



**Tialal & 2 others v Jubilee Party (Employment and Labour
Relations Petition E180 & E177 of 2021 & E063 of 2022
(Consolidated)) [2024] KEELRC 1327 (KLR) (30 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1327 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION
E180 & E177 OF 2021 & E063 OF 2022 (CONSOLIDATED)**

**MN NDUMA, J
MAY 30, 2024**

BETWEEN

WILSON SAMBA TIALAL PETITIONER

AND

JUBILEE PARTY RESPONDENT

AS CONSOLIDATED WITH

EMPLOYMENT AND LABOUR RELATIONS PETITION E063 OF 2022

BETWEEN

STEPHEN OYONGO OMBASA PETITIONER

AND

JUBILEE PARTY RESPONDENT

AS CONSOLIDATED WITH

EMPLOYMENT AND LABOUR RELATIONS PETITION E177 OF 2021

BETWEEN

RUTH NTHENYA MWINZI PETITIONER

AND

JUBILEE PARTY RESPONDENT



RULING

1. The applicants/petitioners filed a notice of motion dated 22/6/2013 seeking an order that:
 1. The honourable court to review the judgment delivered by this Honourable Court on 8th June, 2023.
 2. That the costs of the application be provided.
2. The application is premised on grounds 1 to 10 set out on the face of the notice of motion and buttressed in the supporting affidavit of Wilson Samba Tialal, the 1st petitioner.

The applicants seek clarification on prayers for leave days and house allowance in that they had set out the same in their respective petitions and therefore they be awarded accrued leave days and house allowance as follows: -

Leave days

- a. Wilson Samba – Kshs.2,562,000/=
- b. Ruth Nthenya Mwinzi – Kshs.175,000/= and
- c. Stephen Ombasa – Kshs.800,000/=

House allowance

- a. Wilson Samba – Kshs.549,000/=
 - b. Ruth Nthenya Mwinzi – Kshs.435,000/= and
 - c. Stephen Ombasa – Kshs.1,800,000/=
3. In the replying affidavit to the petition sworn to by Wambui Gichuru, the Executive Director of the respondent, the respondent deposed that:

The individual employees whose positions were affected by the redundancy were issued with termination letters including the petitioner which as per the letter the respondent paid the petitioner one months' salary in lieu of notice as allowed by the Act as well as severance pay.”

4. This deposition applied to all the petitioners in the consolidated petition.

In its judgment delivered on June 8, 2023, at paragraph 25 of the judgment, the court found as follows:-

The respondent also failed to demonstrate that it had established leave days due in respect of each claimant as at the date of termination and paid salaries in lieu of leave days not taken. The respondent therefore did not satisfy the requirement of section 40(1) (e) of the Act.”

5. The applicants' are relying on this paragraph of the judgment as evidence of an error on the face of the judgment since the court did not go ahead and grant the applicants payment in lieu of leave not taken and house allowance.

The court noted at paragraph 15 of the judgment that the respondent in the further affidavit by Wambui Gichuru deposed that upon termination the respondent paid in respect of salary for days worked and severance pay as follows:



- a. Ombasa – Kshs.500,000/=
 - b. Ruth – Kshs.125,000/=
 - c. Wilson – Kshs.150,000/=
6. The court specifically found at paragraph 20 of the judgment:
- The court finds that this is an ordinary termination on grounds of redundancy which ought to have been brought by way of a statement of claim so as to allow the claimants and the respondents to adduce evidence on the substantive and procedural propriety of the exercise conducted by the respondent leading to termination of employment of the petitioner.”
- The court went ahead to find that the respondent failed the procedural test set out under section 40(1) (a) and (b) of the [Employment Act](#), by failing to provide any written notice to the petitioners of the intended redundancy.
7. It was on the basis of this finding that the court went ahead and awarded the petitioners compensation as follows:-
- a. Wilson – Kshs.360,000/=
 - b. Ombasa – Kshs.600,000/= and
 - c. Ruth – Kshs.150,000/=
8. The court then granted the petitioners a certificate of service within 30 days of judgment and more importantly found:
- For the avoidance of doubt, all the other claims set out in the consolidated petition are dismissed for lack of merit.”
9. By coming to court by way of a petition, the petitioners missed the opportunity to adduce any evidence in support of the large claims made in respect of payment in lieu of leave days not taken and house allowance not paid for a period of several years.
- The petitioners had the onus of proving these claims on a balance of probability vide oral evidence in terms of section 107 and 108 of the [Evidence Act](#), cap 80 Laws of Kenya. The petitioners failed in this respect and the court correctly found that these claims were dismissed for lack of merit having not been sufficiently proved.
10. The respondent did not have any burden to prove these claims on behalf of the petitioners. The reference at paragraph 25 of the judgment that the respondent had failed to establish leave days due to the petitioners was referred to by the court only for the purposes of showing that the respondent did not adhere to the procedure set out under section – 40(1)(e) of the [Employment Act](#) 2007.
- This however did not shift the burden of prove to the respondent demonstrate the quantum of leave days and house allowance if any not paid to the petitioners.
- This application lack merit and is a veiled appeal against the judgment of the court. It does not meet the threshold for review set out under rule 33 of the [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#) for review of a judgment of the court. The applicants ought to have filed an appeal to the Court of Appeal if dissatisfied with the findings of fact and law by the court.



Accordingly, the application is dismissed with costs.

DATED AT NAIROBI THIS 30TH DAY OF MAY, 2024

MATHEWS NDERI NDUMA

JUDGE

Appearance:

Ms. Akinyi for petitioners/applicants

Mr. Kamotho for respondent

Mr. Kemboi, Court Assistant

