Kenya Aviation Workers Union v Kenya Airports Authority (Petition E088 of 2021) [2023] KEELRC 2655 (KLR) (27 October 2023) (Ruling)

Neutral citation: [2023] KEELRC 2655 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION E088 OF 2021

NJ ABUODHA, J

OCTOBER 27, 2023

BETWEEN

KENYA AVIATION WORKERS UNION ..... PETITIONER

AND

KENYA AIRPORTS AUTHORITY ..... RESPONDENT

RULING

1. The Respondent filed application dated 6th July, 2022 under section 16 of the *Employment and Labour Relations Court Act*,2011; Rules 17,33(1)(a) and (d) and (2) of the *Employment and Labour Relations Court(Procedure) Rules* 2016 seeking for orders of the court to review its orders contained in the judgment delivered on 6th June, 2022 declaring the recruitment of security wardens employed in 2018/2019 at job group S2 and confirmed at job Group S3 discriminatory, illegal, unlawful, unfair labour practice, null and void and further that the said security wardens were entitled to equal remuneration for work of equal value similar to those recruited in the year 2015/2016.

2. The applicant further sought a declaration that there was no discrimination as the two recruitments were distinctly different, prompted by operational and job requirements that were distinctly at variance in so far as the needs of the Applicant were concerned.

3. The application was supported by the Affidavit of Mr. Antony Njagi the General Manager Human Resource Development of the Respondent wherein he averred that the Applicant had since established that it did not avail for the Court's scrutiny the Job requirements for the two periods to enable the court determine that the two sets of security wardens were not similarly placed in terms of the job requirements.

4. The Respondent averred that the Applicant advertised for different sets of security wardens based on its needs in 2018/2019 which was distinctly different from that of 2015/2016.

5. The Respondent further averred that the recruitment in 2015/2016 was in respect of technicians and minimum qualifications were distinctly different from the recruitment done in 2018/2019 and needs similarly different.

6. In reply the Petitioner filed its reply sworn on 6th April, 2023 and opposed the Applicant's Application and averred that the Application was devoid of merit, frivolous, an afterthought and otherwise an abuse of court and legal process and the Applicant had not demonstrated or satisfied the legal or evidential threshold set out at Rule 33 of the *Employment & Labour Relations Court(Procedure) Rules* 2016 to warrant the reliefs sought or at all. There was no new important and or relevant evidence and matter disclosed.

7. The Petitioner averred that the Applicant had not demonstrated discovery of any new and important relevant matter which after exercise of due diligence was not within its knowledge or could not have been produced by the Applicant to court either before judgment was made and the purported evidence relied on by the Applicant are letters, contracts and internal Memos dated May 2015, May, September, and November 2018 were drawn and authored by the Respondent itself and in their custody.

8. The Petitioner averred that the court could note from its record that the Petition herein was lodged in June 2021 and the Respondent filed and served a Replying Affidavit on 21/01/2022 hence the purported evidence was within the knowledge and custody of the Applicant for a period of over 6 and 3 years respectively yet it was never produced before the Judgment was delivered and the Applicant was trying to litigate in installments to test the court as an afterthought.

9. The Petitioner further averred that the Respondent's allegation that the 2018 recruitment was under different job requirements is a new ground, plea or defense made post judgment while relying on the Board resolution of 29/08/2018 which was merely made to replace security wardens after promotion of the 2015 security wardens and in any case the 2018 Security Wardens were skilled having being hired from NYS to cut costs of training than the 2015 unskilled ones who needed a lot of training yet the 2018 got a lesser job group and pay.

10. The Petitioner averred that this ground was not relevant to change the fact that the 2018 security wardens were discriminated because they performed the same job as those of 2015 and that this ground could not change the judgment of the court in fact it would affirm it. There was no apparent error or mistake on the face of record or sufficient reason under Rule 33 to warrant review of the court's judgment.

11. The Petitioner averred that this application was an abuse of court process intended to obstruct or delay the Respondent's compliance with the Judgment which was delivered in June 2022 and the Respondent had not taken steps to correct the inequalities directed to be redressed hence against the fair labour practices on the part of the respondents.

Determination

12. The Court has considered the pleadings and submissions filed by the parties herein and observes as follows; rule 33 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 provides for review as follows:-

> (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.

13. The above provisions provide that the aggrieved party needs to approach court within reasonable time. In this case the judgment was delivered on 6th June, 2022 by Lady Justice M. Mbaru and the Application was made on 6th July,2022 which was reasonable time.

14. When it comes to the grounds for review, the Applicant states that they inadvertently did not produce documents to show the 2015 and 2018 recruitments were different. The court needs to be satisfied whether this was new evidence which the Applicant using its due diligence could not get and produce in court before judgment was delivered.

15. It was not in dispute that the said documents were in existence since 2015 and 2018 respectively and there was no explanation by the Applicant why the documents which were in their custody and knowledge, were never produced as defense in its case. The Court therefore takes the view that the Applicant is giving the court piecemeal evidence.

17. In *Kenya Engineering Workers Union v Steel Structures Limited; Kenya Building, Construction, Timber and Furniture Industries Employees Union (Interested Party)* [2020] eKLR the Court agreeing that there was no new evidence explained the ground of sufficient reason as follows;

> As submitted by the Respondent and Interested Party, the affidavit sworn by John Thiong'o does not amount to a discovery of new evidence that was not within the knowledge of the Applicant. Further, I do not find that this is sufficient reason for review. In Nasibwa Wakenya Moses v University of Nairobi & another [2019] eKLR the Court held:
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> "An application for review may be allowed on any other "sufficient reason." The phrase 'sufficient reason' within the meaning of the above rule means analogous or ejusdem generis to the other reasons stipulated in Order 45 Rule 1. This position was illuminated in Sadar Mohamed vs Charan Signh and Another where the Court held that: -
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> "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)."

18. From the above proposition it is clear the sufficient reason ought to relate with discovery of new evidence or error on the face of record. In this particular case the evidence was not new but was within the custody and knowledge of the respondent/applicant.

19. The Applicant apart from stating that the recruitments were different has not illustrated how the documents will help to alter the judgment that there was no discrimination on the 2018 security wardens when all the facts led the Court to reach a finding that there was discrimination.

20. From the foregoing the Court is of the view that the respondent/applicant has not demonstrated merit to warrant the Court exercising its review jurisdiction under rule 33 of the Court rules. The application is therefore found without merit and is hereby dismissed with costs

21. It is so ordered.

DATED AT NAIROBI THIS 27TH DAY OF OCTOBER, 2023

DELIVERED VIRTUALLY THIS 27TH DAY OF OCTOBER, 2023

ABUODHA JORUM NELSON

JUDGE