



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**ELRC PETITION NO.11 OF 2018 ( as consolidated with No. 12,13,14, 15,16,17,18,19,20, 21,22,23,24,25,26,27,28,29, and 36 of 2018**

*(Before Hon. Justice Mathews N. Nduma)*

CELINA NADITE..... 1<sup>ST</sup> PETITIONER  
JOSEPHINE NYAJARA KEGICHA.....2<sup>ND</sup> PETITIONER  
VERONICA LEIRO SIMINTOI.....3<sup>RD</sup> PETIOTNER  
BEATRICE WAMBURA MURIUKI.....4<sup>TH</sup> PETIONER  
FRANCIS AGESA YOYA .....5<sup>TH</sup> PETITIONER  
SIMONE NAIBEI .....6<sup>TH</sup> PETITIONER  
PHILOMENA MWONGELI NICHOLAS.....7<sup>TH</sup> PETITIONER  
DOROTHY ADHIAMBO OKACH.....8<sup>TH</sup> PETITIONER  
PETER MUNGAI KAMAU .....9<sup>TH</sup> PETITIONER  
GEOFFREY MANYALI KIKECH .....10<sup>TH</sup> PETITIONER  
JOYCE ARUS OWITI.....11<sup>TH</sup> PETITIONER  
KENNEDY RUDHO OBUSURU.....12<sup>TH</sup> PETITIONER  
JAPHETH SAFARI BAYA .....13<sup>TH</sup> PETITIONER  
SAMSON KIPKULEI AYEBEI .....14<sup>TH</sup> PETITIONER  
NELSON DAVID NJOROGE.....15<sup>TH</sup> PETITIONER  
ROSINA MKAKISHA MAGANGA.....16<sup>TH</sup> PETITIONER  
SORA DUBA HUKA.....17<sup>TH</sup> PETITIONER  
ROSELYNE LUVEGA MWANJE.....18<sup>TH</sup> PETITIONER  
ROTICH SYLVESTER KIPRONO.....19<sup>TH</sup> PETITIONER  
CHARLES KIRUI KIBORE.....20<sup>TH</sup> PETITIONER

**VERSUS**

**RULING**

1. The applicant in the Application dated 14<sup>th</sup> August 2019 prays for an order to review the consolidated Judgment of the Court delivered on 7<sup>th</sup> March 2018 in respect of the applicant's petition number 28 of 2018 named Roselyn Luvega Mwanje by substituting the order of dismissal of the applicant's case with one allowing her petition.
2. The application is premised on grounds set out under paragraphs (f) and (g) of the application that there is a mistake or error on the face of the record located at paragraph 42 on page 10 of the judgment which reads that "*Roseline Luvega Mwanje's bank statements were incommensurate With her declared and expected income.*"
3. The applicant states that the vetting board only touched on the applicant's M-pesa statements and not her bank statements.
4. That the reason for her dismissal by the vetting board was that she sent money to her seniors and juniors on a regular basis. That this allegation changed in court to that the applicant could not explain entries in her M-pesa statement.
5. That there are errors reflecting the applicant's place of vetting in the Judgment in that it was stated vetting was at Tom Mboya Labour College in Kisumu yet records of the respondent talk of GTI Mombasa and Golf Hotel Kakamega.
6. The applicant states that records demonstrate that she explained the M-pesa entries contrary to the finding of the court and that she should have been given benefit of doubt by the respondent.
7. The applicant further states that she was not given sufficient time by the vetting board to defend herself since the notice to attend vetting was less than 24 hours.
8. That Article 47 of the constitution was not adhered to. Therefore, the application be granted as prayed.
9. The application is opposed vide grounds of opposition dated 19.9.2019 to wit:
10. The application is incurably defective as it attempts to invite the court to determine an appeal on its own Judgment. The application therefore offends the res judicata principle and the application be dismissed for lack of merit.

**Determination**

The jurisdiction of E & L R C court is embodied in rule 33(1) and 2 of the Employment and Labour Relations Court (Procedure) Rules 2016 as follows:-

**“ 33 (1) a person who is aggrieved by a decree or an order from which an appeal is allowed but which no appeal is preferred or which no appeal is allowed, may within reasonable time, apply for 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.**
- (d) For any other sufficient reason.”**

11. Firstly the consolidated Judgment delivered on the 7<sup>th</sup> March 2018 is in respect of all the petitioners named in the Judgment jointly and severally and no specific part may be severed and taken as a separate Judgment in respect of only one of the petitioners.
12. The reasons given by the court for the dismissal of the consolidated petition brought by each one of the petitioners concerns all the individual petitioners in the consolidated petition save for the short summaries of the facts regarding each case derived from the vetting records of each petitioner.
13. In this respect some of the petitioners have already noted appeals against the consolidated Judgment of the Court and the issues raised by the applicant herein are best suited to be addressed by the court of appeal as they touch on the merits of the decision of the Lower court and are not suited for review
14. The Court is satisfied after having considered the record of the proceedings before the vetting and review board, record of proceedings before Court and the Judgment itself that the matters raised in the present application do not amount or qualify to be apparent errors or mistake on the face of the record that would warrant the Court to review its decision in favour of the applicant.

15. At page 6 of the Judgment the Court stated thus:

*“ It is important to note that each of the petitioners was confronted at the hearing with issues of financial impropriety with regard to salaries and M-pesa transactions”.*

16. The Court was therefore alive to the issues that the applicant was confronted with by the vetting and review board that led to her dismissal as an Inspector of Police.

17. The findings by the vetting board at page 11 of the petition were simply summed up at paragraph 42 page 10 of the Judgment that *“ the officer was removed on 6<sup>th</sup> December 2016 due to lack of financial probity and integrity. ”*

18. This is the nub of the findings by the vetting and review board against the applicant regardless of whether the money she had frequently sent and received from her juniors and superiors was found in her M-pesa statements or bank statements.

19. The finding of the vetting board that was correctly upheld by the Court is that the applicant did not give a reasonable explanation, acceptable to the vetting and review Board of the sums of money frequently received by her from her junior and senior officers and vice versa.

20. The court correctly stated that the financial transactions were in commensurate with her declared and expected income and the officer's explanation was found to be untenable.

21. This finding of fact and law may only be challenged by way of appeal but not by asking the trial Court to reconsider its own decision.

22. In **MUYODI – VS – INDUSTRIAL AND COMERCIAL DEVELOPMENT COOPERATION & ANOTHER (2006/EA)**, The Court of Appeal described an error apparent on the face of the record as distinct from an error that has to be established by a long drawn process of reasoning.

13. Financial probity of the applicant or lack of it in the present case was based on her receipt of unexplained money on a regular basis irrespective of where the money was held. The applicant did not dispute receipt of impugned money and so the issue was not up for determination.

14. Where the actual vetting took place is neither here nor there and did not go at all into the final decision of the Court on the merits of the applicant's case.

15. In the final analysis, the application does not merit the criteria for review under Rule 33(1) of the E & L R C (Procedure) Rules 2016 and the standards set out by the Courts.

Application is dismissed.

**Judgment Dated, Signed and delivered at Nairobi this 28<sup>th</sup> day of May, 2020**

**Mathews N. Nduma**

**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, this ruling has been delivered to the parties online with their consent. 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 18 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.

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Odeny for Applicant

Counsel for Respondent

