



**Gikonyo v County Government of Lamu & 2 others (Petition
E007 of 2021) [2023] KEELRC 1429 (KLR) (15 June 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1429 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
PETITION E007 OF 2021**

M MBARŪ, J

JUNE 15, 2023

BETWEEN

JOSEPH KABERO GIKONYO PETITIONER

AND

COUNTY GOVERNMENT OF LAMU 1ST RESPONDENT

LAMU COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

**COUNTY SECRETARY, COUNTY GOVERNMENT OF LAMU 3RD
RESPONDENT**

RULING

1. The petitioner filed application dated 3 June 2022 under the provisions of Rule 33(1)(1)(b), (2) and (3) of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 (Court Rules) and seeking for orders that;

The court be pleased to review the judgment delivered on 4/4/2022 and decree to the extent only of correcting the gross salary to Ksh.246,870/= and the total to be Ksh.1,481,220/= instead of Ksh.133,870/= and Ksh.803,220/= respectively.

2. The application is supported by the petitioner in his Supporting Affidavit and who aver that judgment herein was delivered on 4 April 2022 and there is an error apparent on the face of the record. His gross salary was Ksh.246,870 and for 6 months awarded, this amounts to Ksh.1,481,220 but the court used Ksh.133,870 as gross salary leading to the error. The challenge is not with regard to the court award but a review of the error apparent on the face of the record.
3. The petitioner aver in his affidavit that he pleaded and filed written submissions on the basis that he was earning the following dues;
 - a. Basic pay Ksh.133,870;



- b. House allowance Ksh.48,000;
 - c. Hardship allowance Ksh.45,000;
 - d. Commuter allowance Ksh.20,000
- Total Ksh.246,870.
- 4. This is evidenced by the payment statement issued by the respondents showing the gross monthly salary. The error apparent on the face of the record is that the court based the basic monthly salary to compute compensation instead of the gross monthly salary hence this application seeking for a review of the same and to meet the ends of justice.
 - 5. In reply, the 3rd respondent filed Replying Affidavit sworn by John Mburu and aver that the instant application is a total waste of court time and bad in law and should be dismissed with costs.
 - 6. The judgment herein was delivered after the court perused the record and Supporting Affidavit together with all annexures and the respondents' Reply to the Petition and affidavits and upon appreciating the merits, delivered judgment in favour of the petitioner.
 - 7. Parties are bound by their pleadings and it is not for the court to go beyond what is not prayed for. conditions warranting review have not been met and there is no error apparent on the face of the record as alleged. The petitioner pleaded that his salary was Ksh.133,870 and the court was correct to award the same. There is no new evidence introduced to warrant a review application since the court relied on the pleadings filed by the petitioner to arrive at the judgment and the multiplier of Ksh.133,870 is proper.
- Both parties filed written submissions.
- 8. The petitioner as the applicant submitted that pursuant to Section 80 of the *Civil Procedure Act* he has met the threshold for the grant of the order of review of the judgment herein delivered on 4 April 2021 based on an error apparent on the face of the record which warrant an amendment of the judgment with an award of his gross salary at Ksh.246,870 instead of Ksh, 133,870 which was erroneously applied by the court in the judgement. A review of a judgement is permissible where an applicant is able to demonstrate that there is an error apparent on the face of the record as held in *Paul Mwaniki v National Hospital Insurance Fund Board of Management* [2020] eKLR. Section 49(c) of the *Employment Act* directs that in tabulating the terminal dues for an employee, the applicable rate is that of the gross salary as held in *Postal Corporation of Kenya v Andrew K Tanui* [2019] eKLR.
 - 9. The respondent submitted that Order 2 rule 6(1) of the *Civil Procedure Rules* requires that a party should plead to all facts in his case as held in *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] eKLR. The petitioner was heard on his case and the court correctly assessed his pleadings in the judgement and there is no error to be corrected. The provisions of Section 80 of the *Civil Procedure Act* are not available to the petitioner since there is no discovery of any new matter to justify his application as held in *Republic v Advocates Disciplinary Tribunal ex parte Apollo Mboya* [2019] eKLR.
 - 10. A review application with regard to orders of this court should be premised under the provisions of Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 as correctly done by the petitioner. An applicant seeking a review must demonstrate that;
 - 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 judgement or ruling requires clarification; or
- (d) for any other sufficient reason

