



**Kioko v Technical University of Kenya & another (Employment and Labour Relations
Petition E173 of 2023) [2024] KEELRC 2127 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2127 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E173 OF 2023**

AN MWAURE, J

JULY 26, 2024

BETWEEN

CUSTINE WANZA KIOKO PETITIONER

AND

TECHNICAL UNIVERSITY OF KENYA RESPONDENT

AND

KENYA UNIVERSITIES STAFF UNION APPLICANT

RULING

1. The Petitioner/Applicant filed a Notice of Motion dated 5th June 2024 seeking the following orders: -
 1. spent
 2. the Honourable Court be pleased to give an order restraining the 2nd Respondent, its servant and/or employee and/or agent or anyone acting on its behalf from executing the orders of 17th May 2024 pending hearing and determination of this Application and petition.
 3. This Honourable Court be pleased to vary, review and/or set aside the orders of the 17th May 2024 and any other consequential orders.
 4. the costs of this Application be provided for.

Petitioner/ Applicant’s Case

2. The Petitioner/Applicant avers that the 2nd Respondent held a National Delegate Conference on 17/11/2023 where she was expelled as in a vote of no confidence and reducing her membership to agency fee without following proper procedure.



3. The Petitioner/Applicant avers that she filed an application dated 27/11/2023 seeking orders prohibiting the 2nd Respondent from executing its decision to expel her as its National Vice Chairperson, Branch Chairperson and member. However, Court delivered its ruling on 17/05/2024 and held that the application is unmerited and dismissed it.
4. The Petitioner avers that based on the Court's decision, she is apprehensive that the 2nd Respondent will lodge papers to remove her with the Registrar of Unions.
5. It is the Petitioner's case that the ruling was erroneous as the Court did not put into consideration her evidence.
6. The Petitioner avers that she challenged how the 2nd Respondent ruled that a vote of no confidence was passed by 2/3 majority yet there was shouting of members concerning what her offence was.
7. Further, the Court did not consider the audio recording presented as evidence attached in the supplementary affidavit dated 06/02/2024 entailing the proceeding of the conference.
8. It is the Petitioner's case that from list of delegates present only 182 were eligible to vote while delegates from sub branches in attendance were not eligible voters. It is not clear how the 2nd Respondent obtained 210 eligible voters to conclude 181 votes of no confidence against her yet 28 delegates including herself could not vote.
9. The Petitioner avers that the Court in its ruling indicated that it did not see the submissions of the respective notice of motion application dated 06/02/2024 which was in the file and CTS pertaining to the already determined preliminary objection.
10. The Petitioner avers that the submissions was accompanied by a supplementary affidavit with an audio presented physically at the Court's registry on 15/02/2024.
11. It is the Petitioner's case that the ruling held that there was no employer employee relationship between the Petitioner and the 2nd Respondent as there is no evidence on the same. A copy of the payslip from the 2nd Respondent was presented in Court, showing she received a monthly salary of Kshs 25,004 together with monthly allowances paid in her bank account and at times in cash.
12. The Petitioner avers that she attached a letter dated 20/11/2023 from the 2nd Respondent informing the 1st Respondent that she is no longer a member or an official of the union. She further received a letter dated 22/11/2023 from the 2nd Respondent informing her she is no longer a member of the union, or a Chairperson Technical University of Kenya Branch or National Vice Chairperson of KUSU.

Respondents' Case

13. In opposition to the Application, the Respondents filed a replying affidavit dated 23rd July 2024.
14. The Respondents avers that the application merely discloses the Applicant's discontent with the ruling of the Court without enshrining proper reasons why the Court should review its decisions.
15. The Respondents aver application does not reveal any new or important matter or evidence has arisen to necessitate this Court to review its ruling on the matters in question.
16. It is the Respondents' case that the grounds relied on is merely a request for a reappraisal of the evidence and reanalysing its decision to establish whether or not the Applicant was deserving of the orders sought in the application dated 27/11/2023.



17. The Respondents aver that in exercising the power of review, this Court cannot heed to the Applicant's invitation to sit in appeal over its decision.
18. It is the Respondent case that the Applicant's allegation that the Court failed to consider their evidence is without any basis.
19. The Respondents aver that the 2nd Respondent has commenced the process of removing the Applicant as one of its officials through the Office of the Registrar of Trade Unions.
20. It is the Respondents case that the Petitioner ought to have pursued a judicial review of the decision by the delegates present at the 2nd Respondent's Annual Delegates Conference if they were dissatisfied with the same.

Petitioner/Applicant's Submissions

21. The Petitioner submitted that the Court made an error in dismissing her application dated 27/11/2023 vide ruling delivered on 17/05/2024 holding that there was no submissions in support of the application yet the supplementary affidavit and submissions both dated 6/02/2024 was filed on the e-filing portal and physically delivered to the Court's registry.
22. The Petitioner/ Applicant submitted that she presented the Court with evidence in support of her case, however, in its ruling the Honourable Court did not acknowledge of its existence rather indicated that the same was not on record yet they are. The supplementary affidavit and submissions challenged how the 2nd Respondent reached to a conclusion that a 'vote of no confidence' was passed against her as the numbers do not add up.
23. It is the Petitioner's submission that the ruling delivered on 17/02/2024 was erroneous because the Court was misguided that there was no evidence in support of the application dated 27/11/2023 while in reality the same was filed by the Petitioner/Applicant on the e-filing portal without any delay.

