure Rules and Rule 33 of the ELRC (Procedure) Rules, seeking to introduce documents allegedly omitted from the proceedings, including a letter requesting documents, responses, and other materials marked "EG1". He contended that these documents were in the custody of the investigating officer and that the trial court failed to consider them.
8. In dismissing the application, the learned judge referred to pages 7 and 8 of the impugned judgment in holding that:

“The judgment looked at in totality, the issuance of records leading to investigations, findings and attendance by the claimant before the disciplinary panel and a decision for summary dismissal were addressed vis-a-vis the legal requirements under section 44 and 41 of the *Employment Act*, 2007. The disciplinary panel having undertaken its investigations with regard to matters at the shop floor what the court was required to determine was whether there was unfair termination of employment or whether the sanction of summary dismissal was justified in the circumstances. The findings that there were substantive grounds and procedural fairness is not faulted.”
9. Subsequently, the trial court dismissed the review application, finding no error apparent on the face of the record nor discovery of new and important matter which, despite exercise of due diligence, could not be produced at the time of the hearing. The court held that the disciplinary process was fair and the substantive justification for dismissal had been established.
10. Being dissatisfied with the ruling dated 31<sup>st</sup> May 2021, the appellant lodged the present appeal. While the appellant's counsel initially indicated that the appeal was against "the whole thing" (both the ruling and the judgment), he later clarified and conceded that the appeal was strictly against the ruling that declined review, acknowledging that one cannot appeal a judgment after seeking its review. The memorandum itself is stated to relate to both the judgment and the ruling.
11. The core argument in the memorandum of appeal is that the trial judge erred in dismissing the appellant's application for review, which sought to set aside the original judgment that had dismissed his case. The appellant contended that pertinent issues and material evidence were inadvertently left out during the initial proceedings. This omitted evidence included a letter requesting documents, the response to that letter, and supporting documents marked 'EG1'.
12. The appellant asserted that these documents were in the custody of the investigating officer, Mr. Patrick Mugambi, who also testified, but they were never supplied to his client. The appellant also argued that he was never given any technical assistance during the disciplinary hearing, which the learned Judge



- should have considered. He maintained that if the learned Judge had allowed these documents to be introduced, the original claim would have succeeded.
13. When this matter came up for hearing on 25<sup>th</sup> February 2025, Mr. Odhiambo Thim, learned counsel, represented the appellant, whereas Ms. Patricia Leparashao, learned counsel, represented the respondent.
  14. Mr. Odhiambo relied on the appellant's written submissions dated 6<sup>th</sup> October 2023. Counsel also clarified that this was an appeal from the ruling delivered on 31<sup>st</sup> May 2021.
  15. Counsel submitted that the appellant had sought a review of the judgment on the grounds that pertinent issues and material evidence were inadvertently left out. He contended that the investigating officer had these documents during the disciplinary hearing, but never supplied them to the appellant. He also pointed out that the appellant was never given technical assistance during the disciplinary hearing.
  16. Counsel was of the view that had the application for review been allowed to introduce the new documents, the appellant's claim would have succeeded.
  17. Opposing the appeal, Ms. Leparashao relied on the respondent's submissions dated 12<sup>th</sup> February 2025. Counsel was of the view that the appellant's appeal was an abuse of the court process.
  18. Counsel pointed out that the appellant had previously filed Civil Application No. 412 of 2022 seeking an extension of time to appeal against the original judgment dated 29<sup>th</sup> March 2021. This application was dismissed on 14<sup>th</sup> December 2022 as the appellant had reportedly not disclosed their review application to the court.
  19. Counsel submitted that the learned judge was correct in dismissing the review application because the "ingredients for review" under Order 45 of the Civil Procedure Rules and Rule 33 of the Employment and Labour Relations Court were not met. She pointed out that dissatisfaction with findings constitutes grounds for appeal, not review.
  20. Counsel also challenged the validity of the current appeal due to filing timelines, noting the ruling was on 31<sup>st</sup> May 2021, but the notice of appeal was dated 14<sup>th</sup> June 2022. She urged the court to strike out the appeal on its own motion under Rule 85.
  21. In rebuttal, Mr. Odhiambo submitted that the notice of appeal was actually dated 14<sup>th</sup> June 2021 and not 2022 as claimed by the respondent. therefore, the appeal was filed within the prescribed time. Counsel explained that a certificate of delay was obtained because the proceedings were not ready in time for filing the record of appeal.
  22. This being a first appeal, the duty of this Court is as was stated in the case of *Abok James Odera t/a A.J. Odera & Associates vs. John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, where it was 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 reanalyze 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.”
  23. We have carefully considered the record of appeal, the submissions of both parties, the authorities cited, and the law. The primary issue for determination is whether the learned Judge erred in dismissing the



