



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CIVIL APPEAL NO 13 OF 2019

JOSCARLOS ABUKUSE OBAGA.....APPELLANT

VERSUS

GLOBAL CARGO MOVEMENT LIMITED.....RESPONDENT

RULING

1. This ruling responds to the Respondent's Notice of Motion application dated and filed in court on 4th June 2020.
2. By its application, the Respondent seeks an order to correct/review the judgment delivered by the Court on 9th April 2020 on account of mistake or error apparent on the face of the court record and/or for any other sufficient reason.
3. The application is supported by an affidavit sworn by the Respondent's Managing Director, Sameer Hussein Mohamed G. Virjee and is based on the following grounds:
 - a) Judgment was delivered by the Court on 9th April 2020 whereby the Appellant was awarded the total sum of Kshs. 90,000 together with costs of the appeal and the trial in the court below;
 - b) The Appellant's services were terminated by the Respondent Company for gross misconduct in accordance with Section 44(4)(a)-(g) of the Employment Act, following an accident which occurred on 30th June 2017 at Kakira, Uganda involving motor vehicle registration number KBL 235/ZA 5983, which accident was blamed on the Appellant who had control of the motor vehicle;
 - c) The Appellant was arrested and detained at Kakira Police Station and was later taken to court at Kakira Uganda, where he was charged with three counts of careless driving, driving under the influence of alcohol and wrong parking. He pleaded guilty to all charges and he was fined Ushs. 725,580 the equivalent of Kshs. 20,155, which was paid by the Respondent to secure his release;
 - d) The Appellant is not entitled to payment of the award of 2 months' salary in compensation and 1 month's salary in lieu of notice;
 - e) The Appellant is also not entitled to the award of unpaid salary for June 2017 and July 2017 as the amount was paid in full by the Respondent before the Appellant's termination.
4. The Appellant filed grounds of opposition on 17th June 2020 stating:
 - a) That the application is frivolous, vexatious and misconceived thus ripe for dismissal;
 - b) That the application is misconceived and defective as it invites the Court to sit on appeal on its decision dated 9th April 2020;
 - c) That the instant application is bad in law and lacks merit as no error is apparent on the face of the judgment of the Court and no grounds for review are gleaned on the face of the application.
 - d) That the application amounts to gross abuse of the judicial process as the grounds disclosed for review are actually matters of fact and law already settled through the judgment of the Court;
 - e) That the application is incurably defective, incompetent, bad in law and ought to be dismissed with costs.

5. The power of the Court to review its own decisions is donated by Section 16 of the Employment and Labour Relations Court Act and Rule 33 of the Employment and Labour Relations Court (Procedure) Rules. Rule 33(1) of the Procedure Rules provides 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; or

(b) on account of some mistake or error apparent on the face of the record; or

(c) if the judgment or ruling requires clarification; or

(d) for any other sufficient reason.

6. A scrutiny of the grounds upon which the Respondent seeks a review of the judgment delivered by the Court on 9th April 2020 reveals three things; first, that the Respondent is unhappy with the entire decision of the Court; second, that the Respondent seeks to introduce new evidence that was not tendered before the trial court and third, no specific error apparent on the face of the record has been identified.

7. The Appellant referred the Court to the decision in *Francis Njoroge v Stephen Maina Kamore [2018] eKLR* where it was held that a wrong view on an issue may be a ground for appeal but certainly not a ground for review.

8. By its application, the Respondent ultimately asks the Court to sit on appeal over its own decision, which power the Court does not have.

9. The application dated 4th June 2020 is therefore disallowed with costs to the Appellant.

10. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 8TH DAY OCTOBER 2020

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Mokaya for the Appellant

Mr. Asige for the Respondent