



**Kariuki v Board of Management Mereroni Primary School & another  
(Cause 113 of 2015) [2022] KEELRC 1645 (KLR) (7 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1645 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE 113 OF 2015  
HS WASILWA, J  
JUNE 7, 2022**

**BETWEEN**

**PETER WAMBUGU KARIUKI ..... CLAIMANT**

**AND**

**BOARD OF MANAGEMENT MERERONI PRIMARY SCHOOL .... 1<sup>ST</sup>  
RESPONDENT**

**PRINCIPAL SECRETARY, MINISTRY OF EDUCATION ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before me for determination is the Claimant/ Applicant's application dated 9<sup>th</sup> February, 2022 filed under certificate urgency and brought pursuant to Section 3,12 and 16 of the *Employment and Labour Relations Court Act*, Rule 33 and 34 of the *Employment and Labour Relations Court Procedure Rules 2016* and all other enabling provisions of the law seeking the following Orders;
  1. Spent.
  2. That this Honorable Court be pleased to review and set aside its ruling delivered on 20<sup>th</sup> January, 2022 and adopt the terminal dues as assessed by the County labor officer in a report dated 18<sup>th</sup> October, 2021.
  3. That in the alternative the matter be referred to the trial Court, Honourable Lady Justice Monica Mbaru for final disposal.
  4. That the costs of this application be provided for.
2. The application is based on the following grounds;
  - a. That, this Court (Lady Justice Monica Mbaru) delivered judgment in this matter for payment of terminal dues for the period between August 2010 to December, 2014 specifically for



underpayments inclusive of house allowance due, pay for leave days, pay for rest days, pay for overtime for work at 12 hours for the 7 days each week and pay for work during public holidays and that no appeal was preferred by the Respondent neither did they seek for review of the said Court Orders.

- b. The Court directed the Labour Officer to calculate the dues payable to the Claimant which was done vide the report dated 29<sup>th</sup> July, 2021, however that it was noted by the Court that the said report had errors and a corrected version filed on the 18<sup>th</sup> October, 2021 which was subjected to submissions of the parties.
  - c. It is averred that this Court relied on the report of 29<sup>th</sup> July, 2021 in making its calculation instead of the Report of 18<sup>th</sup> October, 2021. Further that the Court suo moto dismissed the Labour officer assessment on rest days and public holidays when the same had been awarded by the trial Court and only pending for assessment as such reversing the award given to the Claimant in the judgement of 27<sup>th</sup> February, 2020.
  - d. It is averred that the Court is functus officio and ought not disturb the award given by the trial Court. Additionally, that the award of the Court in the ruling delivered on the 20<sup>th</sup> January, 2022 is not in tandem with the Judgment of the Court of 27<sup>th</sup> February, 2020.
3. This application is also supported by the affidavit of Peter Wambugu Kariuki, the Claimant herein deposed upon on the 9<sup>th</sup> February, 2022.
  4. The Respondent opposed the application and filed a replying affidavit deposed upon on the 11<sup>th</sup> February, 2022 by Chepkirui Janet the state counsel ceased of the conduct of this matter. The affiant avers that the decision of this Court of 20<sup>th</sup> January, 2022 is sound as the Court was still free to reassess the dues payable to the Claimant depending on the evidence produced. She added that the Court was right to reduce the sum payable from 617,134 to 452,239 because the rest days and public holidays pay were never proved by the Claimant.
  5. She states that litigation has to come to an end and the application before Court is aimed at wasting precious judicial time and an abuse of Court process. She also maintains that there is no error in the ruling that can warrant the review Orders sought.
  6. The Application was disposed of by written submissions.

#### **Claimant/Applicant's submissions.**

7. The applicant submitted on only one issue, whether review Orders should be granted. It submitted that this Court is empowered under rule 33 and 34 of the Employment and labour Relations Court procedure rules to review its Orders. In support of this argument the Applicant relied on the case of [Re estate of Simoto Omwenje Isaka \(Deceased\)](#) [2020] eKLR where the Court held that:-

“In *Muyodi vs. Industrial and Commercial Development Corporation & Another* (2006) 1 EA 243, the Court of Appeal considered what constitutes a mistake or error apparent on the face of the record, and stated as follows:

“In *Nyamogo & Nyamogo vs Kogo* (2001) EA 174 this Court said that an error apparent 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 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 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 or wrong view is certainly no ground for a review although it may be for an appeal.”

8. In *Paul Mwaniki vs. 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.”

9. 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.<sup>38</sup> 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.”

10. Accordingly, he submitted that the error is apparent in two folds. One that the Trial Court, Justice Monica Mbaru had already made her decision in the matter and the separate head payable and the labour officer was merely tasked to calculate the amount payable in each head, as such that the issue of proving the Claimant was already done away with and no longer up for determination unless on appeal which was not the case herein. Secondly, in the calculation it is apparent that the Court used a wrong report being report of 29.7.2021 instead of the one for 18.10.2021 in arriving at its decision.
11. It was submitted in conclusion that the error made by the Court are apparent and ought to be review in accordance with the law.

### **Respondent’s Submissions.**

12. The Respondent on the other hand submitted that the Court was right in holding that the Claimant did not proved his case on off days and public holidays. He argued that the Claimant ought to have tendered evidence in form of muster roll to ascertain his claim in accordance with section 107 of he



Evidence Act. In support of this argument the Respondent cited the case of Alice Wanjiru Rubiu v Messiac Assembly Yabweh [2021] eKLR where the Court held that;

“It is a principle of law that whoever lays a claim before the Court against another has the burden to prove it. Sections 107 and 108 of the Evidence Act provide as follows:

107 “(1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.” ... In the circumstances of this case the Court has the appellant’s word against that of the Respondent. The trial magistrate weighed all this and came to the correct conclusion that the appellant had failed to prove her case as required by law. I find no reason to make me fault the learned trial magistrate.

13. The Respondent also submitted that the criteria for grant of review Orders was aptly stated by Justice Mativo in Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR where the Court listed the principles as follows:-

- “i. A Court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
- ii. The expression “any other sufficient reason” appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
- 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.
- v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior Court.
- vi. While considering an application for review, the Court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
- vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the Court/tribunal earlier.
- viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination.



In the present case the petitioner has not been able to point out any error apparent on the face of the record.

- ix. Section 80 of the Civil Procedure Code provides for a substantive power of review by a civil Court and consequently by the appellate Courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the Civil Procedure Code does not prescribe any limitation on the power of the Court, but such limitations have been provided for in Order 45 Rule 1.
- x. The power of a civil Court to review its judgment/decision is traceable in Section 80 CPC. The grounds on which review can be sought are enumerated in Order 45 Rule 1.”

- 14. Accordingly, that the Applicant has not met the conditions therein and therefore is not deserving of the review Orders sought.
- 15. I have examined all the averments of the parties herein. The applicant prays that this Court reviews its ruling on the ground that there is an error on the face of the record.
- 16. Under Rule 33 of the Employment and Labour Relations Court Rules 2016 this Court has jurisdiction to review its orders and Rulings/Judgments on the following grounds;
  - (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.
  - (2) An application for review of a decree or order of the Court under subparagraphs (b), (c) or (d), shall be made to the judge who passed the decree or made the order sought to be reviewed or to Review. Kenya Subsidiary Legislation, 2016 2507 any other judge if that judge is not attached to the Court station.
  - (3) A party seeking review of a decree or order of the Court shall apply to the Court by way of notice of motion supported by an affidavit and shall file a copy of the Judgment or decree or Ruling or order to be reviewed.
  - (4) The Court shall, upon hearing an application for review, deliver a ruling allowing or dismissing the application.



- (5) Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.
- (6) An order made for a review of a decree or order shall not be subject to further review.

17. Indeed if there is an error in my Ruling dated 9<sup>th</sup> February, 2022 then I have jurisdiction to review it. In this Court's Judgment of 27<sup>th</sup> February, 2020 the Court referred the matter to the County Labour Officer Nakuru for assessment of terminal dues for the period of August 2010 to December 2014.

“Underpayments inclusive of house allowance due, pay for leave days, pay for rest days, pay for overtime for work at 12 hours for 7 days each week, pay for work during public holidays.....”

18. Following the order of the Court the Labour Officer considered the Judge's Judgment and presented a report to this Court dated 18<sup>th</sup> October, 2021.

19. I considered this report and rendered my Ruling on 20<sup>th</sup> January, 2022. In the Ruling I adopted the calculation of the Labour Officer for underpayments, Leave, overtime and unpaid wages.

20. I found the head on off days and public holidays not proved and dismissed it. Indeed in the Judgment of the Court the Court had found the Claimant entitled to the above heads inclusive of holiday pay which in my Ruling of 20<sup>th</sup> January 2022, I adopted. I however didn't adopt the finding of the Labour Officer on holiday pay and rest days which he found were 41,355/= and 50,580/= respectively.

21. The ruling of this Court indeed advertently and in error omitted the 2 heads for which the Court in the Judgment had already found for the Claimant.

22. This error is apparent on the face of the record. I correct this error and include the findings of the Labour Officer on the 2 heads as follows;

1. Holiday pay = 50,580/=

2. Rest days = 41,355/=

TOTAL = 91,935/=

23. I review my Ruling accordingly and add the above amounts with the resultant total now due to the Claimant to read kshs.544,174/= instead of kshs.452,239/=.

24. Costs in the cause.

**RULING DELIVERED VIRTUALLY THIS 7<sup>TH</sup> DAY OF JUNE, 2022.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:-**

Ekesa for Claimant – present

Chepkurui for respondents – present

Court Assistant - Fred

