



REPUBLIC OF KENYA



**Fidelity Security Limited v Anene (Appeal E199 of 2022)
[2024] KEELRC 275 (KLR) (16 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 275 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E199 OF 2022
B ONGAYA, J
FEBRUARY 16, 2024**

BETWEEN

FIDELITY SECURITY LIMITED APPELLANT

AND

HARRISON NZABANYI ANENE RESPONDENT

(Being an appeal against the entire judgment delivered by hon. S. N Muchungi (SRM) on 21st October, 2022 in MCEL Cause E130 of 2022 at Milimani Commercial Courts)

RULING

1. The appellant filed a notice of motion application dated 10.07.2023 through CM Advocates LLP. The application is made pursuant to the provisions of Sections 1A, 1B, 3A and 99 of the [Civil Procedure Act](#), Order 51 Rule 1 of the Civil Procedure Rules, Rules 34 of the Employment and Labour Relations Court Rules and all enabling provisions of the law. The applicant prayed for orders as follows:
 - a. (spent)
 - b. Pending the hearing and determination of the application, the Honourable Court be pleased to issue an order of stay against its judgment of 16th June, 2023.
 - c. The Honourable Court be pleased to amend its judgment to read that the sum awarded to the respondent as gratuity as Kshs.209,774/- instead of Kshs.314,180.14.
 - d. Costs of this application be provided for.
2. The application is based upon the following grounds:
 - a. That there exists an arithmetic error in the judgement of the Court dated 16th June, 2023 which acts to divest the Court of its manifest intention in awarding the respondent an award for gratuity in line with section 17 Regulation of Wages (Protective Security Services) Order 1998



- b. That the application herein seeks to invoke this Court's inherent jurisdiction to recall its judgment and make necessary amendments to correct an error and give effect to the intention of the Court when it gave its judgment.
 - c. That in awarding gratuity this Court relied on the respondent's gross salary instead of basic salary in its tabulation. That the amount payable ought to be Kshs.209,774/-.
 - d. That the judgment of this Court specifically on the award of gratuity which should read Kshs.209,774/- instead of Kshs.314,180.30/-.
 - e. That according Section 17 of the Private Employment Security Act, Section 17 provides that gratuity is calculated on wages. Further the schedule of wages indicates that wages are exclusive of house allowance and thus tabulation of gratuity should be based on basic wages and not gross wages.
 - f. That ex facie the applicant is only seeking to disclose an arithmetical error to the Court for amendment and give effect to the intention of the Court.
 - g. That there is a real threat and apprehension that the respondent may execute the judgment as is with a material error that is unjust, prejudices the respondent and is contrary to the intention of this Court.
 - h. That it is in the interest of justice that the application be allowed.
3. In response to the application the respondent filed a replying affidavit sworn on 18.10.2023 by Alfred Nyabena Advocate for the respondent. It was stated that the Court delivered its judgment on 16th June, 2023 partly allowing the appellant's appeal. That aggrieved by the Court's decision, the respondent filed a notice of appeal at the Court of Appeal and is in the process of filing his record of appeal.
 4. Mr. Nyabena further states that the appellant or applicant has not disclosed any grounds that will necessitate an order of review of this Honourable Court's judgment delivered and dated 16th June, 2023.
 5. That the applicant has not met the threshold for grant of the orders sought as highlighted under rule 33 of the Employment and Labour Relations Court (Procedure) Rules.
 6. The respondent argues that the instant application by the appellant is an appeal disguised as an application for review and should not be entertained by the Court. Further that the Court lacks jurisdiction to sit on appeal of its own decision. The affiant further states that the appellant or applicant never challenged the tabulation or calculations with respect of gratuity before the trial court and raising the issue at this point is an afterthought. The respondent therefore maintains that there is no mathematical error in the Honourable Court's judgment on gratuity as contended by the appellant or applicant.
 7. The respondent states that the appellant or applicant's calculation is erroneous and cannot be a ground for review as urged in the instant application. The respondent urged the Court to find the application dated 10.07.2023 without merit and to dismiss it with costs to the respondent.
 8. Parties filed their respective submissions. The Court has considered the respective positions and returns as follows.
 9. To answer the 1st issue, the Court returns that an appeal having been preferred against the Court's judgment delivered on 16.06.2023, the matter has since moved to the Court of Appeal and the parties are thereby barred from invoking the review jurisdiction as done in the instant case. The notice of



appeal was dated on 23.06.2023 and the application was dated 10.07.2023 and filed on 27.07.2023. The appeal having been preferred prior to the filing of the review application, the Court finds that the application is barred as an abuse of court process because the matter is already properly before the Court of Appeal. The record shows that indeed the typed and certified proceedings are ready for appeal process. In that regard, the Court upholds the respondent's objection that invoking review procedure was not available to the applicant.

10. To answer the 2nd issue, the Court returns that as urged for the respondent in the application, the appellant (applicant) did not plead the issue of computation of the gratuity in his memorandum of appeal as purportedly done in the instant application for review. In *Fondo & another v Commission for Human Rights and Justice & another* (Civil Appeal E40 of 2021) [2023] KECA 927 (KLR) (28 July 2023) (Judgment) Neutral citation: [2023] KECA 927 (KLR) the Court of Appeal held thus, "19. The Supreme Court added its voice to the chorus in *Raila Amolo Odinga & Another vs. IEBC & 20thers* (2017) eKLR when it emphasised that: "In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings..." The Court is bound accordingly and the issue of computation of gratuity not having been a ground of appeal and urged as such was outside the issues for determination in the appeal before the Court. In any event, the Court upholds the respondent's submission that the applicant has established no error by merely stating the gratuity should have been Kshs.209, 774.00 and not Kshs.314,180.14 whereas no arithmetic errors have been demonstrated based on pleadings and evidence.
11. In view of findings on issues 1 and 2 above, the Court returns that the applicant has failed to establish a proper case for review per rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 because an appeal has already been preferred against the judgment and the applicant has not established any of the prescribed grounds for review.

In conclusion the application by the appellant dated 10.07.2023 is hereby dismissed with costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 16TH FEBRUARY, 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

