



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: GITHINJI, VISRAM & KARANJA, J.J.A**

**CIVIL APPEAL NO. 267 OF 2012**

**BETWEEN**

**BARBERE ISAAC WANTAHE.....APPELLANT**

**AND**

**TARGET GUARDS.....RESPONDENT**

***(An appeal from the Award of the Industrial Court of Kenya at Nairobi (James Rika, J.) given on 3<sup>rd</sup> August 2012***

***in***

***Industrial Court Cause No. 59 of 2011)***

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**JUDGMENT OF THE COURT**

[1] **Barbere Isaac wantahe** (appellant) was an employee of **Target Guards** (the respondent), a security company, where he was employed as a trainee security guard on 10<sup>th</sup> October, 2009 and confirmed later on 1<sup>st</sup> November, 2009.

In his memorandum of claim dated 14<sup>th</sup> January, 2011 filed before the former Industrial Court of Kenya, now the Employment and Labour Relations Court (ELRC) he avers that his monthly salary was Ksh. 5,750/=. He also avers that he was not given a letter of appointment , nor did he sign any contract. He appears to have worked for one year, as his services were terminated on 2<sup>nd</sup> December, 2010.

[2] We wish to point out from the onset that even as we appreciate that the appellant appeared in person, both here and in the court below, his pleadings are so badly drafted that it is difficult to contemplate some of the contents of his pleadings. We shall nonetheless endeavour to wade through them and make the best out of them.

Although the appellant only talks of Ksh. 5,750/= as his basic salary in his memorandum of claim, in his *viva voce* evidence in court, he stated that his monthly salary was Ksh. 7,500/=. He told the court that he received the Ksh. 5,700/= for one year but went to see the manager on 25<sup>th</sup> May, 2010 and demanded to

know why he was being underpaid. He said that the manager told him that the respondent would not raise his salary. He consequently lodged a complaint with the Ministry of Labour and according to him, the Labour Office advised him to go and terminate his employment. He therefore gave his employer notice to terminate employment, which notice the employer accepted. At the end of his notice period, he was given a cheque for Ksh. 8,300/= which he refused to accept and went to court and filed his memorandum of claim in which he claimed the following as his terminal dues:-

- (a) *One month salary of November 2010 Ksh. 5,750/= per basic salary*
- (b) *One month salary in lieu of notice pay for 2010 Ksh. 5,750/= per basic salary*
- (c) *Salary arrears from July up to December 2010 Ksh. 15,957/=*
- (d) *Housing allowance pay for 15% 1 year of the basic salary Ksh. 12,000/= per 1 year*
- (e) *Overtime allowance pay per 4 hours in a day = 36/= per one hour x 4 hours in a day = Ksh. 144 per day x 30 days per month = 4,320/= per month x 12 months = 51,840/= per one year*
- (f) *Weekly rest allowance pay per 4 days in a month = Ksh. 144/= + 4 days = 288/= per normal overtime in a day x 48 days in a year = 32,152/= per year rest*
- (g) *Public Holiday allowance pay per 1 year = 640 per one holiday x 9 days in holiday = Ksh. 5,841/= per 1 year*
- (h) *Peorala (sic) Leave per year pay Ksh 13,680/= per 1 leave + 1600/= Travelling allowance per 1 year + 15,280/= per full leave 1 year*
- (i) *Subcontract per year pay Ksh. 7,400/= per 1 year*
- (j) *Severance pay per year pay Ksh. 7,400/= per 1 year*
- (k) *Uniform deduction per 1 year refunded pay = Ksh 3,000/=*
- (l) *NSSF & NHIF Contributions per year pay = Ksh 7,200/= (sic)*

He also claimed for compensation for wrongful dismissal, which he says should be a maximum of twelve (12) months wages plus costs and interest of the suit. He denies signing any discharge voucher.

[3] In its statement of response to the appellant's claim, the respondent denied the appellant's claim. It stated that the appellant voluntarily resigned from its employment through a hand written letter dated 1<sup>st</sup> November, 2010, which the respondent annexed to the response. The respondent accepted the resignation vide its letter dated 5<sup>th</sup> November, 2010 which was also annexed, and signed a discharge form dated 10<sup>th</sup> December, 2010 which was also annexed to the response.

One George Kamau Mwangi the operations manager of the respondent testified on behalf of the respondent. He told the court that he was employed by the respondent in 1996 but had left employment and only rejoined the company on 18<sup>th</sup> February, 2011. He did not therefore find the appellant working for the company when he rejoined. He could not produce the appellant's personal file in court as the same was being held at the police station for investigations following complaints of fraud.

[4] After hearing the parties, the court rendered its award dated 30<sup>th</sup> August 2011, and awarded the appellant "service pay at 18 days" salary for the year completed in service at Ksh. 3,980/= within 30 days of the delivery of the Award. The appellant's co-claimant was awarded Ksh. 75,461/=. It is worth noting that the appellants were not awarded any costs.

Subsequently, however, the claimants obtained warrants of attachment alleging that the sum awarded to them was Ksh. 173,352/=. The respondent moved to the court and was successful in having the execution stayed; but the court ordered that the decretal amount be deposited in court, which was done. The appellant's co-claimant collected his dues and exited from the matter.

[5] The appellant however filed an application for review of the award. The same was duly considered but dismissed by the court on grounds that the appellant failed to satisfy **Rule 32(1) of the Industrial Court (Procedure) Rules 2010**. The learned Judge found that the appellant had just cited figures which had not been supported by evidence. He found, like we have, that the claim was poorly crafted, and further that the appellant's evidence did not shed any light on the pleadings. The court for instance noted that the appellant voluntarily resigned from employment, and yet he was asking for notice pay!

