Opondo v Rift Valley Railways Ltd (Civil Appeal 5 of 2017) [2023] KECA 170 (KLR) (17 February 2023) (Judgment)

Neutral citation: [2023] KECA 170 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 5 OF 2017

K M'INOTI, GWN MACHARIA & KI LAIBUTA, JJA

FEBRUARY 17, 2023

BETWEEN

MUNAYI ISAAC OPONDO .... APPELLANT

AND

RIFT VALLEY RAILWAYS LTD .... RESPONDENT

(Appeal from the ruling and order of the Industrial Court of Kenya at Nairobi (Kosgey, J.) dated 15th June 2012 in I.C.C. No. 11 of 2010)

JUDGMENT

1. The appellant, Munayi Isaac Opondo, is aggrieved by the ruling and order of the Industrial Court, the predecessor of the Employment & Labour Relations Court, dated June 15, 2012. By that ruling, Kosgey, J. dismissed an application by the appellant for review of the court's award dated September 12, 2011, but directed each party to bear its own costs.

2. The short background to the appeal is that on January 8, 2010, the appellant filed in the Industrial Court a claim against the respondent, Rift Valley Railways Ltd, for wrongful dismissal. He prayed for retrospective reinstatement and payment of pecuniary loss suffered from the date of dismissal until the date of reinstatement. After hearing the claim, by its award dated September 12, 2011, the Industrial Court found that, although the respondent was justified in taking disciplinary measures against the appellant, dismissal was inappropriate and unjustified in the circumstances of the case. The court further found that the remedy of reinstatement was not appropriate because the relationship between the parties had irretrievably broken down. Accordingly, the court ordered the respondent to reduce the appellant's dismissal to normal termination of employment and pay him his terminal dues, to with, one month's pay in lieu of notice, and gratuity for the service rendered to the respondent and its predecessor, the Kenya Railways Corporation. Each party was ordered to bear its own costs.

3. On January 10, 2012 the appellant applied for review of the award on the ground of discovery of new evidence since the rendering of the award. He averred that his union had not represented him properly and had failed to seek important prayers and remedies, namely maximum compensation and damages for loss of employment. He also contended that the court made a glaring error by failing to award those remedies, yet he had prayed in his claim for "any other award" that the court may deem fit to award. The respondent opposed the application contending that it was an appeal rather than an application for review, and that there was no new evidence that the appellant could not have discovered by exercise of due diligence.

4. The court considered and dismissed the application and, yet again, directed each party to bear its own costs. The court found that the appellant had not presented any new matter that would justify review of the award. The appellant was still aggrieved and filed the present appeal founded on three grounds of appeal in which he contends that the ruling was inconsistent with the award; that both the ruling and the award were "inconsistent with written laws and judicial precedent in similar matters"; and that the process of review was flawed and unlawful ab initio.

5. At the on-line hearing of the appeal on January 24, 2023, neither the appellant nor the respondent appeared, although both were duly served with a hearing notice on January 11, 2023. The appellant had already filed his written submission dated September 17, 2021, but the respondent did not file its submissions.

6. In his written submissions, the appellant contends that having found that the relationship between him and the respondent had irretrievably broken down, and that it was imprudent to order reinstatement, the court ought to have awarded him actual pecuniary loss suffered, but it failed to do so. Instead, the court awarded remedies that are not provided in law for unprocedural dismissal. The appellant further argues that, as a result of those errors, he was underpaid his terminal benefits and that it was his hope that the review application would remedy those defects.

7. It is the appellant's further submission that there were contradictions between the findings in the award and the ruling on the review application, and that the court awarded a remedy that is not provided in law for termination of an employee's service. He faults the factual findings of the court both in the ruling and the award as regards his dismissal and the reasons therefor. He also blames his trade union, which had previously represented him before the trial court, for "ineptitude in pleadings", but contended that he was entitled to bring to the attention of the court issues that the trade union had failed to plead.

8. The appellant concluded by urging this court to award him 12 months' compensation for dismissal and damages for the years of service that he was expected to have served the respondent. He also prayed for gratuity for the period he had worked for both the respondent and its predecessor, as well as his underpaid salary.

9. We have considered the award of the trial court, the ruling on review, the grounds of appeal and the appellant's written submissions. From the outset, we have no hesitation in holding that what the appellant presented before the trial court after the reading of the award was an appeal disguised as an application for review. Rule 32 of the repealed *Industrial Court Procedure Rules,* 2010 allowed review of a judgment, award or order on only the following five grounds:

    1. Discovery of a new and important matter of evidence which, after the exercise of due diligence, was not within the knowledge of the person applying for review or could not be produced by him at the time when the decree was passed or the order made;

    2. Some mistake or error apparent on the face of the record;

3. The award, judgment or ruling is in breach of any written law;

4. The award, judgment or ruling requires clarification; and

5. Any other sufficient reason.

10. From the record before us, the appellant's application for review was founded on the first ground above, namely, discovery of new and important matter of evidence. It was his contention that new matter had come to light after the rendering of the award, which showed that his trade union had misrepresented his case and had not properly represented him by failing to seek important prayers, namely maximum compensation or damages for loss of employment. He also argued that, even on its own, the court ought to have awarded those remedies because he had prayed for any "other award that the court deemed fit to grant".

11. The learned judge found, properly in our view, that what the applicant presented was not new and important matter of evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made. He reasoned that the appellant attended court with the union officials and therefore could not claim not to have known of the claim or the pleadings until after delivery of the award. In addition, the court noted that nothing stopped the union or the applicant from applying to amend the claim to include whatever prayer they wished to include.

12. In *Rose Kaiza v. Angelo Mpanju Kaiza* [2009] eKLR, this Court quoted with approval the following passage from Mulla's Commentary on the *Indian Civil Procedure Code,* 15th Ed. at page 2726 on the extent and limits of review on account of discovery of new evidence:

> "Applications on this ground must be treated with great caution and as required by r 4(2)(b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a_discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was notwithin his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."Emphasis added.
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> (See also *D.J. Lowe & Company Ltd v. Banque Indosuez*,CA No. Nai. No 217/1998).

13. We agree with that reasoning. The appellant did not present any new and important matter that was not within his knowledge at the time of the hearing, or that he could not have discovered with the exercise of due diligence. All the other issues argued by the appellant before the trial court and before us are matters fit for an appeal rather than for an application for review.

14. In the circumstances, we find no merit in the appeal and dismiss it in its entirety. We would not have hesitated to award costs against the appellant for this unmeritorious appeal, but since that the respondent did not appear to defend the same, we make no orders on costs.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2023.

K. M'INOTI

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JUDGE OF APPEAL

DR. K I. LAIBUTA

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR