



**Mbataru v Plan International INC (Cause 509 of 2019)
[2024] KEELRC 832 (KLR) (15 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 832 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 509 OF 2019
NZIOKI WA MAKAU, J
APRIL 15, 2024**

BETWEEN

CATHERINE KARIMI MBATARU CLAIMANT

AND

PLAN INTERNATIONAL INC RESPONDENT

RULING

1. The Claimant/Applicant filed a Notice of Motion Application dated 7th November 2023 seeking to be heard for orders that this Honourable Court be pleased to review and/or set aside its judgment delivered in the suit on 19th September 2023 and substitute it with an order allowing the Claim as prayed. She further sought for the costs of this Application to be awarded to the Applicant. The Application was premised on the grounds set out therein and supported by the Claimant’s sworn Affidavit, wherein she averred that there is discovery of new and important evidence that was not within her possession at the time of the hearing of the suit. She explained that she had once gone to sign up for motorcycle riding classes given the nature of her job title as a Community Development Facilitator but was not allowed to take up the said classes because of the nature of her disability, that is, impaired right eye. That she then informed the Respondent of the predicament considering she was to be assigned a motorbike to enable her perform her duties and the Respondent asked for proof that her right eye was impaired. She went ahead to do a medical assessment whose results are as contained in the Report dated 30th July 2014 and which proves that she is a person living with disability. It was the Applicant’s averment that she submitted the Medical Assessment Report to the Respondent and was later issued with a Tax Exemption Certificate. That however, the Respondent knew she was visually impaired and is a person living with disability but deliberately failed to facilitate her transportation to work. She notified the Court that at the time of filing this suit, she had misplaced the said Persons with Disability Medical Assessment Report and Tax Exemption Certificate and was thus unable to produce the same as evidence.



2. Further, the Claimant/Applicant averred that it was not a mere coincidence that less than a year since the Respondent learnt she is a person living with disability, it informed her through its letter dated 21st July 2015 that she was to be switched to fixed term contract within the same position that she had been employed as a permanent employee. That the said fixed term contract was for a period of 1st August 2015 to 31st July 2018 and the Respondent did not explain the major shift in her employment. The Claimant further asserted that on 20th June 2018, she received an email from the Respondent on realignment of the Sponsorship Department and advising her to reapply for the position of Sponsorship Officer through an internal advertisement. She received a Contract Addendum on 5th July 2018 extending her contract to 30th September 2018 and on 13th August 2018, was invited to an interview that she attended on 23rd August 2018 despite having misgivings with her employment status. She averred that later, on 11th September 2018, she was informed through a call that she did not qualify for the said job and would thus not be retained after the end of 30th September 2018. The Claimant asserted that she was surprised to see an advertisement in a local daily newspaper on 19th September 2018 advertising the said position of Sponsorship Officer for which she had attended the interview. She contests the results of the interview all those who qualified were motorcycle riders, which she was not, and believes that the Respondent castigated ways of unlawfully terminating her employment based on her disability, which they saw as a liability on them. It was the Claimant/Applicant's averment that there are sufficient reasons for this Court to set aside or review the said Judgment and that there has been no unreasonable delay in the filing of the instant Application. In addition, that it is in the interest of justice and fairness that the Court upholds the constitutional guarantee of access to justice and for the Application to be allowed also in the interest of expeditious administration of justice.
 3. In response, the Respondent filed a Replying Affidavit of Ms. Grace Lintari sworn on 1st February 2024. Ms. Lintari averred that the Claimant's Application herein lacks merit because the alleged recent discovery of evidence was all along in the Claimant's possession or records or could be retrieved by the Claimant. Secondly, that no evidence has been availed to prove that the Claimant exercised any due diligence to adduce the alleged new evidence at the hearing or prior to the delivery of judgment. Lastly, the Claimant had all the time to adduce/retrieve the alleged newly discovered evidence since the matter was filed in 2019 and judgment was delivered on 19th September 2023, which is a period of more than four (4) years. It was Ms. Lintari's averment that the Respondent never discriminated against the Claimant since her initial employment in 1999 or since 2014 when she obtained the said documents supporting that she was a person living with disability. She thus believes that the alleged new evidence is immaterial as it does not rebut the fact that there was no discrimination on the part of the Respondent as correctly held by the Court in its Judgment. She posited that the Application is therefore not substantiated and has been brought as an afterthought as it alludes to documents the Claimant had possession of since 2014. She further averred that the orders the Claimant is seeking are an attempt to force this Court to make a judgment in her favour even though she failed to prove to Court that she is deserving of the orders she is forcing the Court to grant. Ms. Lintari thus asked the Court to disallow the Claimant's application.
 4. Claimant/Applicant's Submissions
- The Claimant/Applicant submitted that the main issue for determination before this Court is whether she has satisfied the grounds for review. She fronted that this Court has the power to review its decision, which power must be exercised judiciously in accordance with section 80 of the *Civil Procedure Act* and Order 45, rule 1 of the Civil Procedure Rules, 2010, both provisions stating as follows:

Section 80 - Review



Any person who considers himself aggrieved—

- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Order 45, rule 1:

Any person considering himself aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or 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, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay. (Emphasis by Applicant)

5. As regards the discovery of new and important evidence, it was the Applicant's submission that the effect of the Judgment dated 19th September 2023 is that she has suffered a miscarriage of justice. That the Court held that she neither proved discrimination nor unfair termination as she never revealed to the Respondent that she was a person living with disability after the Respondent claimed that it was not aware of her disability. That this allegation is false as the Claimant's disability is evident from her physical appearance alone and which disability she had been willing to demonstrate to this Court during hearing of the case. Moreover, she had averred that the Respondent was made aware of the disability through a Medical Assessment Report and therefore its failure to facilitate her transportation to work given the nature of her duties, was manifestly discriminatory and subjected her to unfavourable working conditions. The Claimant further submitted that whereas the Respondent contested her tax exemption and asserted that her final dues computation was taxed, she on the other hand testified that the final dues issued to her were subject to taxation as the only item she was exempted to pay tax was her income salary as provided under section 35 of the *Persons with Disabilities Act*, No. 14 of 2003. She notified this Court that she had since discovered the Tax Exemption Certificate as well as the Tax Deduction Cards for the years 2015 to 2018 that were legally issued to her in accordance with the law. She argues that she can now prove she was exempted from paying income tax as she had obtained her salary payslips, which the Respondent had deliberately withheld knowing the same would prove her exemption from paying taxes on her income was due to her disability.
6. The Claimant/Applicant further submitted that regarding "any other sufficient reason" as a ground for review, the Court in *Sadar Mohamed v Charan Signh & another* [1963] EA 557, as cited in the case of *Nasibwa Wakenya Moses v University of Nairobi & another* [2019] eKLR, held that 'any other sufficient reason' for the purposes of review, refers to grounds analogous to the other two (for example error on the face of the record and discovery of new matter). That in the case of *Tokesi Mambili & others v Simion Litsanga* [2004] eKLR, the Court of Appeal held that where the application is based on sufficient reason, it is for the Court to exercise its discretion. The Applicant in the instant Application surmised that the Respondent altered her contract from permanent to fixed-term without any justifiable reasons after learning of her disability, and then made her reapply and interview for a position that was essentially the same as the one she was holding then. She contended that the trial



Judge overlooked that the Respondent terminated her employment in an act of discrimination and that it is therefore justifiable for the Court to allow review of the said Judgment in the interest of justice and fairness.

7. Respondent's Submissions

The Respondent submitted that this Court is to determine whether the Claimant has demonstrated any due diligence and whether the alleged new evidence is material/or would affect the outcome of the suit. It was the Respondent's submission that the Claimant/Applicant is bound to strictly prove that the alleged new matter or evidence was not within her knowledge at the time of the hearing despite exercising due diligence. Furthermore, the Applicant has the duty to demonstrate to the Court the due diligence it exercised to avail the evidence. It relied on the case of *Rose Kaiza v Angelo Mpanju* [2009] eKLR in which the Court of Appeal held that not every new fact will justify interference with the judgment of the court and that the alleged new fact must not have been within the knowledge of the party despite exercising due diligence. The Respondent argued that since the alleged new evidence was all along in the Claimant's possession or could be accessed by her during the pendency of the dispute, she cannot therefore allege the discovery of new evidence that was all along in her possession.

8. Regarding whether the alleged new evidence is material/or would affect the outcome of the suit, the Respondent submitted that this Court correctly held that the provision on non-discrimination required the Claimant to demonstrate different treatment by the employer and further, the Claimant was not dismissed as alleged, but rather her contract lapsed. It was the Respondent's submission that the Claimant therefore had no claim to unfair dismissal whatsoever and the alleged new evidence is immaterial in this matter. That the Claimant's Application has not met the threshold required by law and thus be dismissed with costs.

9. For a review, the Employment and Labour Relations Court (Procedure) Rules 2016 make provision as follows:

33. (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—

- (a) if there is 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;
- (b) on account of some mistake or error apparent on the face of the record; (c) if the judgment or ruling requires clarification; or
- (d) for any other sufficient reason

10. The motion before me does not disclose any discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of the Claimant or could not be produced by her at the time when the decree was passed or the order made. There is no indication of any mistake or error apparent on the face of the record. There is no clarification needed nor does the judgment require any. As such, the application for review being so unmerited has only one outcome – dismissal with costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF APRIL 2024

NZIOKI WA MAKAU



JUDGE

