



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1329 OF 2016**

**MATHEW MUTUA MUNYAO.....CLAIMANT(APPLICANT)**

**- VERSUS -**

**THE NATIONAL TRANSPORT & SAFETY AUTHORITY.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 29<sup>th</sup> January, 2021)

**RULING**

The Court entered judgment in the suit on 04.01.2019 for the claimant against the respondent for:

- 1) The declaration that the respondent's action to terminate the claimant's employment was unfair within the meaning of section 45 of the Employment Act and therefore the termination was grossly unfair.
- 2) The declaration that the respondent's actions have infringed on the claimant's legitimate expectation that as a public authority the respondent would uphold the principles of fairness, equality, good governance and natural justice and constitutionalism.
- 3) The respondent to pay the claimant a sum of **Kshs.7, 369, 280 .00** by 01.03.2019 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
- 4) The dismissal of the counterclaim with costs.
- 5) The respondent to pay the claimant's costs of the suit.

In awarding the sum of Kshs. 7, 369, 280.00 the Court stated in the judgment as follows, thus, "**Consequential to the reinstatement, the claimant is awarded 16 months' salaries for the unexpired term of service of 16 months at Kshs. 460, 580.00 per month making Kshs.7, 369, 280 .00.**"

The claimant has filed on 11.11.2019 an application for review through Michuki & Michuki Advocates. The application is by the notice of motion brought under Rule 33(1) (b), (c) and (d) of the Employment and Labour Relations Court (Procedure) Rules 2016, section 16 of the Employment & Labour Relations Court Act, and Article 159(2) (d) of the Constitution of Kenya, 2010. The applicant prays for orders:

- 1) That the application is urgent and service thereof be dispensed with in the first instance.
- 2) That the Honourable Court be pleased to review its Judgment delivered on the 04.01.2019 by Honourable Justice Byram Ongaya by reworking or computing the sum payable to the claimant or applicant upon reinstatement to include all entitlements under the contract of employment.
- 3) That in alternative the Honourable Court be pleased to correct or rectify its judgment delivered on 04.01.2019 to accord with the record of the Court.
- 4) That the Honourable Court be pleased to reconsider the pleadings, proceedings and submissions of the parties and enter judgment as can be supported by the record of the Court.
- 5) That the cost of the suit be provided for.

The application was based on the attached claimant's supporting affidavit, the claimant's supplementary affidavit filed on 14.05.2020 and upon the following grounds:

- 1) The judgment has an error apparent on the face of the record and therefore it is a proper case for review.
- 2) Award consequential to the reinstatement of the claimant for 16 unexpired months of the contract of service should be accurately computed per the contract of service to include all due benefits prior to the unfair termination being:
  - a) 10 days between 02.01.2016 to 31.01.2016 being 0.3 months at Kshs. 460, 585 per month making Kshs. 138, 174.00;
  - b) Unpaid annual leave for 16.3 months making 40 days (1.3 months) thus Kshs. 598, 754.00;
  - c) Unpaid leave allowance for 3 years making 30 days (10 days' pay for each annual leave) thus one month pay of Kshs. 460, 580.00;
  - d) unpaid gratuity 31% of basic salary for 36 months (3years) being 11.16 months, basic pay of 300, 580.00 making Kshs. 3, 354, 472.80;
  - e) unpaid telephone allowance for January 2016 to May 2017 being 17 months' times Kshs. 12, 000.00 per month making 204, 000.00;
  - f) one off unpaid club membership at Kshs. 600,000.00;
  - g) unutilised medical cover for 16 months 10 days being 16.3 months at Kshs. 50,000.00 per month thus Kshs. 815, 000.00; and
  - h) unutilised group life insurance and group accident cover thus Kshs.815, 000.00.
- 3) The inaccurate computation amounts to an error apparent on the record and should be corrected by allowing the review.
- 4) The effect of the reinstatement was to treat the termination as if it never occurred and the applicant should be granted all the entitlements under the contract of service. The awarded sum only considered salary and the other entitlements which were not computed by the Court should be included.
- 5) By pleading for reinstatement, the claimant effectively pleaded for all benefits, rights and privileges as contained in the letter of employment contract and once the Court granted reinstatement,
- 6) The pay for January 2016 was until the date of unfair termination so that the Court's computation excluded 10 days unpaid in January 2016.
- 7) The respondent does not deny that the items excluded by the Court's computation and now claimed in the present application indeed existed and were agreed upon in the contract of employment. Review should allow inclusion of the excluded items so that the claimant is returned to such position as though the termination never happened.
- 8) The unexpired term was for 16 months and 10 days. The amount prayed for consequential to the review flow directly from the contract of service in view of the reinstatement. The application is not with respect to issues that are *res judicata* or that should go to appeal.
- 9) The respondent filed a notice of appeal on 11.01.2019 and by 11.06. 2019 the respondent had not taken any steps to file an appeal and upon lapsing of six months, the notice of appeal lapsed. The application was not therefore filed after undue delay because it was prompt after the respondent failed to pursue the appeal.

The respondent opposed the application by filing on 07.02.2020 the replying affidavit of Margaret Kabochi, the respondent's Deputy Director for Human Resource and Administration. The replying affidavit was drawn and filed through Prof. Albert Mumma & Company Advocates. It was urged for the respondent as follows:

- 1) That pursuant to the Court's judgment delivered on 04.01.2019 the respondent contacted the claimant and settled the entire judgment sum less statutory deductions on 28.02.2019.
- 2) The judgment considered all issues in dispute and decision was rendered. The judgment has no error in law or fact and is incapable of being reviewed as vainly sought for in the present application. The Court awarded a substantial sum of Kshs.7, 369, 280.00 in favour of the claimant after considering the pleadings by the claimant.
- 3) The application introduces new claims that were not in the claim and which are not awardable. The application is essentially an appeal.
- 4) The claimant claims Kshs. 138, 174.00 for unpaid salary for 10 days from 02.01.2016 to 31.01.2016 is not only a new issue but also an afterthought that was never pleaded or claimed in the memorandum of claim dated 05.07.2016. Further all salary for January 2016 was paid to the claimant before his termination and the claim is not meritorious.

- 5) Leave days had been considered and paid or settled per exhibit MK on replying affidavit.
- 6) Claim for Kshs. 3, 354, 472.80 in gratuity was not pleaded and is wishful claim and due gratuity was paid per exhibit MK on replying affidavit.
- 7) Club membership fees as claimed was never pleaded.
- 8) The claims on insurance were not pleaded and the insurance premium was paid to insurers who provided group insurance to its employees.
- 9) If the claimant is dissatisfied with the judgment, then the correct path is to appeal. The application alleges that the Court failed to award certain remedies and the same does not amount to an error but to a ground of appeal. Considering the claims in the application will amount to reopening the dispute – it is a challenge of the judgment on merits and should go to appeal and not review.
- 10) The applicant should not be allowed to benefit from the same judgment he is seeking to disturb and in which event he should refund the amount paid in satisfaction of the judgment.

The Court has considered the application, the parties' respective positions thereon as per the affidavits filed and all material on record and makes findings as follows.

**First**, the judgment was delivered on 04.01.2019 and the applicant does not deny that the respondent paid the judgment sum on 28.02.2019. The application for review was then filed on 11.11.2019. The explanation offered by the applicant is that the respondent had lodged a notice of appeal on 09.01.2019 and the claimant waited to see if the appeal would be prosecuted prior to filing the application for review. The Court finds that it is not disputed that the notice of appeal had been filed and the proper path was to pursue the matters at the Court of appeal. The Court further finds that the claimant had not preferred the appeal on his part and he has not explained why he did not file the application prior to accepting the payment of the judgment sum on 28.02.2019. Thus, the Court returns that the application was filed as an afterthought and after inordinate delay. The respondent having settled the judgment sum and rested the matter, the Court returns that it was seriously prejudicial for the claimant, long after enjoying the judgment sum, to purport to reopen the dispute by way of filing the present application.

**Second**, as for the claim of payment of Kshs. 138, 174.00 alleged as unpaid salary for 10 days from 02.01.2016 to 31.01.2016 the Court finds that it is a new issue and is also an afterthought that was never pleaded or claimed in the memorandum of claim dated 05.07.2016 and filed on 06.07.2016. In prayer (v) (a) the claimant specifically stated that the unpaid salary was running effective the month of February 2016. There was no mention and claim of 10 days' unpaid salary for January 2016 and as urged for the respondent, the Court's award for 16 months unexpired tenure of service and consequential to the order of reinstatement for the 16 months was consistent with the claimant's own pleadings and submissions. It could be that the claimant may have been entitled to the 10 days' pay as now urged for him but it is clear that the issue was not pleaded and no submissions were made in that regard so that with due diligence, the claimant ought to have raised the issue in his pleadings and evidence then in the final submissions. That was not done and the Court returns that it would be unfair to reopen the suit and grant the 10 days' pay as belatedly prayed for and in circumstances that the claim and prayer was never specifically stated in the pleadings and urged at the hearing. Accordingly, the Court will not revisit the issue because the issue fails to amount to an error apparent on record as alleged for the claimant.

**Third**, the Court finds that as urged for the respondent, the alleged claims in the application based on leave and leave allowance, gratuity, club membership and insurance covers are all new matters which were not pleaded or claimed. The Court made an award based only on the material as were pleaded, claimed and evidence as well as relevant submissions provided. The Court has re-examined the final submissions and the memorandum of claim and returns that as urged for the respondent, indeed the claims in the application are new matters and the applicant has failed to establish an error apparent on record in that regard. The Court has also examined the exhibit MK on the replying affidavit and returns that gratuity and outstanding leave appear to have been paid or settled up to the last day worked – and the Court considers that gratuity and leave must be earned and they were duly paid as earned per the term actually served. Further, the claims are in the nature of special or liquidated damages and the Court returns that the matters having not been pleaded and final submissions made in that regard, the applicant has failed to establish an error apparent on the record as alleged in the application.