appellant's application for review. However, a significant procedural hurdle has arisen, which demands our consideration: the appellant's conduct in seeking to challenge the original judgment.

24. On the procedural tenability of the appeal and abuse of the court process: it is common ground that during the hearing, the Court sought clarification from the appellant's counsel regarding the scope of the appeal. Initially, Mr. Odhiambo stated that the appeal was against "the whole thing", both the ruling and the judgment. However, when pressed further on the established principle that one cannot appeal a judgment after having sought a review of the same judgment, the appellant's counsel ultimately conceded, stating, "No. You cannot". This concession is critical, as it limits the scope of the current appeal strictly to the ruling dismissing the application for review, and not the original judgment itself.
25. Furthermore, the respondent raised a pertinent issue regarding the appellant's prior actions. It was revealed that the appellant had previously filed Civil Application No. 412 of 2022, seeking an extension of time to appeal against the original judgment dated 29<sup>th</sup> March 2021, and this application was dismissed on 14<sup>th</sup> December 2022. Crucially, in that earlier application, the appellant failed to disclose to the Court that they had also pursued an application for review at the Employment Court. This non-disclosure, in the face of an earlier attempt to appeal the very judgment that was subsequently sought to be reviewed, strongly suggests an abuse of the court process. The appellant appears to have engaged in multiple, overlapping, and inadequately disclosed attempts to challenge the same core decision, which undermines the integrity of the judicial process.
26. On the merits of the review application, the learned judge in the exercise of her judicial discretion, dismissed the appellant's application for review. It is trite that the circumstances in which this Court can interfere with the exercise of discretion by a lower court are circumscribed. This Court may only interfere with the exercise of such discretion when, in the words of the predecessor of this Court in *Mbogo and Another vs. Shah* [1968] EA 93, it is satisfied that the decision of the lower court was clearly wrong:

“...because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
27. The appellant must demonstrate that the trial judge erred in applying the principles for review. The respondent correctly pointed out that for a review application to succeed, the "ingredients for review" under Order 45 of the Civil Procedure Rules and Rule 33 of the *Employment and Labour Relations Court Act* must be met. These typically include the discovery of new and important matter or evidence, error apparent on the face of the record, or any other sufficient reason.
28. It is well settled that where a party is aggrieved by the judgment, ruling, or order of the court, such a party can either file an appeal or apply for review. The applicable law for review is Section 80 of the *Civil Procedure Act*, Order 45 of the Civil Procedure Rules.
29. It is trite that not all cases qualify for review. The grounds for review are narrower in scope compared to an appeal. The main grounds for review are; discovery of new and important matter of evidence; mistake or error apparent on the face of the record; and any other sufficient reason, and most importantly, the application has to be made without unreasonable delay. (See *Otieno, Ragot & Company Advocates vs. National Bank of Kenya Limited* [2020] eKLR).
30. Section 80 of the *Civil Procedure Act* states that:

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 Act may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
  
- 31. Order 45 Rule 1 of the Civil Procedure Rules states that:
  - (1) Any person considering himself aggrieved-
    - a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
    - b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
  
- 32. Similarly, Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 mirrors the above and limits review to the same three conditions as follows:
  - (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;
    - b. if the judgment or ruling requires clarification; or
    - b. for any other sufficient reason.
  
