



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO.1873 OF 2016

RICHARD KIMEU MUTHAMA.....CLAIMANT

VERSUS

SYSTECH LIMITED KENYA.....RESPONDENT

RULING

The respondent, Systech Limited Kenya filed application dated 5th October, 2020 under the provisions of Order 45 Rule 1 and 2 of the Civil Procedure Rules and seeking for orders that;

- a) *The court be pleased to review and set aside the judgement dated 17th September, 2020.*
- b) *The court be pleased to direct that the matter be heard afresh by way of oral examination of witnesses.*
- c) *In the alternative to the above the court be pleased to stay execution of the decree arising from the judgement delivered on 17th September, 2020 pending hearing and determination of an appeal.*
- d) *Costs of the application be provided for.*

The application is supported by the affidavit of Elias Kibathi and on the grounds that on 17th September, 2020 the court delivered judgement against the respondent on the basis that the respondent did not give the claimant any opportunity to be heard before termination of his employment as required under section 42¹ of the Employment Act, 2007. Under paragraph 10 and 11 of the judgement there are details of the witness statement and the claimant as given an opportunity for hearing and the reasons leading to non-performance during the numerous meetings held with him but he failed to make improvements. The court however held the claimant was not given a hearing and there was unfair termination of employment.

Other grounds in support of the application are that the court may have failed to appreciate that nature of meetings held between the claimant and the respondent which evidence the court may have missed as a result of the agreement by the parties to proceed by way of written submissions rather than by oral examination of witnesses. The agreement to continue by way of written submissions was made in the interests of justice given the overwhelming effects of COVID-19 pandemic on the practice of the court.

Elias Kibathi the advocate for the respondent also avers in his Supporting Affidavit that the circumstances of this case are exceptional given that the court has clearly outlined in its judgement that the meeting were held between the claimant and the respondent and relating to termination of his employment. Cross-examination of the claimant is necessary for the court to appreciate that the claimant was given an opportunity to be heard. At paragraph 11 of the judgement the claimant acknowledged to poor performance in meetings held with the respondent. if there is oral evidence and examination of witnesses it will be clear that termination of employment was justified.

At paragraph 10 the court appreciated that the respondent issued the claimant with notice of termination yet made a finding that the issue of notice had not been addressed and hence awarded notice pay. The court did not determine the issues of;

- a) Service pay for an employee who has worked for over a year and the claimant worked for 11 months only; and
- b) The respondent paid NSSF for the claimant and ought not to benefit in service pay.

Mr Kibathi also avers that the process of termination of employment is outlined in the written submissions by the respondent and in the bundles of documents filed in support of the defence.

The instant application is filed without delay, in good faith and a review should be granted and judgement delivered herein be reviewed as there is an apparent mistake on the record and the ruling to substitute the judgement. The claimant will suffer no prejudice if the judgement herein is set aside and the same reviewed so as to meet the ends of justice.

In reply, the claimant filed his Replying Affidavit and avers that the issues raised by the respondent cannot be grounds for review but subject of an appeal. The hearing of the matter proceeded by way of written submissions following consent by both parties on 23rd June, 2020 and in regard to Rule 25 of the Employment and Labour Relations Court (Procedure) Rules the court is allowed such mandate to give hearing directions as agreed upon by the parties.

The respondent cannot invite the court to review its judgement based on what it presumes the court did not do or ought to have done as that is an issue of appeal and not review. A review can only be done where there is a mistake on the record, which is not the case here.

The application is also based on the wrong provisions of the law and should be dismissed with costs.

Both parties agreed and addressed the instant application by way of written submissions.

The respondent as the applicant submitted that the conditions for the review of the judgement have been met and the apparition should be allowed. The application is based on the provisions of section 80, 63(e) and (e) Of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules. In the judgement of the court on 17th September, 2020 the court made a finding that there was no hearing accorded to the claimant before employment terminated and this was by error and had the court heard the parties in oral evidence and examination it would have been apparent that this was admitted by the claimant in his witness statement. There is an error apparent on the record as held in **Muyondi v Industrial and Commercial Development Corporation & another [2006] eKLR**.

The court is given power under section 80 of the Civil Procedure At to review its orders and Order 45 Rule 1 sets out the applicable rules. Under paragraph 18 of the judgement the court made a finding that the there was no evidence of the claimant having been taken through the formal process of hearing and there was no proper notice issued contrary to section 35(1) of the Employment Act. the witness statement was not put into account and hence a review of the judgement is necessary.