11. The petitioner's case is that there is an error apparent on the record of the judgement delivered on 4 April 2022 when the court applied a basic salary instead of the gross salary to calculate his compensation and award herein.
12. Unlike civil and commercial disputes filed at other superior courts, employment and labour relations disputes are regulated under the Court Rules including the filing of petitions. Employment claims are also required and regulated under the *Employment Act*, 2007 (Act) particularly when tabulating terminal dues for an employee. Example is Section 49(2) of the Act which directs every employer, whether pleaded or not, whether addressed in the judgement or not, to deduct all statutory dues and remit accordingly. It is a statutory requirement binding on all parties while paying an employee any dues.
13. Equally, when tabulating terminal dues, whether this is pleaded or not, whether this is awarded or not, the legal threshold is in terms of Section 49(1)(c) of the Act is that while calculating terminal dues owed to an employee, the application is gross monthly wage or salary that the employee was last earning. The application of such gross wage/salary is based on the pleadings, the filed payment statement(s) or the evidence of the parties. These records are therefore crucial in guiding the court on what constitutes the gross salary;
 - (c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.
14. In this case, the petitioner under paragraph (7) of his petition pleaded that;

By letter dated 14/9/2021, the 1st respondent through the governor employed the petitioner as a Chief Officer for a contract of 2 years with effect from 8/9/2021 till 7/9/2023 at a salary and remuneration of Ksh.133,870 per month with annual increase to Ksh.140,440 on 1.9.2022.
15. In the final orders at paragraph (f) the petitioner reiterated the same figures of his salary at Ksh.133,870 per month. This is his own multiplier.
16. The petitioner's Supporting Affidavit restates this much. His salary was Ksh.133,870 per month.
17. The Offer of Appointment filed in evidence also gives the same rate without any other monetary benefit.
18. The record and extract of Human Resource Policies and Procedures manual for the Public Service, May 2016 filed with the petition does not include any other monetary benefit. The petitioner did not file any payment statement with his petition.
19. In his written submissions, the petitioner reaffirmed his petition and further that his petition should be allowed as prayed.



20. As the court was retreating to deliver judgement on 4 April 2022 there was no matter before it, directly or indirectly to apply any other salary other than as pleaded by the petitioner himself. Even with the best and innovative application of Section 49(1)(c) of the Act, there was no matter to apply any other salary other than as stated in the Petition, Supporting Affidavit or written submissions by the petitioner who was properly represented by Counsel throughout these proceedings.
21. This then is not an error apparent on the face of the record. It must be something else. The alleged error or mistake by the court in applying Ksh133,870 instead of Ksh.246,870 cannot be discerned. The court could not identify any other benefits and matters outside the pleadings.
22. The court well analysed the pleadings as evidenced under paragraphs 60(d) of the judgement.
23. In *Hosea Nyandika Mosagwe & 2 others v County Government of Nyamira* [2022] eKLR the court in addressing a similar matter where the applicant was seeking a review of the judgement on alleged error apparent on the face of the record held that;
 - iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
 - iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
24. And in *Muyodi v Industrial and Commercial Development Corporation & Anor* [2006] 1 EA 243 in applying findings in the case of *Nyamogo and Nyamogo v Kogo* [2001] EA 174 the court held that;

... There is 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 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.
25. Applying these principles in this case, the court finds no mistake or error apparent on the face of the record as envisaged under Rule 33 of the Court Rules to warrant any review of the judgement herein.
26. Accordingly, application dated 3 June 2022 is hereby dismissed. each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 15TH DAY OF JUNE, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