The Court has revisited the letter of termination dated 22.01.2016 and it stated that the claimant was entitled to 3 months' salary in lieu of notice, gratuity on the term served, and, any leave accrued and not utilised. In the pleadings and final submissions, the claimant did not specifically compute and claim outstanding gratuity or leave. The contractual clause on gratuity stated thus, "**14. Upon successful completion of each contract term, you will qualify for a one-off gratuity calculated at a rate of 31% of your annual basic salary for each year worked. The gratuity is taxable.**" It is clear that the parties did not plead and make submissions on the effect of the clause in view of the claimant's prayer for reinstatement. The Court considers that to balance justice for the parties, the issue will not be reopened. Is it that despite the unfair termination, the Court should find that there had been successful completion of the contract term in view of the order for reinstatement? What is clear to the Court is that such is a weighty matter that ought to have been pleaded and argued but was not done. The matter will rest and the judgment remain undisturbed for now and in the present circumstance that the applicant did not quantify such specific claim for the respondent to be able to answer accordingly by way of pleading, evidence and submissions.

The Court further considers that for the unexpired term of 16 months the claimant did not actually work and leave was not earned per section 28 of the Employment Act, 2007 and in view of the contractual leave clause which did not provide otherwise, but stated, "**You will be entitled to thirty (30) working days leave per calendar year. Leave will not be carried forward except with the written approval of the Board setting out the reason for the extension. Any leave not taken during the leave year will be forfeited unless authority to carry over the leave days due has been granted in writing by the Director General.**" The effect of the clause was never raised at the hearing or in pleadings or submissions and the Court returns that no basis for an error on record has been established at all. Further, the Court finds that unpaid leave allowance, unpaid telephone allowance, unpaid club membership, unutilised medical cover and unutilised group life cover were all none remunerative benefits and in absence of specific pleading, claims or prayers, and, submissions in that regard, the Court considers no error apparent on the record has been established. The Court therefore returns that it was not automatic to grant the payments

and claims as now urged in the application as flowing from the order of reinstatement in absence of specific pleading, evidence and submissions to guide the Court in computing the awards in the judgment as now claimed for the applicant. The Court returns that in absence of pleadings, evidence and submissions to justify the award, to award as claimed in the application would amount to unfair reopening of the suit or an ambush to the respondent and therefore prejudicial and outside the true purpose of review and due process based on proper pleading, evidence and submissions. In other words, the Court holds that payments consequential to reinstatement order are in the nature of special damages and the same must be specifically pleaded setting out the particulars of the amounts claimed and must be strictly proved per the trite law on civil claims for special damages. In the instant case the applicants purport to make the specific and particularised pleadings in the supporting affidavit and the Court finds the same to be an abuse of court process and as submitted for the respondent it amounts to unjustified reopening of the case to serious prejudice of the respondent long after settling the full judgment sum.

The holding of the Court of Appeal in **Mwihoko Housing Co. Ltd –Versus- Equity Building Society [2007]eKLR** cited for the respondent applies, thus, to justify a review the error or omission alleged in the application should be self-evident and should not require an elaborate argument to be established and where it is alleged that the trial judge arrived a wrong conclusion of law, it could be a good ground for appeal but not review.

In the instant case the applicant says that there was an omission in the computation of the amount awarded in the judgment and the amount as claimed in the application should be awarded consequential to the review. The Court finds that the alleged omission is not self-evident and requires elaborate arguments to be established so that it does not constitute a proper ground for review. Further, the alleged omission or error is fictitious because it is clear that the applicant is purporting to plead the claims in the application as per the supporting affidavit and which pleading is not said or shown to have been made in the statement of claim leading to the judgment. In the circumstances, the Court considers that as urged for the respondent, the claimant has enjoyed the judgment sum and as an afterthought has filed the application for review hoping to get more than he deserved under the judgment and based upon speculative claims in the application outside the initial claimant's pleadings and submissions. The Court holds that the law on review was not meant for a litigant to amend pleadings and to change the character of the suit long after judgment with a purported view of the applicant obtaining a remedy which was otherwise, not initially pleaded and urged for the applicant.

While making the findings, the Court considers that it is true that consequential to an order of reinstatement, the employee is entitled to back-payment of all full salary and other benefits, meaning remunerative benefits flowing from the contract of employment. The Court further finds that where such full salary and benefits are to be incorporated in the computation of the sum awarded in a judgment, the same can only be based on pleadings, evidence and submissions leading to the judgment. Looking at the pleadings, evidence and submissions on record leading to the judgment herein, the Court returns that the applicant has failed to establish an error or mistake apparent on the face of the record or a case for a clarification of the judgment, or other sufficient reason to justify a review as prayed for and as envisaged in Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016.

**Fourth**, the Court has considered the respondent's delay in filing submissions on the application as was directed by the Court and each party shall bear own costs of the application.

**In conclusion**, the application filed for the applicant on 11.11.2019 is hereby determined with orders as follows:

- 1) The application is dismissed.
- 2) Each party to bear own costs of the application.
- 3) The Deputy Registrar to cause the return of the Court file herein to the Court's Registry at Nairobi forthwith and not later than within 4 days from today.

**Signed, dated and delivered by video-link** and in court at **Mombasa** this **Friday 29<sup>th</sup> January, 2021**.

**BYRAM ONGAYA**

**JUDGE**