The respondent also submitted that the court awarded the claimant service pay whereas the respondent was paying statutory dues and this is contrary to section 35(5) of the Employment Act.

There is an error apparent on the face of the record with regard to award of notice pay in lieu of notice. The court disregarded the evidence by the respondent's witness that the claimant refused to attend for handing over so as to receive his salary as outlined in the written submissions. In the interests of justice the judgement should be reviewed.

The claimant submitted that the court in judgement delivered on 17th September, 2020 made a finding that the claimant's employment was unfairly terminated by the respondent. upon employment, it was a term of contract that employment would subsist upon successful completion of the probation period of 3 months. The claimant was served with letter requiring him to improve his work from 29th March, 2016 and under section 43 of the Employment Act, the employer is supposed to terminate employment for a justified reason and it is unfair to proceed and termite employment without a valid reason. Alleged poor performance of an employee places the duty upon the employer to prove as held in **Poorosotum Bheekho v Linksoft Group [2015] eKLR**. before employment can terminate, the employer has the duty to invite the employee to a disciplinary hearing and in accordance with section 41 and 43 of the Employment Act as set out in the case of **Jane Samba Mkala v Ol Tukai Lodge Limited [2013] eKLR; Loice Otieno v Kenya Commercial bank Limited [2013] eKLR** that despite a case of poor performance, the employee must be invited to a formal disciplinary hearing before employment is terminated. The claimant was not accorded a hearing.

A warning letter does not meet the threshold of a hearing or notice upon the employee as held in **Hoes Akunga Ombwori v Bidco Oil Refineries Limited [2017] eKLR.; Gabriel Kariuki Chomba v Insight Management Consultants Ltd [2017] eKLR**.

The claimant also submitted that the orders sought should not issue as there is no matter outlined as meeting the conditions for a review of the judgement. On the finding that there was unfair termination of employment the court awarded salary for April, 2016 which is due together with notice pay, house allowance and service pay pursuant to section 35(5) of the Employment Act and as held in **Elijah Kipkoros Tanui v Ngara Opticians t/a Bright Eyes Limited [2014] eKLR** that service pay is payable only to employees who are not covered under the different social security mechanisms elaborated under section 35(5) of the Employment Act.

Under section 49 of the Employment Act, compensation to an employee is allowed upon a finding there was unfair termination of employment. The application by the respondent should be dismissed with costs.

Determination

The respondent in the instant application is seeking for an order of review of the judgement delivered on 17th September, 2020 and the matter be heard afresh by way of oral examination of witnesses and in the alternative an order of stay of execution pending hearing and determination of an appeal. The application is made on the grounds that parties by consent agreed to proceed by way of written submissions and the court by error failed to address the statements filed and made findings in error, mistake and awarded the claimant notice pay, service pay upon a finding that there was no hearing and notice before termination of employment. The claimant was given a hearing and various notices on his poor work performance and hence the court made an error in the judgement and had the matter proceeded for oral hearing, such matters would have been apparent.

Before a party files an application for review, a serious examination of the matters and issues at hand must be comprehensively addressed to determine whether it should be an application for review or an appeal is necessary as held in **Gerald Kithu Muchanje v Catherine Muthoni Ngare & another [2020] eKLR**;

The applicant was aggrieved by the judgment of the trial court. Under Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, where a party opts to apply for review of a judgment and decree, such a party cannot after the review application is rejected exercise the option to appeal against the same judgment and decree that he sought to review. ...

In the case of **Martha Wambui v Irene Wanjiru Mwangi & Another (2015) eKLR**, the court held that;

From the above provisions of section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure rules, it is clear that one cannot exercise the right of appeal and at the same time apply for review of the same Judgment/decree or order. One must elect either to file an appeal or to apply for a review... It therefore follows that the appellant herein had an unimpeded right to either appeal against the ruling of 13/6/2014 or apply to have it reviewed. And having exercised the right to a review, she lost the right of appeal against the same order ...

The respondent has relied on the provisions of the Civil Procedure Act and the Rules thereto. An application for review before this court must abide the provisions of Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 (the Court Rules). Even though these provisions are not far removed from the Civil Procedure Act and Oder 45(1) it is imperative the correct provisions applicable before this court be invoked.