Respondents' Submissions

24. The Respondents submitted that the Petitioner/Applicant's contention that the Court did not consider their evidence is an allegation that cannot be factually substantiated and further paragraph 15 of the Court's ruling referred to submissions filed by counsel and not affidavits filed in evidence.
25. It is the Respondents submission that the application is an appeal disguised as a review application as it merely expresses the Applicant's dissatisfaction with the Court's ruling. The fact that a party believes that the Court ought to have reached a different conclusion are matters fit for an appeal rather than a review which is limited in scope.
26. The Respondents submitted that as evidenced by her submissions, the Applicant is desirous of ventilating the same issues raised in her application of 27/11/2023 because in her view the Court's decision was wrong but this Court has already pronounced itself functus officio in this respect.
27. The Respondents submitted that the application herein does not meet the legal threshold for review under section 80 of the *Civil Procedure Act* and Order 45 of the *Civil Procedure Rules*.

Analysis and Determination

28. Having considered the application, affidavits and submissions on record, the issue for determination is whether the Petitioner/Applicant is entitled to review of the ruling delivered on 17/05/2024.



29. The applicable law in review of a Court's determination is laid down under section 16 of the [Employment and Labour Relations Court Act](#) which provides: -

“The Court shall have power to review its judgments, awards, orders or decrees in accordance with the Rules.”

30. Rule 33 (1) of the [Employment and Labour Relations Court \(procedure\) Rules](#) further prescribes the requisite ingredients that warrant a review 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,
 - c. If the judgment or ruling requires clarification or,
 - d. For any other sufficient reason.”

31. It's the Applicant's submission that the ruling of 17/05/2024 was erroneous by holding that there was no submissions in support of the application yet the supplementary affidavit and submissions both dated 6/02/2024 was filed on the e-filing portal and physically delivered to the Court's registry.

32. In [Paul Mwaniki v National Hospital Insurance Fund Board of Management](#) [2020] eKLR, it was said:

“... 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.”

33. The Court went on to say-

37. The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act. Put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the Court/tribunal on a point of fact or law. In any case, while exercising the power of review, the Court/tribunal concerned cannot sit in appeal over its judgment/decision.
38. The wisdom flowing from jurisprudence on this subject is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it.”



34. In view of the foregoing, the Applicant has proved that it filed its supplementary affidavit and submissions both dated 6/02/2024 by producing in Court the official payment invoice of the filing fees of these documents dated 07/02/2024.
35. These documents were erroneously missing from the Court file and CTS platform due to unforeseen system issues, therefore, the Applicant is entitled to a review of this Court's ruling of 17/05/2024.
36. The second issue for determination is whether the Applicant is entitled to an order restraining the 2nd Respondent, its servant and/or employee and/or agent or anyone acting on its behalf from executing the orders of 17th May 2024.
37. To prove that she was expelled by the 2nd Respondent, the Petitioner/ Applicant relied on her supplementary affidavit dated 06/02/2024 which was accompanied by an audio recording of the 2nd Respondent's National Delegate Conference held on 17/11/2023 which recording were quite entertaining.
38. In the case of *Republic v Barisa Wayu Matuguda* [2011] eKLR the Court observed that any information stored in a computer which is then printed or copied shall be treated just like documentary evidence and will be admissible as evidence without the production of the original. The Court however cautioned that such electronic evidence will only be admissible if the conditions laid out under section 106B are satisfied.
39. Section 78A (1) of the *Evidence Act* (cap 80) provides for admissibility of electronic and digital evidence while section 78A (2) provides that a Court shall not deny admissibility of evidence under subsection (1) only on the ground that it is not in its original form. These provisions must be read together with Section 106A which provides that the contents of electronic records may be proved in accordance with the provisions of section 106B.
40. Section 106B (1) and (2) provides as follows;
 - (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.
 - (2) The conditions mentioned in subsection (1), in respect of a computer output, are the following —
 - (a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;
 - (b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
 - (c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was



out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and

- (d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.”

41. The audio recording produced is admissible as the Petitioner/Applicant filed a certificate of authenticity dated 06/02/2024 confirming the authenticity of the recording.
42. The certificate has identified the electronic record contained in the statement, described the manner in which it was produced and given particulars of the device involved in the production of the electronic record; and signed by David Njenga upon confirming that he is the person responsible in respect of the management of the computer which was used in the reproduction of the electronic record.
43. Section 33(1) of *Employment and Labour Relations Act (Procedure Rules)* provides that:
- A review applies where a person is aggrieved by a decree or an order from which an appeal is allowed from which no appeal is preferred or from which no appeal is allowed 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.
44. The Court concedes there was an audio recording which the Court inadvertently did not find in the file or on CTS platform and so could not listen to the same as it was an old format of recording but once it was converted into a flash disk the Court was able to consider it. The same was a recording of the proceedings that led to the removal of the petitioner from the union leadership.
45. It is therefore evident there was some error in that the Court did not have benefit of listening to the recording at the time and after listening to the same found that at the voting the members just shouted ‘yes’ or ‘no’ when asked about the petitioner. It is not clear how the respondent deciphered the numbers of the members who voted for or against the petitioner’s removal. The petitioner says she was elected through a secret ballot and should have been removed in a similar manner. The respondents also did not certify how they were able to confirm who of their members were eligible to vote. The Court therefore concedes there were mistakes that were not in its purview while writing the ruling dated 17th May 2024.
46. In conclusion, the Court therefore concedes to review the aforesaid ruling dated 17th May 2024 and sets aside its orders therein and instead orders that the 2nd respondent, its servants or employee and agents or anyone acting on its behalf be restrained from expelling the petitioner as National vice chairperson, branch chairperson and member of the 2nd respondent.
47. The Court is also pleased to grant prayer no 3 of the said notice of motion.
48. Each party will meet their respective costs of this application

Orders accordingly.



DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 26TH DAY OF JULY, 2024.

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.

ANNA NGIBUINI MWAURE

JUDGE

