



REPUBLIC OF KENYA



KENYA LAW
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**Havi v Director of Public Prosecution & 2 others (Petition E273 of 2021)
[2024] KEHC 3097 (KLR) (Constitutional and Human Rights) (19 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3097 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E273 OF 2021

EC MWITA, J

MARCH 19, 2024

BETWEEN

NELSON ANDAYI HAVI PETITIONER

AND

THE DIRECTOR OF PUBLIC PROSECUTION 1ST RESPONDENT

THE HON ATTORNEY GENERAL 2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS 3RD RESPONDENT

RULING

Application

1. This is an application dated January 9, 2024 by Director of Criminal Investigations (the DCI) and the Attorney General (the AG), seeking a review of the judgment delivered on December 15, 2023.
2. The reason advanced for seeking review is that the Petition dated July 13, 2021 was allowed due to an error apparent on the face of the record. According to the DCI and the AG, the Court, (Mrima, J), determined the Petition without considering their response and written submissions dated August 24, 2021 and May 23, 2022, respectively.
3. The DCI and the AG argue that the judgment goes against the Article 159(2)(d) of the Constitution which enjoins the Court to administer justice without undue regard to technicalities.
4. The DCI and the AG assert that they have met the threshold for granting review, having demonstrated the apparent error and the omission on the part of the Court.



5. They argue that the petitioner will not be prejudiced if the judgment is reviewed; the application has been brought without undue delay and they, on their part, will be prejudiced if the judgment is not reviewed.
6. In urging the Court to allow the application, the DCI and the AG rely on the decisions in *Francis Njoroge v Stephen Maina Kamore* [2018] eKLR; *National Bank of Kenya Ltd v Ndungu Njau* [1996] KLR; *Alpha Fine Foods Limited v Horeca Kenya Limited & 4 Others* [2021] eKLR and *Sanitam Services (E.A) Limited v Rentokil (K) Limited & another* [2019] eKLR.

Response

7. The application is opposed through replying affidavit by the petitioner Nelson Havi (Mr. Havi) and written submissions. Mr. Havi argues that the application is flawed on account of misrepresentation of facts. According to him, the alleged grounds of opposition dated August 24, 2021 and written submissions dated May 23, 2022 were not filed in the Judiciary Online Case Tracking System (CTS) and those documents are not on the CTS to date. Those pleadings were also not served on him.
8. Mr. Havi contends that even if the said pleadings were taken to have been filed, it would still not amount to an error apparent on the face of the record to warrant a review of the Judgment if they were not considered.
9. It is Mr. Havi's position that the alleged grounds of opposition and submissions do not introduce an argument that can lead to variation of the Judgment. This is so because from the judgment, the Court relied on four main factual assertions to reach its determination which neither the purported grounds of opposition nor the submissions respond to.
10. Mr. Havi also contends that the arguments raised by the DCI and the AG were raised by the Director of Public Prosecution (DPP) in their grounds of opposition dated August 31, 2021 and written submissions dated October 21, 2021. The points of law being raised by the DCI and the AG were conclusively disposed of in the Judgment.
11. Mr. Havi relies on *Omote & another v Ogutu* (Civil Appeal E005 of 2021) [2022] KEHC 16441 (KLR) (19 December 2022) (Ruling) and *Jeremiah Chelanga (Suing as the Guardian Ad Litem of John Chelanga Chepkonga) v Board of Management Kamatony Primary School & 3 others* [2021] eKLR. He urges the Court to dismiss the application with costs.

Determination

12. This application seeks a review of the judgment delivered on December 15, 2023 on grounds that there is an error apparent on the face of the record. The error identified is that the Court did not consider the response and submissions filed by the DCI and the AG despite being on record.
13. The application is opposed on the basis that there is no error apparent on the face of the record to warrant granting the application.
14. The jurisdiction of the Court to review its decision is not provided for under the *Constitution* or *Constitution of Kenya (Protection of Rights and Fundamental Freedoms Practice and Procedure) Rules, 2013* (The Mutunga Rules). However, section 80 of the *Civil Procedure Act* (the Act) provides for the general power of the court to review its decisions.
15. Section 80 of the *Act* provides:



- Any person who considers himself aggrieved-
- a. By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred: or
 - b. By a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
16. Grounds on which an application for review may be made are provided for under Order 45 rule 1 of the *Civil Procedure Rules*. The Court may, in exercise of its review jurisdiction and allow an application for review if the applicant demonstrates that there is a mistake or error apparent on the face of the record; discovery of new and important matter; or for any other sufficient reason. A review application cannot be based on a point of law.
17. In *Pankras T. Swai v Kenya Breweries Ltd* [2014] eKLR the Court of Appeal stated that an application for review cannot be based on grounds of law since these are grounds for appeal to the Court of Appeal which has the power to review decisions on appeal.
18. In *Benjoh Amalgamated Ltd & another v Kenya Commercial Bank Ltd* [2014] eKLR, the Court of Appeal again stated that the basic philosophy inherent in the concept of review is the acceptance of human fallibility and acknowledgement of frailties of human nature and sometimes possibility of perversion that may lead to miscarriage of justice.
19. In that respect, the Court stated:
- (27) In the High Court, both the *Civil Procedure Act* in section 80 and the *Civil Procedure Rules* in Order 45 rule 1 confer on the court power to review. Rule 1 of Order 45 shows the circumstances in which such review would be considered range from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High Court greater amplitude for review. (emphasis).
20. In *National Bank of Kenya Ltd v Ndungu Njau* [1977] eKLR, the Court of Appeal further stated that 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.
21. The Court of Appeal added that it is not a sufficient ground for review where the applicant thinks another Judge may have taken a different view of the matter or that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law.
22. The jurisprudence from the decisions cited above is that an application for review should be premised on the three limbs in Order 45 rule, namely error, or mistake apparent on the face of the record, discovery of new matters or any other sufficient reason.
23. In the application before this Court, the main argument by the DCI and the AG is that there is a mistake or error on the face of the record because even though they had filed grounds of opposition and written submissions, they were not considered. This is so because the Court stated in the judgment that they did not oppose the petition.



24. That is, the response and written submissions were not on both the file and online platform thus the Court made the decision without considering their response and arguments, thereby condemning them unheard.
25. I have gone through the application and the judgment sought to be reviewed. Grounds of opposition by the DCI and the AG are not on the record. I have again, for avoidance of doubt, checked the record of the E-filing (CTS) portal for this case. There are no grounds of opposition dated 24th August 2021 or written submissions dated 23rd May 2022 that were filed on behalf of the DCI and the AG.
26. Indeed, the Court (Mrima, J.) considered the petition and pleadings filed by parties and was satisfied that the DCI did not take part in the proceedings since there was no response and submissions filed on behalf of their behalf (para 44), thus decided the petition on the basis of the pleadings before court.
27. Having myself perused the record again and checked the CTS, I have not been able to trace the grounds of opposition or submissions that were allegedly filed before the judgment was delivered. I am therefore not satisfied that the DCI and the AG have demonstrated the apparent error or mistake on the face of the record that would justify exercise of the Court's review jurisdiction in their favour.
28. The DCI and the AG merely wanted the Court to review the judgment as a way of reopening the matter so that they could have a second chance by blaming the Court for no mistake of its own after they squandered the opportunity to respond the petition.
29. It is also my respectful view, that even if the Court had failed to consider the response and submissions by the DCI and the AG as alleged, that would not be a ground for review but for appeal. The grounds raised in support of the application are not grounds for seeking the exercise of the Court's jurisdiction. These ground could, at best, support an appeal.
30. In the premise, having considered the application, the response and submissions, the conclusion I come to, is that the application has no merit. It is declined and dismissed with costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH 2024

E C MWITA

JUDGE

