IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, G.B.M. KARIUKI & KANTAI, JJ.A.)

CIVIL APPEAL NO. 79 OF 2015

BETWEEN

DANIEL OKOTH…….……...……..APPELLANT

AND

KENYA NATIONAL COMMISSION

OF HUMAN RIGHTS..... RESPONDENT

(Being an appeal from the Ruling of the Industrial Court of

*Kenya at Nairobi (**Njagi Marete, J**.) delivered on 25th day of February, 2015*

in

Industrial Cause No. 1238 of 2012)

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JUDGMENT OF THE COURT

[**1**] This is an appeal from the ruling of the Industrial Court (**Marete, J.),** now renamed the Employment and Labour Relations Court, dismissing the appellant's application for review of an earlier judgment delivered on 20th November 2013.

[**2**] On 1st November 2010, the appellant was employed by the respondent as a Principal Human Rights Officer in charge of Media and Communication under a contract for five (5) years. By a letter dated 21st February 2012, the employment of the appellant was terminated for misconduct with effect from 21st March 2012, following a recommendation of a disciplinary panel. His appeal against the termination of employment was dismissed by appeal panel on 14th May 2012. On 23rd July 2012 the appellant filed a statement of claim in the Industrial Court alleging that the termination of the contract was unlawful and in breach of the contract. He claimed special damages of Shs. 8,650,999/-, general and aggravated damages.

The respondent filed a response and counter-claim denying the claim. By the counter-claim, the respondent alleged that the appellant negligently handled a number of preparatory works for the respondent's 7th Annual Human Rights and Democracy Awards that were initially set for 15th December

2011, postponed to February 2012 and cancelled on 21st January 2012, thereby occasioning significant financial loss and public embarrassment to the respondent. The respondent tabulated the particulars of the financial loss suffered amounting to Shs. 1,485,101/= which it claimed.

On 22nd October, 2012, the appellant filed a response to the counter-claim denying the allegations of negligence and financial loss and further denied the allegations that the alleged loss was attributable to his conduct.

[**3**] The suit was heard by way of written submissions. The appellant's written submissions were filed on 13th June 2013. With respect to the counterclaim, the appellant submitted that the disciplinary panel had found that the cancellation of the human rights awards was a result of default of the whole institution and could not therefore be attributed to the appellant.

The respondent filed its written submissions on 7th June 2013. As regards the counter-claim the respondent submitted thus;

> ***"the appeal panel noted in its report that as much as the claimant contributed to the failure of the awards his contribution was not to the level of 80% that the Commission Secretary had stated since there was also institutional failings that contributed to the failure, such as, failure to implement the revised Human Rights Award Policy in a timely manner, and committing sufficient funds to the awards in a timely manner. In the circumstances the respondent leaves it to the discretion of this Honourable Court to determine the percentage of liability of the claimant's contribution to the failure of the awards"***

[**4**] By a judgment delivered on 20th December 2013, the court dismissed the appellant's claim and allowed the respondent's counterclaim to the extent of 60% of the sum claimed with the result that the court gave judgment for the respondent for the net of Shs.891,060/60 with costs.

[**5**] By a notice of motion filed on 6th February 2014, the appellant applied for the review of the judgment under **Rule 32(1) (b) (c)** and **(e**) of the Industrial Court (Procedure) Rules on the ground that there was an error apparent on the face on the record.

The appellant identified two errors, namely failure to consider written submissions which the learned judge said were not traceable and a finding that the appellant had not attempted to file a defence to the counter-claim.

As regards the appellant's written submissions the court stated in the judgment thus:

> ***"On record now are the written submissions of the respondent. On 4th June, 2013, the respondent's advocates submitted that they had not been served with the written submissions of the claimant. These are to-date not traceable".***

As regards the counterclaim, the learned Judge said.

> ***"The negligence of the claimant visited as demonstrated above massive financial loss to the respondent. The claimant does not in any way attempt a defence on the counter-claim."***

The application for review was dismissed on 20th February, 2015.

[**6**] In dismissing the application, the learned judge said.

> ***"The absence of the written submissions by the claimant is not itself an error on the face of the record as submitted by the respondent. Again, all intimations of the court not accessing claimant's defence and the defence to the counter-claim is a misconception of the provisions of the judgment. This was intended to highlight the fact that the claimant did not come out of his***

way to support his case and defend the counter-claim."

The appeal is against that finding.

[**7**] The grounds of appeal raise three substantial issues, in essence, that, the learned judge erred in law and in fact;

(i) In finding that the two identified errors were not reviewable;

(ii) In failing to exercise his discretion judicially; and

(iii) In failing to appreciate that the two errors denied the appellant a basic human right of being heard on merit.

Mr. Ndege, the learned counsel for the appellant has filed extensive written submissions and cited authorities. The respondent's advocates have also filed written submissions which, Mr. Kenyatta, the learned counsel for the respondent relied at the hearing of the appeal. The respondent's counsel supports the finding of the learned judge and contends that if the appellant was genuinely aggrieved by the judgment delivered on 20th December 2013, the remedy was in lodging an appeal since the appellant was essentially questioning the substance and the merits of the judgment.