It is the dismissal of that application that the appellant now appeals against.

[6] In his memorandum of appeal dated 9<sup>th</sup> October, 2012, the appellant assails the learned Judge for failing to review the award and grant to him all the orders he had

sought in his claim i.e *“one month salary for November 2010; uniform refunded amount, salary arrears, pro rata leave, house allowances, rest days, overtime allowances and public holiday allowances”*. He also seems to suggest that he availed additional evidence but the court erred in finding that the same was not sufficient to warrant a review of the award.

[7] When the appeal came up for hearing before us, the appellant told us that he wanted to be paid the amount of money tabulated at page 74 of the record of appeal amounting to Ksh. 88,929/=. Once again, he did not expound on why he thought he should be paid that amount after the Industrial Court found that he had not proved that he was owed that money. He also stated that he was relying on the letter at page 72, which is a photocopy of a letter dated 28<sup>th</sup> February, 2011 i.e after he had already filed his claim in the Industrial court. He also prayed for costs of the appeal and interest.

[8] On behalf of the respondent, learned counsel, Ms. Gachuru opposed the appeal. She reminded the Court that the appeal is not against the award itself but against the Ruling dismissing the application for review. Learned counsel maintained that the appellant had not proved before the trial court that he had come across some new and fresh materials which would have influenced the court to review the award. It was learned counsel's submission that the application for review failed to meet the

threshold contemplated under Rule 32 of the Industrial Court rules to enable the court grant the orders sought. She urged us to dismiss the appeal with costs to the respondent.

[9] We have considered this appeal right from the statement of claim, as filed to the Ruling in respect of the application to review the award, which Ruling is the subject of this appeal.

We sympathise with the appellant for the deficiencies in his pleadings, but at the end of the day, the court can only bend backwards to accommodate a litigant only where procedural technicalities are concerned, in the larger interests of substantive justice. We would nonetheless like to assure him that failure to succeed in his entire claim, as filed before the trial court was not on account of his bad pleadings, but purely on the facts presented to the court and the law.

The law is the law and it favours neither the rich, and the educated, nor the illiterate and the impecunious. Indeed lady justice is blind and administers justice equally to all those who find themselves at her mercy. We find it necessary to state this because as we noted at the beginning of this judgment, the pleadings before the court were very poorly crafted and did not lay out the appellant's claim clearly, and in some cases making his claim appear marred with dishonesty. For instance, as the trial Judge observed, why would the appellant lodge a claim for payment of notice while he is the one who actually wrote a letter of resignation and gave the employer notice? The said letter forms part of the record.

[10] That said, we note that there was no appeal against the Award itself. What is challenged before this

Court is the dismissal of the application for review. What we need to determine therefore is whether the learned Judge erred in not allowing the application and thus reviewing the award, as per the appellant's application.

Under **Rule 32(1) of the Industrial Court Act**, 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 on the following grounds:-

- (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) On account of some mistake or error apparent on the face of the record 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 required clarification; or*
- (e) For any other sufficient reasons.*

The appellant therefore needed to bring his application within the above parameters. In his application dated 13<sup>th</sup> January 2012, the appellant stated as follows:-

*“The applicant party (sic) being aggrieved by the award ... dated 30<sup>th</sup> August 2011 and issued on 30<sup>th</sup> August 2011 submits that the purported award is erroneous and does not accord to the prayers of the 2<sup>nd</sup> claimant.”*

When one looks at the memorandum in support of the application for review, it just breaks down the claim that was in the statement of claim. There was nothing new about the claim. There was no fresh evidence. It was the same claim that had been dismissed following full hearing. The claimant did not say whether there was any error on the face of the record; nor did he show any other sufficient cause to warrant review. The crux of the application was that he was not happy with the award, and wanted the learned Judge to award him all that he had prayed for regardless of whether there was evidence adduced in support of the claim or not. What we see here is a litigant who blindly stands by what he believes is his right and entitlement but does not even attempt to prove the same as required by law. The learned Judge found that the application did not meet the threshold required under **Section 32(2)**.

Did he err in so finding? We don't think so.

[11] We have reconsidered the said application and as we have noted earlier, it raises nothing new. It was the same claim that had been dismissed for lack of sufficient evidence that was re-lodged under the guise of an application for review. There was not even an iota of additional evidence introduced in the application by the appellant, as new and important material. He did not demonstrate that there was any error on the face of the record; he did not demonstrate that the learned Judge had failed to consider some material evidence, or considered some irrelevant evidence.

In our view, a bad claim is a bad claim however many times it is re-lodged in court. There was no evidence initially to support the claim. The appellant could not expect to clothe the same claim in a review 'apparel' and without adding any evidence, expect to get the orders which had been denied in the first instance.

Before this Court, the appellant only said he was relying on a photocopy of a letter, authored by somebody who was not even a witness in the trial court? That letter would not have been admissible in the trial court as it would have gone against the Evidence Act; it was not produced before the Judge in the review application, for whatever it is worth, nor can it be thrown to us for consideration at this stage.

We are unable within the confines of the law to make any findings in favour of the appellant, save from may be saving him from paying costs to the respondent.

In sum, we find this appeal totally devoid of merit. We dismiss the same but make no orders as to costs.

***Dated and delivered at Nairobi this 7<sup>th</sup> day of April, 2017.***

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

*I certify that this is a*

*true copy of the original.*

**DEPUTY REGISTRAR**