On the substance of the application, on 23rd June, 2020 parties agreed by consent to proceed herein by way of written submissions in addressing the claim herein. Such consent has not been faulted.

On this basis there are written submissions filed and upon which the court analysed and delivered judgement on 17th September, 2020.

The respondent has faulted the findings under paragraphs 10 and 11 and the judgement that service pay awarded is not due since the claimant worked for 11 months and the respondent was paying his NSSf dues.

Under Rule 33 of the Court Rules, the court is allowed to review, revise and correct an error apparent on the record and to clarify its orders. There must be a sufficient cause to justify for a review.

In the court judgement delivered on 17th September, 2020 paragraphs 10 and 11 made the flowing findings;

10. The Respondent also filed a Witness Statement dated 06/10/2018 made by its Head of Human Resource and Administration, Kaguai Tabitha who states that the Claimant was given a letter of appointment and that he was issued with his scope of duty, responsibilities and full job description on 05/05/2015 for which he duly signed. That the Claimant was given an opportunity to be heard on the reasons for his non-performance during the numerous meetings that were held with his supervisor but never made any improvements. That during one of the meetings called by his Manager, the Claimant acknowledged his poor performance and even agreed not to be paid for the months of March and April 2016 if he did not deliver on his work but out of compassion the Respondent paid him for March 2016.

11. She further states that the Claimant had already taken 17.5 days of requested leave before he had even completed a year of service with the Respondent and that he was also habitually absent from office on business not known to the Respondent. That the Claimant owed Shs. 20,000/= for a loan taken from the Manager which was recovered from his salary at the time of termination and that the Claimant also never made any proper handover.

The court reading of these findings, the written submissions by the parties and the witness statement of Kaguai Tabitha is that during the course of the claimant's employment, it was noted that he was poorly performing his duties and was invited to several meetings in this regard. None of these meetings related to any matter of misconduct, gross misconduct but that his performance was poor.

Paragraph 8 of the defence is that the claimant was given numerous opportunities to improve his performance; he was given a full hearing by his supervisor and even the manager to show cause prior to termination of employment. In the attached witness statement of Kaguai Tabitha at paragraph 6 and 7 she avers that due to inability to perform, the claimant was invited to a meeting with the superiors. By letter dated 5th January, 2016 a notice of poor performance was issued. In February, 2016 there was a meeting called by the manager concerning continued poor performance and the claimant acknowledged that he was not performing to expectation.

On the list of documents filed by the respondent are letters dated 5th January, 2016 notifying the claimant of his poor performance.

Letter dated 29th March, 2016 asking the claimant to show cause.

What followed was letter dated 28th April, 2016 terminating employment on the grounds of underperformance.

Upon a show notice, the motions of section 41(1) of the Employment Act, 2007 came into force. That law requires that;

(1) Subject to section 42(1), an employer shall, before terminating the Employment of an employee, on the grounds of misconduct,

poor performance or Physical incapacity explain to the employee, in a language the employee Understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

These provisions are addressed by the court under paragraph 25 of the judgement herein. An employee who is of poor work performance must be issued with notice and allowed a hearing at the shop floor in the presence of a representative of his choice. These provisions are mandatory.

The court having applied itself to the evidence and the law, the court stands *functus officio*. A review is not available in this instance.

The application of section 35(5) of the Employment Act, 2007 is a matter of law. the court analysed the claim and made a finding. Where the court made a wrong application of the law in assessment, application and awarded, such is not a matter subject of review.

The court herein in judgement delivered on 17th September, 2020 appreciated the matters in dispute and proceeded to address and delivered an award. Such is not in error, mistake and or need for clarification.

Application for review cannot apply in this instance.

The respondent has in the alternative made prayer seeking for stay of execution pending appeal. As noted above, before making application for review, a party must clearly set out the issues to be addressed and decide which way to follow. A mixed grill application for review, setting aside and stay of execution to allow for an appeal hearing and determination is in abuse of the process. In any event, there is no appeal, notice to appeal or any matter that the court finds necessary to address at this instance.

Accordingly, application dated 5th October, 2020 is hereby found without merit and is dismissed with costs to the claimant.

DELIVERED IN OPEN COURT AT NAIROBI THIS 6TH DAY OF MAY, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

.....and.....