IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KARANJA & KANTAI, JJ.A)

CIVIL APPEAL NO 319 OF 2017

BETWEEN

CSL.....APPELLANT

AND

CASN.....RESPONDENT

(Being an Appeal against the Ruling and Order of the Employment and Labour Relations Court of Kenya at Nairobi (Hellen Wasilwa, J.) dated and delivered on 7th September 2016

in

E.L.R.C. Cause No. 1443 of 2015)

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JUDGMENT OF THE COURT

1. This is an appeal from a ruling and order of the Employment and Labour Relations Court (ELRC), delivered on 7th September 2016, following an application by CAN (the respondent), seeking review of its judgment, delivered on 13th June, 2016, to include an award of damages for sexual harassment as pleaded in the statement of claim. In the said ruling, the learned Judge granted orders allowing the application for review and awarded the respondent Kshs. 1,000,000 as damages for sexual harassment.

2. The undisputed facts of this case are that the respondent was employed by CSL (the appellant), in the position of LPO/ Receiving clerk on a monthly pay of Kshs. 15,000 which was later raised to Kshs. 27,272.70.

3. According to the respondent, she was constantly sexually harassed by various staff members of the appellant some of who were part of the management team. The genesis of the suit before the ELRC was that on 16th March, 2015 the respondent fell ill and after seeking medical attention, she was granted sick leave for three days. On reporting back to work, she was served with a Notice to Show Cause for her absence. Despite providing documentary evidence showing that she had attended hospital for treatment, she was summarily dismissed on 21st July, 2015. To her mind, the dismissal had nothing to do with her absence from work but had everything to do with a complaint she had made against one Pius Patel for sexually harassing her. The fact that she had raised the complaint with the Head Office instead of her Department Manager and Supervisor had not been received well by the Human Resource Manager, one Ms. Jane Mwangi who had castigated her verbally for doing so.

4. Following her termination, the respondent filed the statement of claim dated 17th August, 2015 seeking *inter alia* reliefs as follows;

a) *A declaration that the respondent was entitled to issue a policy statement on sexual harassment and/or incorporate the same in their Contract of Service and failure to do so violated section 6 of the Employment Act, 2007;*

b) *A declaration that the respondent's action in dismissing the claimant from employment was unlawful and unfair;*

c) *The sum of Ksh. 422,726.85;*

d) *Damages for sexual harassment*

e) *Certificate of service.*

5. In support of her case the respondent argued: that her appointment letter lacked a policy statement on sexual harassment contrary to the provisions of **Section 6(2)** of the Employment Act 2007 and that the policy adduced by the appellant in evidence was not authentic; that her dismissal was procedurally and substantively unfair as no reasons were given to her and that it was her act of submitting a letter complaining of sexual harassment that led to her being issued with the Notice to show Cause. Further, that the same was a desperate attempt to cover up and protect the management as the appellant had no legitimate cause for firing her and; that the burden of proof was upon the appellant to justify her dismissal. Further, that she was never accorded a disciplinary hearing nor was her complaint of sexual harassment addressed.

6. The appellant, on the other hand, vehemently opposed the claim asserting that: it's Code of Conduct comprehensively set out what constituted sexual harassment and the venue for seeking redress; that the respondent never made any allegations of sexual harassment to the appellant; that the respondent was absent from duty on 16th March, 2015 without permission and only raised the allegations of sexual harassment in an attempt to disparage the disciplinary process invoked by the appellant. Further, that the respondent failed to provide documentary evidence to support her allegations that she had sought medical attention on the material day; that upon termination of her employment the appellant offered her salary arrears in full and final settlement which she declined. Additionally, that the respondent was only entitled to such arrears and not the compensation for unfair termination.

7. Upon consideration of the rival submissions by the parties, the trial Judge discerned the issues for her determination to be: whether there were valid reasons to summarily dismiss the claimant; whether due process was followed; what remedies if any the respondent was entitled to and whether the appellant had a valid sexual harassment policy and if not what was the implication in law. On the issue of unfair termination, the Judge found the appellant's reasons for dismissing the respondent invalid given that she was dismissed for seeking help at the appellant's head office instead of reporting the matter to her immediate boss.

Further, that the respondent was not accorded the due disciplinary process as envisaged under **Section 41** of the Employment Act. She concluded that the respondent's dismissal was unfair and unjustified in terms of **Section 45(1)** of the Employment Act. On the issue of the sexual harassment policy, the Judge found that the appellant did not have a Sexual Harassment Policy hence the provisions of **Section 6** of the Employment Act were applicable in the circumstances of the case. She further found the appellant in breach of **Section 88** of the Employment Act.

8. In view of the foregoing the learned Judge entered judgment as follows:

1. 1 month salary in lieu of notice = 27, 272.70/=

2. Salary for July 2015 = 27, 272.70/=

3. Service pay for 3 years being ⁄ x 3 x 27, 272.70 = 40, 909.08/=

4. 12 months' salary as compensation for unfair dismissal = 12 x 27, 272.70 = 327, 272.40/=

TOTAL = 422, 726.85/=

5. Plus costs and interests As for the issue of Sexual Harassment Policy, I do find the Respondents guilty of failing to have the Policy and I direct the Respondents to appear in Court to answer to the said charge."

9. In view of the last finding, the Judge fixed the matter for mention for further orders on 4th July, 2016. When the parties appeared before her on that day, pursuant to the earlier finding that the appellant was guilty of failing to put in place a sexual harassment policy, the respondent's director was ordered to pay a fine of Kshs. 30,000.00 and to incorporate a sexual harassment policy within 60 days.

10. By a motion on notice dated 5th July, 2016, the respondent applied for the review of the judgment under **Rule 32** of the Industrial Court (Procedure) Rules seeking orders, *inter alia,* that the judgment rendered on 13th June, 2016 be reviewed and that the claimant be awarded damages for sexual harassment as prayed for in the Statement of Claim. The respondent sought review of the judgment on the grounds, *inter alia,* that the learned Judge overlooked to award damages for the claim of sexual harassment for reasons that the said prayer was not sought despite the same having been specifically pleaded in the statement of claim and both parties having submitted on the same.

11. The pertinent paragraphs of the affidavit in support of the motion were as follows:

"2. THAT on 17th August 2015 I filed a statement of Claim… in which I sought inter alia my terminal dues and Damages for Sexual Harassment.

1. THAT the suit was heard and both the Respondent and I submitted on the issues including that of Sexual Harassment

…

6. THAT on 4th July 2016 this Honourable Court punished the Respondent's Directors and ordered them to pay a fine of Ksh. 30,000.00 and in corporate a Sexual Harassment Policy Statement…

7. THAT upon my Advocate enquiring as to the issue of the Damages for Sexual Harassment this Honourable Court stated obiter that if I had sought that prayer I could have been awarded the damages.

8. THAT the prayer for Damages for Sexual Harassment was sought as prayer (d) in my submissions. My Advocates on record submitted a figure of Kshs. 1,500,000.00 and the Respondent's Advocates submitted that if the Court granted the same it should only grant Kshs.500,000.00."

12. The respondent vide a replying affidavit sworn by one Jane Mwangi, its Human Resource Manager deposed that: the respondent's application did not satisfy the grounds for seeking a review as provided for under **Rule 32(1)** of the Industrial Court (Procedure) Rules, 2010 hence was incompetent in law; after delivery of the said judgment the court became *functus officio* and could not therefore review or alter its decision; the trial Court lacked jurisdiction to sit on appeal against its own decision; the respondent's claim for damages for sexual harassment was a factual issue that required re-examination of evidence by the court and that review of the judgment would substantially affect the substance of the judgment and would essentially amount to an appeal and; the alleged obiter was not part of the judgment and neither was it a ground for seeking review.

13. The learned Judge in determination of the application held that she had made an innocent mistake in not awarding damages with respect to the subject prayer even after determining that the appellant was guilty of failing to incorporate a sexual harassment policy. On the issue that the court was *functus officio* the learned Judge held that the principle of *functus officio* forbids the court from adjudicating over the same issue more than once. Further, that the issue of sexual harassment had already been adjudicated upon and a determination made and in determining the issue, the court was not re-opening the matter. Further, that the appellant had also submitted on the issue during the trial of the substantive suit. In view of the foregoing, the learned Judge held that this was a proper case for review consequently allowed the application in favour of the respondent and awarded damages of Kshs. 1,000,000.

14. It is in light of the above findings that the instant appeal was preferred. The appeal is premised on 10 grounds which in the main fault the learned for: failing to find that the respondent's application did not satisfy the threshold set under **Rule 32** of the Industrial Court (Procedure) Rules, 2010; failing to find that the trial court was *functus officio*; failing to find that the trial court essentially was being called upon to sit on appeal in addressing the issue of damages for sexual harassment and; in finding that the respondent was entitled to the damages as prayed and that the sum of Kshs. 1,000,000 was inordinately high.

15. The instant appeal was canvassed by way of written submissions with brief highlights by learned counsel, Ms. Akeng'a appearing for the appellant and Mr. Gomba for the respondent.

16. Urging the Court to allow the appeal, Ms. Akeng'a submitted that the learned Judge erred in failing to find that the respondent's application did not meet the threshold of the provisions of **Rule 32** of the Industrial Court (Procedure) Rules, 2010. She contended that the Judge in considering the application held that failure to award damages for sexual harassment was an innocent mistake. She urged that a mistake or an error on the face of the record denotes an error on a substantial point of law, which was apparent, and with no ambiguity. She relied on the case of **Wanjiru Gikonyo & 2 Others v. National Assembly of Kenya**, **Nairobi HCCC Pet No. 453/2015.**

17. Citing the case of **South African Transport and Allied Workers Union Obo TB Mbatha & 52 Others v. Transnet Limited t/a Transnet Capital Projects & 3 Others Labour Court of South Africa [2014] ZALCJHB] 443** counsel submitted that once the Court pronounced itself on the judgment dated 13th June, 2016 it became *functus officio* and therefore could not alter and review its own decision as it would essentially be sitting on appeal. That the proper recourse for the respondent would be through an appeal against the said judgment.

18. Counsel submitted that the trial court erred in finding that the respondent had been sexually harassed solely based on its findings that the appellant did not have a valid sexual harassment Policy contrary to **Section 6** of the Employment Act. She urged that the respondent's allegations of sexual harassment were unfounded since the appellant had a Code of Conduct dealing with sexual harassment and that the respondent was aware of the same. Further, that despite the appellant having a Code of Conduct providing for redress for cases of sexual harassment, the trial court found that the same was deficient. She contended that the respondent, prior to her termination, never raised the issue of sexual harassment and that the same was only raised in her demand letter, statement of claim and submissions during trial.

19. Counsel submitted that the trial Judge in her judgment dated 13th June, 2016 never analyzed the evidence of the rival parties on record pertaining to the allegations of sexual harassment in order to soundly determine whether the claims were well founded. In view of the above, counsel urged the Court to allow the appeal.

20. In a bid to demonstrate why the appeal should be dismissed counsel for the respondent submitted that the respondent's grounds for review were based on mistake on the part of the court. He contended that this was a valid ground for review under **Rule 32** of the Industrial Court (Procedure) Rules, 2010. He relied on the case of **Peterson Ndung'u & 5 Others v. the Kenya Power and Lighting Company Ltd, Civil Appeal No. 208 of 2015.**

21. On the issue as to whether the trial court was *functus officio* counsel cited the Supreme Court case of **Raila Odinga & 2 Others V. Independent Electoral & Boundaries Commission & 3 Others 2013 [eKLR]** where the principle of *functus officio* was aptly discussed. He submitted that in view of the principles in the aforementioned case, the trial Judge properly exercised her discretion in reviewing her judgment in the manner she did.

22. On the question whether the trial Judge erred in finding that the respondent was sexually harassed, counsel submitted that the learned Judge properly exercised her discretion in considering the evidence adduced during trial regarding the issue of sexual harassment. The Judge had satisfied herself that the issue of sexual harassment had been fully canvassed and the Judge's failure to pronounce herself on the same was an error on the face of the record. In conclusion, counsel urged the Court to dismiss the appeal.

23. In view of the foregoing it is evident that the appellant is calling upon this Court to interfere with the learned Judge's exercise of discretionary power of review. In **Mbogo v Shah 1968 EA 93,** Sir Charles Newbold stated the applicable principle thus:

> **"A Court of Appeal should not interfere with the exercise of the discretion of a trial Judge unless it is satisfied that a judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been mis-justice."**

24. In essence, the main issue for our determination is whether the learned Judge properly exercised her discretion in allowing review. The trial court in review of its own decision was to exercise its discretion within the ambit of **Rule 32** of the Industrial Court (Procedure) Rules, 2010 which provides as follows:

> **"32. Review.**
>
> **(1) A person who is aggrieved by a decree or an order of the Court may apply for a review of the award, judgment or ruling –**
>
> **(a) If there is a 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; or**
>
> **(b) <u>On account of some mistake or error apparent on the face of the record</u>; or**
>
> **(c) On account of the award, judgment or ruling being in breach of any written law; or**
>
> **(d) If the award, the judgment or ruling requires clarification; or**
>
> **(e) For any other sufficient reasons.**
>
> **(2) A person seeking review of a decree or decision of the court shall apply to the court by notice of motion supported by affidavit and the Court shall proceed to hear the persons in accordance with section 16 of the Act."** (Emphasis supplied)

25. A keen reading of the above provisions shows that the court's jurisdiction on review is circumscribed by the definitive limits fixed by the law as set out under **Rule 32** above. Indeed, a review ought not to be done in a manner that can be construed as an appeal in disguise whereby an erroneous decision is determined afresh and fundamentally altered. It can only lie if one of the grounds as set out above is demonstrated. The purpose is not to enable a Judge rewrite a judgment or ruling because the initial one is erroneous but rather to address a new and important matter, address a mistake on the record or where established, any other sufficient reason.

26. The Court in exercise of such discretion must establish whether there is an evident omission in need of rectification so as to meet the ends of justice and prevent a miscarriage of justice; it must correct weighty and unmistakable or obvious errors. **See: <u>Nduhiu Gitahi V. Waruguongo</u> [1988] KLR 621.**

27. The appellant faulted the Judge for awarding the respondent damages for sexual harassment. Counsel submitted that the learned Judge in her decision had not gone into the details of the allegations of sexual harassment yet in her determination as to whether or not to review her judgment to include the award, she went into the merits of the case hence finding that the respondent was sexually harassed in the absence of sufficient evidence.

28. It is trite that a party seeking to institute a suit before a court of law does so through pleadings. It is also trite that parties are bound by their pleadings and that the court can only grant what is prayed for. It is evident from the face of the respondent's statement of claim that she specifically pleaded her allegations of sexual harassment. Further, a careful perusal of the parties' submissions shows that this was an issue raised before the trial court and was within the ambit of issues to be considered by the trial Judge. The appellant does not deny the contention by the respondent that it submitted on the said allegations.

Indeed, from the submissions on record it is evident that the appellant's counsel had even proposed a sum of Ksh. 500,000.00 as damages for sexual harassment as opposed to the Ksh 1,500,000.00 sought by the respondent.

29. A simple reading of the judgment delivered indicates that the court in its determination as to whether the respondent's termination was unlawful established that the said termination was indeed unlawful due to the fact that the appellant dismissed the respondent after she raised complaints of sexual harassment. This is an indication that the court looked into the allegations of sexual harassment and made findings that indeed the respondent had been sexually harassed. The omission to grant damages under the head of sexual harassment can only be inadvertent and would therefore qualify as an error on the face of the judgment since the issue was pleaded, submitted upon and determinations reached by the court.

30. Allegations of sexual harassment are serious allegations that beg the determination of a court when pleaded and failure to determine such allegations would occasion a miscarriage of justice. See: **<u>Nduhiu Gitahi</u> <u>v. Waruguongo</u>** (Supra).

31. The appellant further challenged the review stating that it was based on findings that the trial court reached while it was *functus officio.* In

Menginya Salim Murgani V. Kenya Revenue Authority, Civil Application No. 4 of 2014, the Supreme Court held that:

> **"It is a general principle of law that a Court after passing Judgment, becomes functus officio and cannot revisit the Judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law."**

32. As seen above, a careful reading of the court's decision of 13th June, 2016 shows that the Judge addressed the issue of sexual harassment and made final findings. The court did not therefore re-try the same issues leading to different findings/determination. Nor did the learned Judge determine, on review, issues that had not been pleaded and canvassed during the trial. The learned Judge confirmed in her Ruling that failure to award damages for sexual harassment was "*an innocent mistake.*" We cannot fault her for rectifying an innocent mistake she acknowledged to have made.

1. As a first appellate Court, we have also reconsidered the circumstances leading to the claim of sexual harassment and the award of Ksh. 1,000,000.00 by the learned Judge. We are not persuaded that the amount awarded was excessive.

34. Ultimately, we find no merit in this appeal and dismiss it accordingly with costs to the respondent.

Dated and delivered at Nairobi this 24th day of January, 2020.

A. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

S. **ole KANTAI**

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR