Kenya Building Construction Timber & Furniture Employees Union v Sagoo & Nyota Limited (Cause 1650 of 2015) [2023] KEELRC 1154 (KLR) (11 May 2023) (Ruling)

Neutral citation: [2023] KEELRC 1154 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1650 OF 2015

K OCHARO, J

MAY 11, 2023

BETWEEN

KENYA BUILDING CONSTRUCTION TIMBER & FURNITURE EMPLOYEES UNION ..... CLAIMANT

AND

SAGOO & NYOTA LIMITED ..... RESPONDENT

RULING

1. Through an application expressed to be pursuant to the provisions of Rules 33, 34 &17 of the *Employment and Labour Relations Court Rules 2016*, the Claimant/Applicant seeks:

    a. Spent

    b. That this Honorable Court be pleased to review its own judgement delivered on March 24, 2022 by this Court.

    c. That costs be in the cause

2. The application is supported by the affidavit of Lucy Wanjeri Chege, the Claimant's/ Applicant's counsel that was sworn on the May 25, 2022.

3. The Claimants/Applicants state that through its judgement delivered on the February 24, 2022, this Court pronounced itself on the manner how the separation of employment between them and the Respondent occurred, redundancy. The Court then granted a compensatory award in their favour pursuant to the provisions of section 49[1] [c] of the *Employment Act*. That by error the Court didn't make an award on the statutory dues contemplated under section 40 of the *Act*. The application herein seeks that the error be corrected.

4. The Respondent opposed the application vide its grounds of opposition dated October 11, 2022 raising the following grounds:

a. The claimant was bound by their pleadings and it was incumbent upon them to specifically plead and proof the reliefs sought.

b. The application for review is an attempt by the applicant to reopen and re-litigate their claim through the backdoor as no genuine grounds have been adduced for review as neither was the alleged mistake or error apparent on the face of the record demonstrated to exist.

c. The instant application questions the Court's discretion on the award granted and that it is not within the ambit of Rule 33 of the Employment and Labour Relations Court Rules.

d. The court once it rendered its decision became functus officio and has no jurisdiction to determine the issue set out in the application.

e. The application herein amounts to an abuse of court process as it seeks for the Court to sit appeal in its own decision.

f. The application and proceedings are otherwise incompetent in law or otherwise.

g. Such other grounds as shall be adduced at the hearing hereof.

Claimant/Applicant's Submissions

5. The claimant submitted that this Court held that the grievants' termination by way of redundancy was both procedurally and substantially unfair and proceeded to award the grievants compensation of 6 months each under Section 49(1) (c) of the *Employment Act*. That however, it, in error omitted to grant the Statutory dues under Section 40 *Employment Act*.

6. The applicant further submitted that nothing can explain the omission being an inadvertent error can be rectified as it does not require extraneous explanations to show its incorrectness and therefore prays that the application be allowed as prayed.

Respondent's Submissions

7. The respondent submitted that while it is not in issue that Rule 33 of the *Employment and Labour Relations Court (Procedure) Rules* allow for review of judgement, the error cited by the claimant/ applicant is that the court failed to make an award for statutory dues.

8. That the same cannot be allowed as courts have time and again held that a purported failure to apply the law or misconstrue the law is not a ground for review but for appeal. It made reference to the Court of Appeal case of *Mwihoko Housing Co Ltd v Equity Building Society* (2007) eKLR to support its position.

9. It further submitted that a challenge to a decision made can only be done through an appeal and not a review and that the Claimants, in asking the court to sit on an appeal to its own decision leads to a position in law that is greatly frowned upon by the courts. It relied on the case of *Pancras T Swai v Kenya Breweries Limited* (2014) eKLR to support its position and insisted that the court is functus officio in the matter and the ground relied on by the claimant is neither cogent nor sufficient for an order of review. It urged the court to dismiss the application.

Analysis and Determination

10. I have carefully considered the material placed before court by the

parties, and find that only one principal issue commends itself for determination, thus, whether the Claimants' / Applicants' application, is meritorious. Rule 33[1] of this Court's Procedure Rules

provide the Court with the authority to review its judgment or order subject to the conditions set out thereunder. The provision stipulates;

> " 33 Review
>
> 1. A person who is aggrieved by a decree or an order form which an appeal I allowed but form which no appeal is preferred or form which no appeal is allowed may within reasonable time, make apply of a review of the judgment or ruling;-
>
> a. If there is discovery of new and important mater or evidence which after the exercise of due diligence was not within the knowledge of tht person or could not be produced by that person at e 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 rung requires clarification: or
>
> d. For any other sufficient reason"

11. on March 24, 2022, this court entered judgement and held as follows:

    a. A declaration that the termination of the Grievants' employment was by way of them being declared redundant.

    b. A declaration that the termination was both procedurally and substantively unfair.

    c. Compensation pursuant to the provisions of Section 49(1)(c) of the *Employment Act*, *2007* at 4(Four) months' gross salary of each of the grievants.

        i. Stanley Anyerere, Ksh 50,780

        ii. John Andeka, Kshs 50,780

        iii. Lazarus Ndenga, Kshs 66,000.

    d. Interest on the awarded sum from the date of filing this suit till full payment, at court rates.

    e. The respondents to issue certificates of service to the Grievants within one month of the date of this judgment.

    f. Costs of this suit.

12. True as the Applicants/Claimants contend, this Court having found that the termination of their employment was on account of redundancy, it didn't make reference to the provisions of section 40 of the *Employment Act* and the entitlements set out thereunder. The question that then emerges is as to whether that was an error or omission, and which can be cured through an order for review. There is firm jurisprudence on the Jurisdiction bestowed upon the Courts to entertain applications for review and grant review orders. In the case of *Mwihoko Housing Co Ltd v Equity Building Society* (supra) the Court of Appeal stated;

> " It is trite law, and we reiterate, that a review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the court. The

error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground of review that another Judge could have taken a different view of the matter. Nor can it be a ground of review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review. See Nairobi City Council v Thabiti Enterprises Ltd [1995-98] 2EA 251 (CAK).

In the instant case it is plain that the matters in dispute had been fully canvassed before the learned Judge. It is plain from his ruling that he made a conscious decision on the matters in controversy and correctly exercised his discretion in favour of the respondent. If he had reached a wrong conclusion of law, it could be a good ground for appeal but not for review."

13. The Court notes that Section 40 of the Act places an obligation upon the employer to prove that at the terminations of his or her employee's employment, the benefits stipulated under the provision were availed to the employee. In my view, the benefits should be mandatorily availed. This Court having found that the separation was as a result of redundancy, was legally obliged to consider the benefits. Under the Act, the employer bears the burden to prove that the benefits were availed. They didn't place any evidence before court to establish the payment. It was an omission that the benefits under section 40 were not considered by this Court.

14. Having stated as I have that there was an omission, that the Court didn't consider the benefits under section 40 at all, I am not persuaded by the argument by Counsel for the Respondents that the Applicants are asking this Court to sit on an appeal on its own decision.

15. By reason of the premises, I find that the Applicants have demonstrated that there was an error on record and a sufficient reason to warrant a review of the judgment herein. The judgment is consequently reviewed to the extent that in addition to the award of the compensatory damages that was made pursuant to the provisions of section 49 (1) (c) of the *Employment Act*, each of the Claimants is entitled to one month's salary in lieu of notice, and severance pay, pursuant to the provisions of section 40 (f) and (g) respectively. Therefore:

[i] Stanley Anyerere

(a). Salary in lieu of notice.....Ksh 12,600.

(b). Severance pay [12,600 *15/30*6.5 years] ..... Ksh 40,950.

[ii]. John Andeka

(a). Salary in lieu of notice .....Ksh 12,600

(b). Severance Pay (12,600 X 15/30 X6.5 years) .....Ksh 40,950

[iii]. Lazarous Ndenga

(a) Salary in lieu of notice.....Ksh 13,000

(b) Severance pay (13,000 X 15/30 X 6.5 Years) .....Ksh 42,250.

16. The Court declines to make any award as relates to payment for leave, as I see no basis for the grant of the same.

READ SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 11TH DAY OF MAY 2023.

OCHARO KEBIRA

JUDGE.

In presence of

Ms. Bhoke for the Respondents.

Ms. Chege for the Claimants.

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE