



**Kenya National Union of Nurses v Kisumu County Public Service Board & another
(Cause E031 of 2022) [2023] KEELRC 3055 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 3055 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E031 OF 2022
CN BAARI, J
NOVEMBER 30, 2023**

BETWEEN

KENYA NATIONAL UNION OF NURSES APPLICANT

AND

KISUMU COUNTY PUBLIC SERVICE BOARD 1ST RESPONDENT

KISUMU COUNTY GOVERNMENT 2ND RESPONDENT

RULING

1. This ruling relates to the Applicant's motion application dated 24th July, 2023, wherein, the Applicant seeks the following orders: -
 - i. Spent.
 - ii. That, this Honorable Court be pleased to review and /vary its order No. 1 made vide the judgment of 22nd day of June, 2023.
 - iii. That, the Applicant be allowed to produce additional new evidence in respect of whether the grievant was entitled to payment of salaries during the period of approved training.
2. The application is supported by grounds on the face of the motion and the affidavit of David Omulama.
3. The Applicant states that Judgment in this matter was delivered on the 22nd June, 2023, and that the Honorable Court held at paragraph 67 of judgment that,

“it was not clear to this Court whether the Grievant's salary was paid or was payable during his study”.



4. The Applicant avers that flowing from the above holding, the Honorable Court proceeded to make an award for unpaid salaries only for the period of between September, 2021 to April, 2022 and therefore excluded salaries for the period between September, 2020 to September, 2021.
5. It is the Applicant's case that it specified clearly the period for which it was claiming withheld salaries in its statement of claim, which specification is correctly captured at paragraph 7 of the judgment dated 22nd June, 2023, and which shows that the claim period is between April, 2021 to June, 2022, amounting to Ksh.1,701,791.
6. The Applicant states that there is therefore a clear error apparent on the face of the record as whereas, the Honorable Court found that it was not clear whether the salaries for the period the grievant was away for training had been paid or payable, the Court also had correctly captured at paragraph 7 the period for which the claim was made and the total amount of Ksh.1,701,791 meaning that the salaries for part of the months the grievant was away for study and the — period from when he resumed duty had not been paid were payable.
7. The Applicant avers that the new evidence relied upon in this application could not be produced during hearing after due diligence, because the Claimant's claim period was not disputed by the Respondents who opted to plead gross misconduct of the grievant as the only reason why the salaries were withheld from April, 2021 to September, 2022.
8. The Applicant further states that the PSC HR Manual and the County Government Policy on training do not provide for none payment of salaries to staff who have been approved and bonded for training.
9. Parties sought to canvass the application by way of written submissions. The Applicant filed submissions, while the Respondents did not.

Determination

10. The issue for determination herein, is whether the Applicant has established grounds for review.
11. Section 16 of the *Employment and Labour Relations Court Act*, empowers this court to review its judgements, awards, orders or decrees in accordance with the Employment and Labour Relations Court (Procedure) Rules, 2016.
12. Rule 33 (1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 states:

“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.”



13. In the case of *Rose Kaisa v Angelo Kaiza*, the Court held thus on review:

“Before a review is allowed on the ground of discovery of new evidence, it must be established that the Applicant had acted with due diligence and the existence of the evidence was not within his knowledge; and if found that the Petitioner did not act with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause...”
14. The Claimant/Applicant’s application for review orders is premised both on the need to adduce new evidence and an alleged error on the judgment of the Court. It is its contention that the evidence could not be produced during hearing after due diligence because the period on which its claim was premised was not disputed.
15. In *Smith v. New South Wales* [1992] HCA 36; (1992) 176 CLR 256 the Court held that:

“If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application.”
16. Further in the case of *Wavinya Mutavi v Isaac Njoroge & another (2020)* eKLR the court in disallowing an application for review held that:

“Over the years, Kenya’s superior courts and courts in the Common wealth have developed principles which guide the exercise of jurisdiction to re-open a case and receive additional evidence in a civil trial court. First, the jurisdiction is a discretionary one and is to be exercised judiciously. In exercising that discretion, the court is duty bound to ensure that the proposed re-opening of a party’s case does not embarrass or prejudice the opposite party. Second, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the court will not grant the plea. Third, the plea for re-opening of a case will be rejected if there is inordinate and unexplained delay on the part of the applicant. Fourth, the applicant is required to demonstrate that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of his case. Fifth, the evidence must be such that, if admitted, it would probably have an important influence on the result of the case, though it need not be decisive. Lastly, the evidence must be apparently credible, though it need not be incontrovertible.”
17. The evidence the Applicant seeks to have produced, is the Public Service Commission human resources manual and the county government policy on training. The two are public documents and which could easily have been obtained at the time of hearing of this case.
18. Further, the assertion by the Applicant that he did not adduce evidence on the claim of withheld salary because the issue was not disputed, in my view does not hold. The Applicant was under duty to prove his entire claim during the hearing.
19. On the issue of a mistake apparent on the face of the record, the Applicant has not clearly brought out the mistake it alleges exist in the judgment subject of the review motion.
20. In the circumstances, I find and hold that the new evidence for which the suit is sought to be reopened, is evidence that was readily available during the hearing being public documents, and hence the Applicant has not demonstrated that the evidence could not have been obtained with reasonable diligence at the time of hearing of its case



21. In the premises I decline to grant the orders sought and dismiss the application.
22. I make no orders on costs since the Respondents did not defend the application.
23. Orders of the Court.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 30TH DAY OF NOVEMBER, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. David Omulama present for the Claimant/Applicant

N/A for the Respondents

Erwin Ongor - C/A

