



Kenya Union of Domestic Hotel, Education Institutions and Hospital Workers (KUDHEIHA Workers) v Njoroge (Cause 708 of 2016) [2022] KEELRC 1672 (KLR) (12 May 2022) (Ruling)

Neutral citation: [2022] KEELRC 1672 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 708 OF 2016
MA ONYANGO, J
MAY 12, 2022**

BETWEEN
**KENYA UNION OF DOMESTIC HOTEL, EDUCATION INSTITUTIONS AND
HOSPITAL WORKERS (KUDHEIHA WORKERS) APPLICANT**
AND
ESTHER NJOROGE RESPONDENT

RULING

1. Before me for determination is the claimant/applicant's notice of motion application dated October 13, 2021 seeking the following orders that:
 - i. Spent.
 - ii. That the honourable court be pleased to review its judgment delivered on September 10, 2021 dismissing the claim with cost.
 - iii. The costs of this application be awarded to the applicant/claimant.
2. The application is premised on the grounds that:
 - a. This honourable court delivered its judgment on September 10, 2021 dismissing the claim with costs for reasons that the claimant witness who is the grievant did not prove her case to the court's accepted standards.
 - b. As at the time of arriving at the decision to dismiss the claim for want of sufficient evidence the applicant had applied to Safaricom Ltd for *M-pesa* statement but only received a statement indicating that the same should not be used in court.
 - c. The decision of the court prompted the applicant to apply for another statement that can be adduced in court to prove existence of a relationship where in all occasion the respondent paid



for the services of the CW1 which the statement Safaricom Ltd gave on September 23, 2021 revealing transaction between the parties in occasions through *M-Pesa* transactions as follows:

- i. On March 30, 2013 at 1338 hours transaction reference number DH64RQ256 received KES 6,100 from the respondent
 - ii. On September 19, 2019 at 1814 hours transaction reference number FR49VR430 received KES 530.00
 - iii. On September 2, 2012 at 0626hours reference number CP28US007 received KES 530.00
 - iv. On April 5, 2012 at 1624 hours transaction reference number CE21LJ310 received KES 2,100 from the respondent.
- d. The compelling evidence above was not at the disposal of the claimant at the time of dismissing the claim would require the respondent to discharge the onus statutorily placed on her head by dint of section 9 (20 and 10(7) of the *Employment Act, 2007*.
- e. The instant application is meritorious and therefore deserving to be heard by this court in the interest of justice and fairness.
3. The application is supported by the affidavit of Albert Njeru, the Secretary General of the claimant sworn on October 13, 2021 in which he reiterates the grounds as set out on the face of the notice of motion application.
 4. The respondent did not file any response to the application despite being given a chance to do so.
 5. There were no submissions on record filed by either party at the time of writing this ruling.

Analysis and Determination

6. Having considered the application and the affidavit on record I find that the only issue for determination is whether the instant application is merited.
7. This court is clothed with powers to review its judgments as provided under section 16 of the *Employment and Labour Relations Court Act* and rule 33 of the *Employment and Labour Relations Court (Procedure) Rules 2016*.
8. The circumstances under which this court may exercise the discretion to review its decisions are set out under rule 33 of the *Employment and Labour Relations (Procedure) Rules* are 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.



2. An application for review of a decree or order of the court under subparagraphs (b), (c) or (d), shall be made to the judge who passed the decree or made the order sought to be reviewed or to any other judge if that judge is not attached to the court station.
 3. A party seeking review of a decree or order of the court shall apply to the court by way of notice of motion supported by an affidavit and shall file a copy of the judgment or decree or ruling or order to be reviewed.
 4. The court shall, upon hearing an application for review, deliver a ruling allowing or dismissing the application.
 5. Where an application for review is granted, the court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.
 6. An order made for a review of a decree or order shall not be subject to further review.
9. In *Kenya Union of Hair and Beauty Salon Workers v Black Beauty Products Ltd; Kenya Scientific Research International & Technical Institutions Workers Union (Interested Party)* [2018] eKLR, Makau J observed that the power of review is discretionary and unfettered as was the finding in the Court of Appeal in the case of *Shanzu Investment Ltd v the Commissioner of Lands* [1993] eKLR where the court held that:
- “The court has a wide discretion to set aside judgment and there are no limitations and restrictions on the discretion of the judge except if the judgment is varied, it must be done on terms that are just”.
10. The instant application is pegged on rule 33(1)(a) which is in respect of the 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.
 11. The claimant/applicant avers that it was not able to access the Safaricom statements for the grievant at the time of filing suit and that it was only after the delivery of the court’s judgment in this matter that it was able to secure the statements.
 12. No explanation was given by the claimant/applicant for its failure to obtain the Safaricom statements earlier to aide in proving its case as against the respondent at the hearing of the case. This in my view is an attempt by the claimant/applicant to patch up the gaps in the evidence after the court verdict. This cannot be entertained by this court as it constitutes re-litigating on a matter that has bene finally determined.
 13. In any event, the statements attached to the supporting affidavit clearly state that they are not to be used in court. They are thus not admissible as evidence.
 14. In the circumstances I find the application dated October 13, 2021 devoid of merit and dismiss it with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF MAY 2022

MAUREEN ONYANGO

JUDGE

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 Civil 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.

MAUREEN ONYANGO

JUDGE

