



**Njihia & 2 others v Kenya Road Hauliers Limited (Employment and Labour Relations Cause E318 of 2023) [2024] KEELRC 2228 (KLR) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2228 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E318 OF 2023**

**JK GAKERI, J  
SEPTEMBER 19, 2024**

**BETWEEN**

**GEORGE NJUGI NJIHIA ..... 1<sup>ST</sup> CLAIMANT**

**BENARD NJACI NJOROGE ..... 2<sup>ND</sup> CLAIMANT**

**PETER KARUME MACHARIA ..... 3<sup>RD</sup> CLAIMANT**

**AND**

**KENYA ROAD HAULIERS LIMITED ..... RESPONDENT**

**RULING**

1. Before the Court for determination is the Claimant/Applicant's Notice of Motion dated 29<sup>th</sup> May, 2024 seeing Orders that the Court reviews its judgement delivered on 16<sup>th</sup> May, 2024 and;
  1. Order payment of severance pay and outstanding leave.
  2. Order for computation and payment of terminal dues as prayed in paragraph 15 of the statement of claim.
  3. In the alternative to (1) and (2) above, an order adopting the Respondent's admitted computation of terminal dues Kshs 325,191/= for the 1<sup>st</sup> Claimant and Kshs 176,176.00 for the 2<sup>nd</sup> Claimant and Kshs 127,704/= for the 3<sup>rd</sup> Claimant.
  4. Issue any other appropriate relief it may deem fit.
  5. Orders that the costs of this application be borne by the Respondent.
2. The Notice of Motion is expressed under Section 16 of the *Employment and Labour Relations Court Act*, 2011 and Rule 33 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* and is grounded on the reasons set forth on its face and the Supporting Affidavit of George Njugi



Njihia sworn on 29<sup>th</sup> May, 2024 who deposes that the Court did not award terminal benefits despite finding that the termination on account of redundancy was unfair that Section 40(e) and (g) of the [Employment Act](#) gives the Claimants a statutory right to terminal benefits ie accrued leave and severance pay.

3. That the Court overlooked the Respondent's admission at paragraph 10(c) and (d) of the Defence on terminal dues and the witness statement of Bhavin Shah dated 18<sup>th</sup> May, 2023 at paragraph 11 at pages 17 and 19 of the Respondent's evidence.
4. That in addition, the Court overlooked the express admission by the Respondent on payment of terminal dues hence a mistake on the face of the record.
5. That the Respondent also admitted that severance pay and terminal dues were also payable.
6. That the Court overlooked documentary evidence availed by the Respondent in the form of computation schedule of terminal dues that there is a mistake or error apparent on the face of the record as the court overlooked the provisions of law and the Respondent's admission on payment of terminal dues and the Respondent stands to suffer no prejudice if the application is allowed as it has already admitted payment of terminal dues and unless the same is directed, the Claimant will lose terminal dues.
7. That the Claimants have sufficient reason to have the judgment reviewed as regards terminal benefits or otherwise suffer economic and financial loss.
8. That there is need to clarify on payment of terminal dues.
9. The affiant prays for the judgment dated 16<sup>th</sup> May, 2024 be reviewed and set aside as regards leave and severance pay.

#### **Respondent's case**

10. By its grounds of opposition dated 12<sup>th</sup> July, 2024, the Respondent argues that the Application filed by the Claimants is fuctus officio as the prayers are couched analogous to an appeal and Application for review and is thus fatally defective and cannot stand.
11. That the application is an abuse of the court process and the Court has no jurisdiction to entertain it.

#### **Claimant's submissions**

12. As to whether the Notice of Motion is merited, counsel urges that it is under Rule 33 of the [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#) and there is an error or mistake apparent on the face of the record for the judgment to be reviewed as the Respondent's admission were overlooked as the Claimant's benefits were not controverted by the Respondent and the same are payable.
13. That payment of terminal dues was admitted.
14. Reliance was made on the decision in [ABN Amro Bank NV v Kenya Revenue Authority](#) (2017) eKLR on legitimate expectation as well as [Zablon Mokuva v Solomon M. Choti & 3 others](#) (2016) eKLR to reinforce the submission.
15. Counsel urges that the applicants will be subjected to hardship and prejudice if the application is not allowed as the conditions for review have been met.
16. On costs, counsel submits that they should follow the event.



## Respondent's submissions

17. By 25<sup>th</sup> August, 2024 when the Court retired to prepare this ruling, the Respondent had not filed submissions, notwithstanding the directions issued on 15<sup>th</sup> July, 2024.

## Analysis

18. As correctly submitted by the Claimant's counsel, the power of the Court to review its judgements, decree, orders or rulings is statutory.
19. In the case of the Employment and Labour Relations Court, the power is expressly provided for under Section 16 of the *Employment and Labour Relations Court, 2011* and Rule 33(1) of the *Employment and Labour Relations Court (Procedure) Rules, 2016*. The later provides that;
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 judgement or ruling –
    - a. . . .
    - b. On account of some mistake or error apparent on the face of the record;
    - c. If the judgement requires clarification; or
    - d. For any other sufficient reason.
20. The foregoing provisions were highlighted by the Court of Appeal in *Yani Haryanto v E. D & F Man (Sugar) Ltd* Civil Appeal No 122 of 1992 in the context of Order 44 of the *Civil Procedure Rules*, then in force.
21. The Claimants rely on sub-section (b) of Rule 33(1) of the Rules.
22. The concept of mistake or error apparent on the face of the record has been explained in various decisions including *Evans Onera Omote v Mary Odinga Ogutu* (2022) KEHC 1644 1 KLR where Gikonyo J. held that;
- “An error or mistake apparent on the face of the record is one that is self-evident and does not require elaborate arguments to be established. See *Paul Mwaniki v NHIF Board of Management* (2020) eKLR”.
23. In *Muyodi v Industrial and Commercial Development Corporation & another* (2006) EA 243, the Court of Appeal held as follows;
- “In *Nyamongo & Nyamongo v Kogo* (2001) EA 174, this Court said that an error on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature and it must be left to 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 record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two options, 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 or 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 also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us”.

24. In *James Kiiru Mwangi v Gibson Kimani Mwangi & another* (2021) eKLR, the Court expressed itself as follows;

“From the foregoing, it is clear that an error apparent on the face of the record must be a self-evident error which need not require elaborate arguments to support it”.

25. The pith and substance of the Claimant’s argument and justification for review is that they should be awarded leave pay and severance pay as terminal dues as according to them the Respondent had computed the same and the same should be awarded.

26. The specific paragraphs of the response relied upon state that the Respondent had prepared and computed a schedule of terminal dues, a fact the Claimants were aware of and discussions were on-going between the parties on the actual amounts payable including pay in lieu of notice, accrued leave and severance pay.

27. What the Applicants are reticent about is that they bolted out of the negotiations and served the Respondent with a demand letter as the notice was still running and thus effectively rejected the Respondent’s proposals and ultimately filed this case.

28. The fact that the Respondent had computed the terminal dues is not evidence that it had agreed to pay.

29. That was its proposals which the Claimants rejected and filed a case in Court.

30. The Respondent’s proposal cannot be cited as an admission yet it was declined.

31. It behoved the Claimants to prove entitlement to terminal dues evidentiary.

32. However, the applicant’s contention that there is an error or mistake on the face of the record or is sustainable, to the extent that;

i. They are entitled to one (1) month’s salary in lieu of notice as held in paragraph 98 of the Judgement delivered on 16<sup>th</sup> May, 2024.

33. Having held that the termination of the Claimants on account of redundancy was unfair and having further held that they were entitled to pay in lieu of notice, the same became an entitlement as follows; George Njugi Njihia Kshs 35,483.00 Benard Njaci Njoroge Kshs 35,483.00 Peter Karume Macharia Kshs 35,483.00

34. On accrued leave days, the Court found that the prayer lacked relevant particulars as neither of the Claimants availed evidence of the number of days prayed for and when they accrued.

35. The prayer was dismissed for want of supportive evidence as evidenced by paragraph 103 of the Judgement delivered on 16<sup>th</sup> May, 2024.

36. Significantly, paragraph 104 of the judgement delivered on 16<sup>th</sup> May, 2024 is explicit why severance pay was not awarded.

37. Severance pay is not in the Court’s view an accrued terminal due as it is a consequence of the redundancy in this case and since the redundancy was contested and the Claimants proved that it was



unfair, it transitioned to an unfair termination of employment for which compensation is payable under Section 49(1) of the *Employment Act*.

38. Consequently, the separation was no longer a redundancy but an unfair termination of employment.
39. In the Court's view, there was neither a mistake nor an error apparent on the face of the error as regards leave days and severance pay.
40. In the upshot, the Claimant's Notice of Motion dated 29<sup>th</sup> May, 2024 is partially successful and the judgment delivered on 16<sup>th</sup> May, 2024 is reviewed as follows;
  - a. Salary in lieu of notice
    - i. George Njugi Njigia Kshs 35,483.00
    - ii. Benard Njaci Njoroge Kshs 35,483.00
    - iii. Peter Karume Macharia Kshs 35,483.00
41. Parties shall bear own costs.  
Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 19<sup>TH</sup> DAY OF SEPTEMBER 2024**

**DR. JACOB GAKERI**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 Civil 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.

**DR. JACOB GAKERI**

**JUDGE**