- 33. The appellant's argument for review hinged on the claim that "pertinent issues and material evidence were inadvertently left out". This allegedly included documents that were in the possession of the investigating officer but not supplied to the appellant during the disciplinary hearing. However, the appellant also conceded that these documents were within his knowledge, as they were part of the disciplinary process.
  
- 34. Notably, the trial court extensively considered the disciplinary process, including the appellant's participation, availability of documents, and fairness of the hearing.
  
- 35. A review application is not meant to re-litigate a case based on a party's disappointment with the outcome, especially when the "new evidence" was arguably available or discoverable during the original proceedings, or its absence could have been addressed through other procedural avenues. The appellant has not sufficiently demonstrated an error apparent on the face of the record or truly new and important evidence that could not have been presented earlier with due diligence.



36. In *National Bank of Kenya Ltd vs. Ndungu Njau* [1997] eKLR, this Court stated thus:
- “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.”
37. The documents sought to be introduced by the appellant were not “new” within the meaning of Order 45. The appellant had knowledge of their existence and could have sought their production earlier, including by way of discovery.
38. To our minds, this cannot be said to be a discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the appellant, or could not be produced by the at the time when the decree was passed or the order made. In that regard, we are guided by the case of *Mary Wambui Njuguna vs. William Ole Nabala & 9 Others* [2018] eKLR, where this Court addressed itself on the issue as follows:
- “We also need to underscore the fact that when a court is sitting on review, it is not sitting on appeal of its own decision. It is for that reason that the alleged errors must be apparent on the face of the record without inviting any interrogation or protracted arguments thereon.”
39. Similarly, in the case of *Abasi Belinda vs. Frederick Kangwamu & Another* [1963] E.A. 557 Bennett, J. stated that:
- “A point which may be a good ground of appeal may not be a good ground for an application for review, and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for appeal”.
40. From the foregoing, we find that the appellant has not established that there was discovery of new and important evidence within the meaning of the rules cited, nor is it analogous to the other reasons stipulated in Order 45 Rule 1 and there is no demonstration that the learned Judge erred in reaching that conclusion
41. The respondent raised concerns about the timeliness of the notice of appeal. While the appellant clarified that the notice of appeal against the ruling was dated 14<sup>th</sup> June 2021 (within time from the 31<sup>st</sup> May 2021 ruling) and a certificate of delay was obtained for the record of appeal, no evidence has been placed before us to conclusively prove otherwise. We decline to strike out the appeal on that basis.
42. Having carefully weighed the arguments and the procedural history, this Court finds that the appellant’s actions demonstrate a pattern of seeking to circumvent established legal procedures for challenging court decisions. The non- disclosure of the review application in the prior extension of time application, coupled with the appellant’s eventual concession that one cannot simultaneously appeal and seek review of the same judgment, is a fatal flaw.
43. Furthermore, the appellant has not persuaded this Court that the learned Judge erred in principle, failed to exercise the court’s discretion judiciously, in dismissing the review application. There is no misdirection of law or principle that would warrant our interference with the ruling.



- 44. Therefore, the appeal lacks procedural tenability and substantive merit.
- 45. Accordingly, we dismiss the appeal in its entirety, with costs to the respondent.  
Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 20<sup>TH</sup> DAY OF JUNE, 2025.**

**S. GATEMBU KAIRU, FCIARB.**

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**JUDGE OF APPEAL**

**F. OCHIENG**

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**JUDGE OF APPEAL**

**A. O. MUCHELULE**

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**JUDGE OF APPEAL**

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

**Signed**

**DEPUTY REGISTRAR**

