



Mwende v Interstat Limited t/a Big Square (Employment and Labour Relations Cause 616 of 2018) [2024] KEELRC 286 (KLR) (16 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 286 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 616 OF 2018
K OCHARO, J
FEBRUARY 16, 2024**

BETWEEN

KIMANTHI NAOMI MWENDE CLAIMANT

AND

INTERSTAT LIMITED T/A BIG SQUARE RESPONDENT

RULING

1. The Claimant/applicant filed a Notice of Motion application dated March 28, 2023 through Wilbur Antony & Company Advocates seeking the following orders:
 - a. This application is certified urgent and heard on a priority basis.
 - b. The honourable court be pleased to review its Decree delivered on February 23, 2023.
 - c. Costs of this application be costs in the case.
2. The application is supported by the affidavit of Kimanthi Naomi Mwende and made on the following grounds:
 - a. On February 23, 2023 this court delivered judgment in this suit and decreed in claimant's favour.
 - b. In the judgment, the court found the claimant was a victim of salary underpayment whilst in the employment of the respondent and decreed an award for salary underpayment along with several other awards.
 - c. The claimant is aggrieved by the decree of the court in so far as some of the awards do not correspond with the court's judgment on underpayment.
 - d. Despite the court's judgment on underpayment, the honourable court in error based all its awards on the impugned salary of Kshs. 16,500/- rather than the claimed Kshs. 29169, thereby



arriving at a wrong tabulation of annual leave payment, compensation at six months' gross salary, one month's salary in lieu of notice, payment for 10 days worked in December 2017, and leave pay for annual leave for 2016. Despite the court's judgment on underpayment, the honourable court in error awarded the claimant a lower award for underpayment; Kshs 301,782/= as opposed to Kshs 399,849.09/=.

- e. Despite the court's judgment on underpayment and the finding that the claimant's claim under the *Labour Institutions Act* for underpaid salaries is well anchored, the court failed to award the claimant unpaid house allowances constituting 15% of basic pay, for the entire duration the claimant was in employment with the respondent, as mandated under the regulation of wages (general) order established under the *Labour Institutions Act*.
 - f. The claimant has exercised all reasonable celerity to bring this application for review before the honourable court for consideration.
3. The Respondent filed the Replying affidavit of Priyan Kolapara, Managing Director of the respondent, sworn on 11.04.2023 through Macharia –Mwangi Njeru Advocates, wherein it was stated and argued as follows;
- a. That the notice of motion application is incompetent and defective ab initio and should be struck out for the following reasons;
 - i. There is no mistake or error apparent on the face of the judgment delivered on February 23, 2023.
 - ii. The claimant has not shown the errors she seeks to have reviewed by this court.
 - iii. The application for review as filed by the claimant amounts to an appeal because the claimant in her estimation finds the reasoning of the judgment to be wrong.
 - iv. The claimant has not presented before this honourable court any new evidence for the court's consideration.
 - v. The claimant has not advanced before this court any sufficient reason to warrant the court to review its judgment delivered on February 23, 2023.
 - vi. The claimant has not sought for any clarification of the judgment delivered on February 23, 2023.
 - b. The court did not make an error when it awarded the claimant a sum of Kshs 301,782/= for underpayment. The court in arriving at its decision, had in mind that the claimant sought the sum of Kshs 399,849.09 for underpayment and this can be deduced from paragraph 72 of the judgment where the court wrote as follows:

“.....the claimant asserted that all through her employment with the respondent, she was not paid pursuant to the obtaining wage orders at the material times.... therefore, cumulatively, she was underpaid by a sum of Kshs 399,849.09 an amount she claims”



- c. That there was no error made by the court in awarding the claimant the sum of Kshs 301,782/= as the court rightfully found that the claimant should be awarded the said sum. The court in paragraph 76 of the judgment found as follows:
- “the court finds that the claimant's claim under the Labour Institutes Act for unpaid salaries is well anchored. I have considered the relevant Wages Orders for the period June 2015 to December 2017, and found that at all their various times, the claimant was not paid in accord with their prescripts, she was underpaid, I have computed the underpayments, (being the difference of what she ought to have earned under the law and she actually earned) and find that the cumulative underpaid sum is Kshs 301,782/= a figure which I award in her favour pursuant to the provisions of section 48 of the *labour institutions act*”
- d. The court in paragraph 69 of the Judgment, was right in its finding that the claimant be awarded Kshs 16,500/- salary in lieu of notice. The court reasoned as follows;
- “the claimant further sought for one month’s salary in lieu of notice Kshs 29,169/=. Having found as I have that the summary dismissal of the claimant’s employment was unfair, the claimant is entitled to one month’s salary in lieu of notice pursuant to the provisions of section 35 read together with section 36 of the *employment act*. He is awarded kshs 16,500/= salary in lieu of notice”.
- e. The court considered the issue of house allowance and declined to grant the same to the claimant. In paragraph 70 of the judgment it found;
- “I have had a casual look at clause 2 of the employment contract and it succinctly stipulated that the claimant was entitled to a monthly gross/consolidated salary of Kshs 15,600/= and the same was inclusive of house allowance. In view of this I consequently decline to grant the sum under this head or any sum at all”
- f. If the court reviews the judgment as sought by the claimant the same will prejudice the respondent as the matter has already been heard on merit and determined by this honourable court.
- g. The claimant’s application is an appeal in disguise of a review which is an abuse of the court process and should be dismissed with costs to the respondent.
4. The parties filed their respective submissions as directed. I have carefully considered the same and return as follows.
5. The authority of this Court to review its decisions flows from Rule 33 of the *Employment and Labour Relations Court Rules* 2016 which provides that:
- (1) (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;



- (c) if the judgment or ruling requires clarification; or
 - (d) for any other sufficient reason
- (2) An application for review of a decree or order of the Court under subparagraphs (b), (c) or (d), shall be made to the judge who passed the decree or made the order sought to be reviewed or to any other judge if that judge is not attached to the Court station.
 - (3) A party seeking review of a decree or order of the Court shall apply to the Court by way of notice of motion supported by an affidavit and shall file a copy of the Judgment or decree or Ruling or order to be reviewed.
 - (4) The Court shall, upon hearing an application for review, deliver a ruling allowing or dismissing the application.
 - (5) Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.
 - (6) An order made for a review of a decree or order shall not be subject to further review.”
6. The Claimant’s application is anchored on the principle ground that there is an error apparent on the face of the record. If I understand the Claimant/Applicant’s case correctly, his argument is that this Court tabulated the amounts erroneously, as it based its calculations on the impugned monthly salary of Kshs. 16,500/-, which it had already declared an underpayment. According to the Applicant, the basis for the calculations should have been the correct monthly salary per the relevant Regulation of Wages (General) (Amendment) Orders. My understanding is therefore that the Claimant/Applicant is aggrieved by the amounts as tabulated, rather than the awards.
 7. Further, the Claimant/Applicant challenges the decision of this Court declining to grant the Claimant/Applicant house allowance.
 8. An error apparent on the face of the record has been defined as an error or mistake which is self-evident and does not require elaborate arguments to establish. Regarding this issue, the Court in the case of *Paul Mwaniki v National Hospital Insurance Fund Board of Management* [2020] eKLR held that: -

“Third, 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 the law. Misconstruing a statute or other provision of law cannot be a ground for review. [6]

33. In *Nyamogo & Nyamogo v Kogo* [7] discussing what constitutes an error on the face of the record, the court rendered itself as follows:-

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of undefiniteness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error



apparent on the face of the record would be made out. An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal.”

9. No doubt, a mathematical error falls within the definition of an error or mistake apparent on the face of the record. Normally, it could be self-evident. In its judgment herein, this Court did find that at all material times, the Claimant was not being paid in conformity with the relevant Wage Orders. There is no contestation that the claimant came into the employment of the Respondent as a cashier from 23rd April 2014 to 11th December 2017. From 23rd April 2014 to 1st May 2015 (12 months), she was subject to the [Regulation of Wages \(General\) Amendment Order 2013](#) (LN No. 197), which provided the basic monthly pay for cashiers as Kshs. 22,070.95. Accordingly, during this period, the claimant was underpaid by Kshs. $22,070.95 - 15,000 = 7,070.95$ per month (total-Kshs. 84,851.40). From 1st May 2015 to 1st May 2017 she was subject to the [Regulation of Wages \(General\) Amendment Order 2015](#), which set the basic monthly pay for cashiers as Kshs. 24,719.50. So, from 1st May 2015 until 31st December 2016 (19 months), the Claimant/Applicant was underpaid by Kshs. $24,719.50 - 15,000 = 9,719.50$ (total – 184,670.50). From 1st January 2017 until 1st May 2017 (4 months), she was underpaid by Kshs. $24,719.50 - 16,500 = 8,219.50$ (total – 32,878). From 1st May 2017 to 11th December 2017 (7 months), the minimum wage for cashiers was under the [Regulation of Wages \(General\) Amendment Order 2017](#), Kshs. 29,169. So, from 1st May 2017 until 11th December 2017, she was underpaid by Kshs. $29,169 - 16,500 = 12,669$ (total-88,683). Per the above calculations, the total underpayment was Kshs. 391,082.50.
10. The application of the correct wages and re-tabulation of the cumulative wages for the claimant for the various periods is inspired by the trite principle that no party should be aided to benefit from his or her own wrong or illegal act. In the case of John [Kuria Mathenge T/A Aberdare Filling Station v Caltex Oil \(K\) Ltd & another](#) [2015] eKLR, the Court held that: -

“In a democracy such as ours where one of the values and principles of governance is the rule of law as set out in Article 10(2) of the [Constitution](#), no principle of law or any court should aid the perpetuation of an illegality. No party should be aided or allowed to benefit from his own wrong or illegal act.”
11. This Court has not lost sight of the fact that under the [Labour Institutions Act](#), paying an employee[s] wages that are below the minimum wages provided for under relevant Wage Orders is a crime punishable in law.
12. I am persuaded that I conclusively settled the issue of house allowance in my Judgment delivered on 23rd February 2023 when I stated in paragraph 70 that Clause 2 of the Contract of Employment which was duly executed by both parties provided for a consolidated monthly salary. House allowance was therefore included in the gross pay. The Applicant’s belief that I should have reached a different conclusion, cannot be a ground for review of the finding.
13. In the upshot, pursuant to the powers of this Court donated by Section 99 of the [Civil Procedure Act 2010](#) and Rule 33 of the [Employment and Labour Relations Court Rules 2016](#), the Claimant’s Notice of Motion application is allowed in the following terms: -



- a. Paragraph 86 of the judgment delivered on 23rd February 2023 is amended to read:
 - i. A declaration that the Claimant’s termination was both procedurally and substantively unlawful and unfair;
 - ii. Annual leave payment Kshs. 29,169/-
 - iii. Compensation at 6 months gross
Salary Kshs. 175,014/-
 - iv. One month’s salary in lieu
of noticeKshs. 29,169/-
 - v. Payment for 10 days worked
in December 2017.....Kshs. 9,723/-
 - vi. Compensation for unpaid
maternity leaveKshs. 74,158/-
 - vii. Leave pay for the annual leave
for 2016.....Kshs. 29, 169/-
 - viii. Underpaid salary..... Kshs. 391,082.50/-
 - ix. Costs of the suit;
 - x. The Respondent to issue a Certificate of Service to the Claimant within 30 days of today.
 - xi. Interest on the awarded sums at court rates from the date of this Judgment till full payment.

14. Each party is to bear its own costs for the application.

14. It is so ordered.

READ, DELIVERED AND SIGNED THIS 16th DAY OF FEBRUARY, 2024.

OCHARO, KEBIRA

JUDGE

In the presence of:

Ms Nyaega for the Claimant/Applicant

Ms. Njagi for the Respondent

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.

OCHARO KEBIRA

JUDGE

