



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT UASIN GISHU

COURT NAME: ELDORET LAW COURT

CASE NUMBER: ELRCC/20/2020

CITATION: PATRICK MYAMBA, SIMON MUSEMBI, RICHARD ODUOR & 47 OTHERS

VS

AFRO PLASTICS (KENYA LTD)

RULING

By an application dated 3rd April, 2019 the respondent/applicant sought Orders among others that the judgement of the Court delivered on 29th June, 2018 be reviewed, varied or amended to correct errors on the face of the record.

2. The application was brought on the grounds inter alia that the Court in its judgement delivered on the 29th June, 2018 ordered that the advocates for the parties agree on the amount payable to the Claimant. However, the respondent on receiving the judgement and perusing the same realized that there were other issues the Court had not addressed itself to.

3. That is to say the Court made a decision in respect of 15 Claimants who had been found sleeping on duty.

4. That being the finding the respondent had instructed its advocate to file an appeal as the evidence presented by the respondent on this aspect had not been fully considered. That in respect of the other Claimants the court had not pronounced itself and this was clearly an error on the face of the record.

5. The application was further supported by the affidavit of Ekya Shah who deposed on the main that the respondent filed its defense wherein the defense brought out three categories of the 47 workers who filed the claim. Pursuant to the said categories the Claimant selected four witnesses each representing the various categories. That is to say those dismissed for being found asleep, those whose contracts had expired, those with valid contracts but abandoned the same and those whose services were terminated for gross misconduct not related to unrest. The Claimant called witnesses who testified on the categories that had been set out by the parties.

6. Mr. Shah further deposed that the Court awarded other damages not proved by the evidence and which were not due and payable to the Claimants.

7. Mr. Shah further stated that he offered evidence that the fifteen claimants were found asleep, the union was informed and apologized on their behalf and this aspect of his evidence was not considered by the Court.

8. The Claimant opposed the application and filed a replying affidavit through one Patrick Moyamba who deposed among others that:

(i) THAT I am the 1st Claimant herein conversant with the facts of thickset and I have the authority of the Claimants to swear this Affidavit on their behalf hence competent to swear this affidavit.

(ii) THAT the Application coming nearly more than one year since the delivery of the judgement in this case has been brought after inordinate delay by the Applicant and should be disregarded

(iii) THAT in the grounds of the Application the Respondent talks of the Court having failed to address "other issues" yet these issues have not been particularized either under the grounds of the application or in the Supporting Affidavit.

(iv) THAT the Court did make a determination in this matter after considering all the evidence filed and the testimonies of all the witnesses and as such the assertion by the Applicant that the Court only dealt with 15 Claimants does not hold water.

(v) THAT indeed at paragraph 21 of the judgement the Court clearly states having reviewed the evidence that "No evidence can be

found either in documents filed before Court or by oral evidence that the Claimants herein were taken through a disciplinary process at which presentation were made before they were dismissed”.

9. In the submissions in support of the application, Mr. Mbabu for the applicant submitted in the main that the Court omitted to address the other categories of witnesses hence no decision was made in that regard. Further in view of the judgement the respondent's expressed its inability to comply with the Court's directive to negotiate and agree on the amount payable because the judgement was incomplete.

10. Mr. Anan for the Claimants on the other hand submitted that the application lacked merit and was an afterthought. Counsel further submitted that the application was intended to delay the conclusion of the matter coming more than one year after the delivery of the judgement.

11. Further the Court made a determination after considering all the evidence filed and testimonies of all witnesses and as such the assertion by the applicant that the Court only dealt with 15 Claimants did not hold any water.

12. Mr. Anan further submitted that rule 33 and 34 of the Rules of the Court gives the Court powers to rectify clerical and incidental omissions which the applicant has not demonstrated as being present in the judgement.

13. From the grounds on the application and supporting affidavit it was clear that the issues raised were appeal issues and not for determination by the trial Court.

14. This Court delivered its judgement on 29th June, 2018. In that judgment the Court discerned heads of compensation payable to the Claimants and directed that the parties compute the quantum thereof due to each Claimant based on the identified heads of compensation and report to Court for the recording of final orders. The matter was thereafter mentioned severally to confirm compliance with the Court's directions.

15. On 27th November, 2018 the Court directed that the matter be mentioned for the final time on 24th January, 2019 to finalize on computation of payments due to the individual Claimants.

16. On 24th January 2019 when the matter came up for mention as directed, the Court observed that if the issue be that the Court did not consider certain aspects of the claim to which the final judgment applies, that should be a matter to be addressed by way of an application for review and not an appeal. The Court therefore left it to the respondent to consider the issue and if agreeable move the Court appropriately.

17. It is important to note that the observation made by the Court on 24th January, 2019 came almost six months after the delivery of the judgment and after several mentions to see if there has been any compliance with the judgment of the Court.

18. At no time during those mentions did the respondent raise the issue of the judgment omitting to consider certain aspects of issues in dispute between the parties as raised in the present application. Further the present application was filed on 4th April, 2019 some three months after the observation by the Court on 24th January, 2019.

19. On the complaint that the Court made a decision only in respect of 15 Claimants who were sleeping on duty and omitted to pronounce in respect of other Claimants who left employment for other reason other than dismissal on account of being found asleep on duty, the court observes as follows: -

“In preparing the judgement sought to be reviewed, the Court carefully considered the evidence as recorded by Justice Rika who partially heard the matter and also evidence adduced by the respondent's witness Mr. Ekiya Shah. Mr. Patrick Mayamba and Mr. George Ochieng gave evidence whose essence was that they were dismissed for being found asleep while on duty (see paragraph 7-13 of the judgment)”.

20. Mr. Marren and Mr. Richard Omondi gave evidence to the effect that they were dismissed because they refused to sign a renewal contract. The reason for refusal was that if they signed the contract, they would lose their years of service. All the witnesses were cross-examined by the Counsel for the respondent. The respondent's only witness Mr. Ekiya Shah gave evidence whose essence was that 15 of the respondent's employees were dismissed on account of sleeping during their shift 19 Claimants were not dismissed. They left employment before their contracts expired and that further 12 refused to sign the new contracts. The final 7 continued working after their contracts expired.

21. The complaint by the Claimants as captured in the pleading was that they ceased being the respondent's employees where their services were individually and prematurely terminated for various reasons including failing to sign new contracts, suspension and allegations of sleeping while on duty.

22. The evidence by both parties revolved around the above issues. As observed by the Court in the judgement, under section 43(1) of the Employment Act, the employer is required to prove the reason for termination and where the employer fails to do so the termination shall be deemed to have been unfair.

23. The Court observed in the judgment that no evidence was laid before it sufficient enough to show the Claimants were found asleep at work and further no evidence was produced to show they underwent any disciplinary hearing. This led to the conclusion that the termination was unfair and hence the consequential award.

24. The complaint in the present application is that the Court did not consider other employees dismissed for other reason other than being

found asleep at work and further that some of the claimants' contract had expired and were not renewed.

25. Mr. Shah in his evidence stated that 12 of the Claimants refused to sign new contracts, 19 of the Claimants left before expiry of their contracts while some 7 continued working after expiry of their contracts.

26. Mr. Shah however did not produce any evidence to support these allegations. For instance, none of the expired contracts were produced. Further no evidence was brought before the Court over the

19 who left before the expiry of their contracts. The question then arises how the Court was expected to make a finding on matters though pleaded but no evidence was adduced in support.

27. Parameters for review are clearly set out under rule 33(1) of the Court Rules. A review will be admitted if there is discovery of new and important matter or evidence which after 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.

28. Further a review will be allowed on account of some mistake or error apparent on the face of the record. A review will also be allowed if the judgment or ruling requires clarification or for any other sufficient reason.

29. The 47 Claimants petitioned the Court claiming their service were unfairly terminated for various reasons including allegations of sleeping while on duty and refusal to sign new contracts. They father alleged they were never subjected to any disciplinary hearing before termination of their service.

30. As required by law the respondent did not provide sufficient evidence to support the allegation that the Claimants were found sleeping at work and that those concerned refused to sign new contracts. Further the respondent did not offer any sufficient evidence to show the Claimants were subjected to due process prescribed in the Act before termination of their service.

31. These were the foundation of the Court's judgement. The complaints by the respondent therefore go to the merit of the judgement which can only be addressed by way of an appeal which as noted the respondent had commenced by filing a notice of appeal.

32. In conclusion the application is hereby dismissed with costs. The Court further orders that this file be returned to Nairobi to continue under to old Nairobi ELRC cause number 566 of 2010. There was absolutely no reason for transferring the same to Eldoret.

33. It is so ordered.

DATED THIS 11TH DAY OF MARCH, 2021

DELIVERED 11TH DAY OF MARCH, 2021

SIGNED BY: HON. JUSTICE J. N. ABUODHA

THE JUDICIARY OF KENYA.

ELDORET ELRC

EMPLOYMENT AND LABOUR RELATIONS COURT

DATE: 2021-03-12 10:03:40