[**8**] Section 16 of its Industrial Court Act gives the court power to review its judgments, awards, orders or decrees in accordance with the Rules. As **section 3(1**) of the Act states, the principal objective of the Act is to facilitate the just, expeditious and proportionate resolution of disputes governed by the Act and the court is enjoined by section 3(2) to apply the overriding objective principle. Rule 32(1) of the **Industrial Court (Procedure) Rules 2010** stipulates the grounds upon which a right to review can be exercised. The appellant cited sub-paragraphs

(b) (c) and (d) of Rule 32(1) in the heading of the review application which allow review:

(b) On account of some mistake or error apparent on the fact of the record.

(c) On account of the award of judgment or ruling being in breach of any written

law; or

(d) If the award, judgment or ruling requires clarification, or

(e) for any sufficient reasons.

[**9**] In **J.M.K. v.M.W.M. & Another [2015] eKLR** relied on by the appellant this Court said at page 7 of the 3rd paragraph of the judgment:

> ***"It does not take much imagination to see that under section 16 as read with Rule 32, the Industrial Court is empowered to exercise its review jurisdiction on far much broader grounds than the High Court is allowed under Order 45 of the Civil Procedure Rules. Under rule 36(6), if the court allows an application for review its decision is to conform to the finding of the review or quash its decision and order that the suit be heard again."***

Thus, if the criteria for review as stipulated in Rule 32(1) is satisfied and the ground or grounds on which review is sought are established, it follows that a review which generally means a re-examination of the dispute, is effectively an appeal and the court can set aside the impugned judgment, ruling or order and make appropriate orders.

[**10**] The learned Judge had power to review the judgment delivered on 20th December, 2013, *inter alia*,

on account of mistake or error apparent on the face of the record. The word "**record**" in our view includes the entire trial proceedings including the pleadings, the evidence, exhibits, submissions and the judgment. As correctly submitted by the appellant's counsel, the error must be manifest and self evident without an examination or arguments to establish it. We would agree with the appellant that failure by the learned judge to take into account the written submissions and the appellant's response to the counter-claim respectively, which were already filed and which had the court stamp, signing receipt by the court would constitute a mistake or apparent error on the record and the judgment could be reviewed on that ground.

[**11**] The appellant is asking the Court to interfere with the exercise of discretionary power of review. In **Mbogo v Shah 1968 EA 93 Newbold** stated the applicable principle at p.96 G 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."***

Whether or not a decision of a judge is wrong or results in mis-justice would ultimately depend on the facts of each case.

[**12**] In this case, the learned judge framed four issues thus:

> ***"1. Was the termination of the claimant's employment unfair, unlawful and wrongful.***
>
> ***2. is the claimant entitled to the relief sought.***
>
> ***3. is the respondent entitled to counter-claim.***
>
> ***4. who bears the costs of the suit."***

Regarding the first issue, the learned Judge examined the grounds on which the appellant was subjected to disciplinary proceedings, the findings of the disciplinary panel, the appellant's grounds of appeal to appellate panel, the findings of the appellate panel and the grounds on which the claim in the Industrial Court was based and came to conclusion that the unfair termination of employment as stipulated in section 45 of the Employment Act had not been estlabihsed.

The entire and comprehensive proceedings of the disciplinary panel and the appellate panel, the documentary evidence and the respective finding were part of the record. The appellant was given an opportunity to defend himself and his defence and submissions in the appellate panel are contained in the respective proceedings which the appellant produced. This was the third time that the appellant was questioning the grounds of termination of employment. However, the learned judge did not have regard to the appellant's written submissions in his decision. In the circumstances, the failure by the learned judge to specifically refer to the written submissions did not occasion a failure of justice.

[**13**] However, the finding of the learned judge that the appellant did not in any way attempt a defence on the counter-claim is contradicted by the record. The appellant indeed filed a response to the counter-claim and submissions. It seems that it was the award of compensation that triggered the review application. The claim of compensation in the counter-claim was a new matter. The disciplinary panel did not recommend any compensation. The appellate panel had rejected the claim for compensation saying:

> ***"We find that unlike the respondent's view that the appellant was liable 80% for the failure of the activity – a figure which we hasten to add the respondent, seemed to draw from the air, the appellant's liability would definitely not be that high, relative to the liability of the institution. We do not find it necessary to proceed further on the question of liability since the respondent stated that he was not actually making any monetary claim on the appellant."***

By the counter-claim, the respondent revived a claim that it had abandoned and did not prove the extent of appellant's liability. The learned Judge did not only fail to give reasons for fixing the appellant's liability at 60% of the total claim but also assessed liability based on an incomplete record. In the circumstances, we find that the learned judge did not exercise his discretion judicially. We do not find it just to order a re-hearing of the counter-claim as the respondent has previously abandoned the monetary claim.

[**14**] In the premises, we dismiss the appeal against the termination of employment but allow the appeal in respect of the counter-claim only. The ruling of the Industrial Court is set aside. The application for review is allowed to the extent that the judgment entered against the appellant on 20th December, 2013 in the sum of Shs. 891,060/60 is set aside.

As regards the issue of costs, the appeal has partly succeeded. The order for costs in the judgment of 20th December, 2013 is set aside and substituted with an order for half of the costs of the claim payable by the appellant to the respondent.

The appellant is awarded half of the costs of both the review application and this appeal.

Those are the orders of the Court.

Dated and Delivered at Nairobi this 16th day of June, 2017.

E. M. GITHINJI

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JUDGE OF APPEAL

G.B.M. KARIUKI

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is atrue copy of the original

DEPUTY REGISTRAR