



Egerton University v Musyoka (Employment and Labour Relations Appeal E001 of 2023) [2025] KEELRC 1851 (KLR) (24 June 2025) (Judgment)

Neutral citation: [2025] KEELRC 1851 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS APPEAL E001 OF 2023**

**AN MWAURE, J
JUNE 24, 2025**

BETWEEN

EGERTON UNIVERSITY APPELLANT

AND

ZABLON MUSYOKA RESPONDENT

(Being an Appeal from the Ruling and order of Honourable R. Kefa, Principal Magistrate, delivered on 9th December, 2022 in Nakuru MCELRC Case No. 205 of 2019)

JUDGMENT

1. The Appellant, being dissatisfied with the Ruling and order of Honourable R. Kefa, Principal Magistrate, filed this appeal vide a Memorandum of Appeal dated 1st February 2023 on the following grounds that:
 1. The learned trial Magistrate erred in law and in fact in finding that Respondent's Application dated 8th September, 2022 had met the threshold for review and/or setting aside of its ruling dated 6th July, 2022.
 2. The learned trial Magistrate erred in law and in fact in finding that the issue of double taxation is an error apparent on the face of the record.
 3. The learned Magistrate erred in law and in fact in holding that the consent award entered into on 24th February, 2021 was not subject to taxation.
 4. The learned trial Magistrate erred in law and in fact in allowing the Respondent's review application dated 8th September, 2022, ventured into matters to be raised on appeal and not review.



5. The learned trial Magistrate erred in and in fact in allowing the Respondent's application for review based on allegations of double taxation without any such proof.
 6. The learned trial Magistrate erred in and in fact in by failing to consider the Appellant's annexures, submissions and authorities thus arriving at an unfair and erroneous finding.
2. The Appellant prays that:
1. This Appeal be allowed.
 2. The ruling delivered on 9th December, 2022 be set aside and an order be made finding that the consent award was subject to taxation.
 3. The ruling delivered on 9th December, 2022 be set aside and the ruling of 6th July be reinstated.
 4. Costs of the appeal be borne by the Respondent.
 5. Any other orders this Honourable Court may deem fit to grant.
3. Parties herein disposed of the appeal by way of written submissions.

Appellant's written submissions

4. The Appellant submitted that the Respondent failed to meet the condition for orders of review. The Appellant relied on section 80 of the [Civil Procedure Act](#) and Order 45 Rule 1 of the Civil Procedure Rules provides that:

“ 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.”

5. The Appellant submitted that the conditions for review are replicated in Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides as follows:

“ 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.
6. The Appellant submitted that the court's discretion to review its ruling is limited by specific conditions. The Respondent requested a review, arguing that the court failed to consider the issue of double taxation. However, this issue does not qualify as newly discovered important evidence, nor does it constitute an error on the face of the record, as claimed by the respondent.
 7. The Appellant relied on the case of Republic V Medical Practitioners & Dentists Board & Another & another; MIO1 on behalf of MIO2 (a Minor) & Another (Interested Party); Kingágá (Exparte) [2021] KEHC 298 (KLR) which defined an error apparent of the face of record as follows:

“A mistake or an error apparent on the face of the record means a mistake or an error which is prima-facie visible and does not require an elaborate argument or more than one opinion. First, the arguments propounded by the applicants are detailed and elaborate.”
 8. Similarly, in Republic V Advocates Disciplinary Tribunal Exparte Apollo Mboya [2019] KEHC 10910 (KLR), wherein Justice Mativo cited the case of Nyamogo & Nyamogo [2019] eKLR the court stated that an error apparent on the face of the record is distinct from a mere erroneous decision; it must be obvious and indisputable without extensive reasoning. If a legal point allows for multiple interpretations, it does not qualify as such an error. A review is not a disguised appeal but a correction of glaring mistakes that require no deep argument. Courts cannot reconsider their decisions simply because an alternative view was possible. Instead, judicial review is limited to clear and undeniable errors, ensuring that the original judgment remains unless a fundamental flaw is evident.
 9. In Omote & Another V Ogutu [2022] KEHC 16441 (KLR) where the court stated that courts have established that a belief in an erroneous conclusion is grounds for an appeal, not a review, which has a limited scope. Additionally, the process of reasoning cannot be considered an error apparent on the face of the record, and an erroneous decision cannot be corrected through a review.
 10. The Appellant submitted that the Respondent sought a review of the court's decision from 6th July 2022, arguing that allowing the decretal sum to be taxed would result in double taxation. However, this does not constitute an error apparent on the face of the record, but rather a challenge to an allegedly erroneous ruling, making it a matter for appeal rather than review. By granting the review, the court effectively sat in appeal on its own ruling, which is legally impermissible. Therefore, the trial magistrate erred in law and fact by upholding the respondent's application for review dated 8th September 2022.
 11. The Appellant submitted that the trial magistrate erred in law and fact by accepting the Respondent's claims of double taxation and ruling that the consent award from 24th February 2021, was not subject to taxation. However, the issue of taxation was already addressed in the court's ruling on 6th July 2022, meaning double taxation does not arise. The Respondent acknowledged that his unpaid dues were calculated based on the hourly rate per unit taught, with the gross amount subject to tax at source. Furthermore, claimants in employment claims typically plead gross entitlement, as court-awarded monetary remedies are subject to statutory deductions under section 49(2) of the *Employment Act*, making the respondent's decision to apply taxation standard practice.
 12. The Appellant relied on the case of Directline Assurance Co. Ltd V Eremiah Wachira Ichaura [2016] eKLR where the court held that it is trite law that lump sum payments, such as terminal dues, are legally subject to statutory deductions based on the relevant years. Simon Deakin and Gillian S. Morris, Labour Law at page 405 it is observed that damages due to an employee are calculated based on net



salary after deductions, including income tax and social contributions. Therefore, the court erred by failing to apply mandatory statutory deductions to the award.

13. The Appellant submitted that the trial court rightly held that the consent judgment dated 24th February 2021, was subject to taxation despite its silence on the matter. The Respondent's decision to tax the settlement award did not vary the terms of the consent, as affirmed in *Kioko Joseph V Bamburi Cement Ltd* [2017] eKLR. Courts have consistently upheld that employers are legally obligated to deduct and remit tax on lump sum payments, as established in *Ian Edwards V Bytes Technology Group Kenya Ltd* [2018] eKLR and *China Road & Bridge Corporation V Commissioner of Domestic Taxes* [2021] eKLR. The *Income Tax Act* expressly mandates employers to deduct tax, and failure to comply is a criminal offense, reinforcing that taxation of the settlement award was legally required.
14. In *Co-Operative Bank of Kenya Ltd V Erastus Kuhara Mureithi* [2013] eKLR the court established that under section 37 of the *Income Tax Act*, employers are responsible for deducting and remitting taxes on salaries, emoluments, and allowances. The Appellant submitted that the Respondent argued that taxation should not apply since he was no longer an employee, and that consent orders are exempt from tax. However, payments arising from employment contracts remain subject to statutory deductions.
15. In *Joseph Ogonda Omondi V SBI International Holding AG Kenya* [2015] eKLR, the court reaffirmed that under Section 49(2) of the *Employment Act*, any monetary award under Section 49 is subject to statutory deductions. Similarly, *Co-Operative Bank of Kenya Ltd V Erastus Kihara Mureithi* (supra) and *China Road & Bridge Corporation V Commissioner of Domestic Taxes*(supra), the courts held that employers must ensure all statutory deductions are made and remitted promptly. Courts have consistently upheld taxation on employment-related awards, reinforcing that the judgment sum was lawfully subject to PAYE deductions.
16. In conclusion, the Appellant urged this Honourable Court to allow the appeal as prayed.

Respondent's written submissions

17. The Respondent has reiterated Section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules which provides for review but the same needs to be exercised within the framework provided. The Respondent relied on the case of *Nyamogo & Nyamogo V Kogo*(Supra) which explains what constitutes an error on the face of the record.
18. In *Attorney General & Others V Boniface Byanyima HCMA No.1789 of 2000* the court cited the case of *Levi Outa V Uganda Transport Company* [1995] HCB 340 which held that an error apparent on the face of the record must be obvious and indisputable. In *Tokeshi Imbuka Mambili & 2 Others v Joseph Onzeke Sambwa & Another* [2004] KEHC 392 (KLR), the court held that a review requires either new evidence or a clear mistake, not merely a different interpretation. Similarly, *National Bank of Kenya V Ndungu Njau Civil Appeal No. 2111 of 1996* the Court of Appeal clarified that a review corrects manifest errors, not decisions based on alternative legal views.
19. The Respondent submitted that the taxation of his decretal sum constitutes double taxation, which Black's Law Dictionary defines as taxing the same income twice for the same purpose. The appellant admitted the initial taxation at source, making further deductions unlawful under section 49(2) of the *Employment Act*. Courts, including in *Kioko Joseph V Bamburi Cement Ltd* (supra), *Ian Edwards V Bytes Technology Group Kenya Ltd* (supra), and *China Road & Bridge Corporation V Commissioner of Domestic Taxes* (supra) which have held that statutory deductions must be made timely and appropriately.



20. Furthermore, the Respondent submitted that the Appellant failed to provide a tax certificate proving remittance to the Kenya Revenue Authority, violating fair labour practices under Article 41 of [the Constitution](#). Equity demands that litigants approach the court with clean hands, and the appellant's actions indicate unjustified double taxation, warranting correction.
21. For costs, the Respondent relied on the case of Jasbir Singh Rai and 3 Others V Tarlochan Singh Rai and 4 others [2014] eKLR and Republic V Communication Authority of Kenya and another ex-parte Legal Advice Centre (Kituo cha Sheria)[2015] eKLR that costs follows the events and urged this Honourable Court to dismiss the appeal with costs.

Analysis and determination

22. The court, having carefully perused the record of appeal, and the rival submissions by both counsels, the issue for determination is whether the appeal before this court is merited.
23. The Respondent instituted a primary claim against the Appellant seeking to be compensated for the work done as a part time lecturer at the Appellant's university. By a consent dated 24th February 2021 the Appellant herein compromised the claim by agreeing to pay the Respondent a total sum of Kshs.2,800,000/= to be paid in instalments of Kshs.200,000/= every 10th day of the month from the date of consent till full payment.

The consent reads as follows:-

“

- “ a) Judgment be entered in favour of Claimant against the Respondent for a sum of Kshs.2,800,000.
- b) The Respondent do pay the decretal sum as follows: -
 - i) On or before 10/4/21 m - Kshs.200,000.
 - ii) Balance to be paid in equal monthly instalments of Kshs.200,000 on or before each succeeding month until payment in full.
 - iii) That the matter be mentioned in fourteen days for parties to agree on costs.
 - iv) In default any single instalment execution to issue.

Ms. Mwangi: I confirm the terms of the consent as Mr. Muriithi informs me. We can mention the matter in 14 days.

Court: The consent is adopted as a court order. Mention on 10/3/21.”

24. The Appellant paid the said amounts except the amount subjected to income tax which were paid to Kenya Revenue Authority. The Respondent reckoned the Appellant abdicated its responsibility and commenced execution against the Appellant.
25. The Appellant in return moved the court on 12th May 2022 seeking to stay the execution process. The said application was determined on 6th July 2022 and upheld the application of deduction of income tax and set aside the said execution.



26. The Respondent was aggrieved by the said decision and filed an application dated 8th September 2022 seeking to review the said ruling. The ruling of 6th July 2022 was set aside and that has given raise to the present appeal.

The ruling in the court file is dated 30th November 2022 by Hon. Kefa but not 9th December 2022 as the date proffered in this Appeal.

27. The law pertaining to review of court orders are quite clear according to order 45 Rule 1 of the Civil Procedure rules.

The same provides as hereunder-

“ Any person considering him himself aggrieved

- a. 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 to be produced by him at the time when the decree was passed or order made on account of some mistake or error apparent on the face of the record, or for any other sufficient reason deserves to obtain a review of the decree or order or may apply for a review of judgment to the court which passed the decree or made the order without reasonable delay;”

28. The Ruling by Hon. Kefa stated:-

“I do agree with Applicant that the court should not interfere with the terms of the consent. In case parties intended to have the award taxed they should have indicated the same in the consent. In view of the foregoing, I find the merit and hereby set aside orders issued on 6th July 2022.”

29. The issues raised by the Applicant in the Ruling dated 30th November 2022 was on double taxation. This was not a newly discovered evidence and neither did it qualify to be an error on the face of the record.

30. In the case of Omoro & Another -VS- Ogotu (Supra) the court stated that a belief in an erroneous conclusion is grounds for appeal not a review. A review has limited scope of application. An erroneous decision cannot be corrected through a review.

31. Hon. Kefa’s Ruling of 6th July 2022 she had stated:-

“The Applicant, has rightly referred to Section 37(1) of *Income Tax Act* which provides for procedure on lump sum payment as read with Section 19(1) of the *Employment Act*. The entire award as agreed upon by the parties is subject to taxation. This position was reinstated in the above mentioned case of Andrew Mukite Saisi -VS- Tracker Group of Companies (2020). She went further to state -“The Applicant has annexed payment voucher showing that they paid tax to the Kenya Revenue Authority.”

32. The court agrees that the application by Zablun Musyoka Mwanzia the Applicant and dated 8th September 2022 did not establish prima facie case to qualify for a review. Also in Republic -VS- Medical



Practitioners & Dentists Board & Another (Supra) the error on the face of record was defined as follows-

“A mistake or an error apparent on the face of record means a mistake or an error which is prima facie visible and does not require elaborate argument or more than one opinion. First the arguments propounded by the Applicants are detailed and elaborate.”

33. The Appellant submitted that the Respondents in seeking review of the ruling of 6th July 2022 claiming it amounted to double taxation but did not constitute an error apparent on the face of the record but rather was a challenge to an allegedly erroneous ruling.

The court agrees that the Respondent should have gone by way of appealing an erroneous judgment and not a review. The Hon. Magistrate was tantamount to sitting in an appeal to her own judgment.

34. If the Respondent was taxed twice he may also approach KRA to refund him and if there is proof of double taxation that might not be a big problem KRA can refund him.

35. In view of the forgoing the court finds the appeal dated 6th November 2024 is merited and so it succeeds and so is allowed. The Ruling delivered on 30th November 2022(not 9th December 2022) is set aside and orders is made finding the consent award was subject to taxation. The ruling of 6th July 2022 is reinstated.

36. In granting these orders the court is guided by Section 37 of the Income Tax Act which states: -

“An employer paying emoluments to an employee shall deduct therefrom and account for tax thereon to such extent and such manner as maybe prescribed.”

37. Also Section 19 of the Employment Act 19(1) provide that an employer can deduct dues from an employee be they statutory or otherwise. Section 49(2) of the Employment Act provide that any payments made by the employer under this sections hall be subject to statutory deductions.

38. The Respondent claims there was double taxation on his salaries. He also claims the Appellant did not produce the KRA Clearance Certificate.

Exactly what the court has stated. These are matters to be raised in the appeal but not in the ambit of review as defined earlier on.

39. In conclusion the appeal is found meritorious and is granted.

40. Due to the intricate issues raised by the respective parties in advancement of justice and jurisprudence let each party meet their respective costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 24TH DAY OF JUNE, 2025.

ANNA NGIBUINI MWAURE

JUDGE

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They



have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

