REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL CASE NO. 39 OF 2005

FRANCIS KIBURI MUCHEKE..... PLAINTIFF

-V-

POLICE COMMISSIONER

PROVINCIAL POLICE OFFICER EASTERN PROVINCE

PS OFFICE OF THE PRESIDENT INTERNAL SECURITY

AND PROVINCIAL ADIMINISTRATION

THE ATTORNEY GENERAL.....DEFENDANTS

R U L I N G

1. Before me is a Motion on notice dated 8th November 2017, brought under to ***Order 45 Rule 1, 2 and 51 Rule 1 of the Civil Procedure Rules and Section 3, 3A and 80 of the Civil Procedure Act.*** The applicants seek a review of the judgment of Makau J, made on 28th May 2015, in which the court awarded the plaintiff Kshs.5,064,000/= for lost earning/income up to retirement age.

2. The application was based on the grounds on the face of it and the affidavit of Janet Kung'u, a state counsel attached to the Attorney General's chambers and who has the conduct of this matter on behalf of the applicants. The grounds were that; there were errors apparent on the face of the record; that ***section 50 of the Employment Act*** provides that, in considering a claim of unfair termination, the Industrial Court shall be guided by the provisions of ***section 49 of the Employment Act;*** that in the premises, awarding the plaintiff salary loss for a period of 25 years up to retirement was contrary to law thus unjustly enriching the plaintiff.

3. The application was argued by way of written submissions. It was submitted for the respondent that in the circumstances of this case, there was no error or omission that was self-evident; that in essence, the application was pegged on an alleged failure by the court to apply the law correctly thereby faulting the decision on a point of law which is a ground for appeal and not review.

4. It was further submitted that the applicants had not raised any new evidence in their application to warrant a review; that all the applicants had raised was a point of law regarding the alleged contravention of ***section 49 of the Employment Act***. As regards sufficient reason, it was submitted that the same must be viewed in the context of ***section 80 of the Civil Procedure Act*** which confers an unfettered right to apply for review and that no sufficient reason had been disclosed to warrant any review of the impugned judgment.

5. The applicants did not file any submissions despite having been given ample time to do so.

6. I have carefully considered the affidavit and the submissions on record. This is an application for review of the judgment made on 28th May 2015. The principles governing such an application are well known that; there has to be an error apparent on the face of the record; that there has been discovery of new evidence that was not available at the time the decision was made and that there is sufficient reason. The gist of the applicants' complaint was that ***section 50 of the Employment Act*** was not applied. That that section provides that, in considering a claim of unfair termination, the Industrial Court should be guided by the provisions of ***section 49 of the Employment Act.***

7. It was the applicant's contention that the said section provides remedies for wrongful dismissal or unfair dismissal as; payment of equivalent the number of months wages not exceeding 12 months based on gross wages, reinstatement and re-engagement. On this basis, the applicants contended that there was an error apparent on the face of the record.

8. Contrary to the long submissions by the respondent, the applicants did not invoke the other grounds for review under ***Order 45.*** The applicant's only contention was that there was an error apparent on the face of the record. The issue for determination therefore is, whether there is an error apparent on the face of the record? Can an error of law be considered to be an error envisaged under ***Order 45?***

9. In ***Chitaley & Rao in the Code of Civil Procedure (4th Edn) Vol. 3, pg 3227,*** the authors explain the distinction between a review and an appeal as follows: -

> ***"A point which may be a good ground of appeal may not be a ground for an application for review. Thus, an erroneous view of evidence or of law is no ground for a review though it may be a good ground for an appeal".***

10. Closer home, in ***Pancras T. Swai v Kenya Breweries Limited [2014] eKLR,*** the Court of Appeal held: -

> ***"It seems clear to us that the appellant, in basing his review application on the failure by the Court to apply the law correctly faulted the decision of the court on a point of law. That was a good ground for appeal and not ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a Judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal will be exposed to attacks in the courts in which they were made under the guise of review when such courts are fuctus officio and have no appellate jurisdiction".***

11. It is clear from the foregoing that, an error of law is not akin to an error apparent on the face of the record to warrant a review. It is a good ground for appeal. In the present case, the applicants' complaint is the alleged non-application of ***sections 49 and 50 of the Employment Act***. This, as was rightly contended by the respondent, could only be a ground for appeal and not review.

12. In this regard, I am not satisfied that the applicants have made out a case to warrant the review of the judgment of Makau J. made on 28 th May 2015.

13. Accordingly, the application dated 8th November 2017, is hereby dismissed with costs.

DATED and DELIVERED at Meru this 8th day of November, 2018.

A. MABEYA

JUDGE