



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MALINDI

CAUSE NO 6 OF 2018

RASHID ABDALLAH.....CLAIMANT

VERSUS

THE BEAUMONT RESORT LIMITED.....RESPONDENT

RULING

1. On 4th December 2018, I entered judgment in favour of the Claimant in the following terms:

- a) 6 months' salary in compensation.....Kshs. 70,200.00
- b) 1 month's salary in lieu of notice.....11,700.00
- c) Service pay.....12,187.50

2. The Respondent subsequently brought an application by way of Notice of Motion dated 17th December 2018, seeking review of the judgment.

3. The application, which is supported by the affidavit of Shukran Mwabonje, Advocate is based on the following grounds:

- a) That the Court, in its judgment delivered on 4th December 2018, made a finding that the Respondent failed to subject the Claimant to mandatory disciplinary procedure as set out in Section 41 of the Employment Act;
- b) That the Court made a finding that the termination of the Claimant's employment was substantively and procedurally unfair;
- c) That the Court did not consider crucial evidence which was on record;
- d) That the Court did not consider an employment contract dated 1st June 2016 annexed to the Claimant's list of documents which exhibited that the Claimant was not terminated, rather his employment contract expired upon lapse of time;
- e) That the Court did not consider the Respondent's witness statement dated 6th June 2018 and adopted as evidence in court on 24th September 2018 which also clearly averred that the Claimant's contract lapsed and it was not renewed;
- f) That the Court did not consider the Respondent's written submissions which were not in the record and could have made the Court to reach a different verdict;
- g) That the Court failed to appreciate that the Claimant was on a 1 ½ year contract that commenced on 1st June 2016 and ended on 1st December 2017;
- h) That no appeal has been preferred by the Claimant against any part of the judgment;
- i) That the application has been made without unreasonable and/or undue delay;
- j) That it is only just and expedient that the application be allowed.

4. The Claimant's response is contained in his replying affidavit sworn on 14th January 2019. He depones that although the Respondent's application is disguised as an application for review, the grounds on which it is premised are mainly grounds of appeal.

5. The Claimant states that Counsel for the Respondent, Shukran Mwabonje was not the proper person to swear the affidavit in support of the application.

6. The Claimant further states that the Respondent's application should be dismissed with costs to him for reasons that:

a) The Respondent has not demonstrated or supplied any new evidence or important matter which was not within its knowledge or could not be produced at the time when the judgment was entered;

b) The Respondent has not demonstrated that there is some mistake or error apparent on the face of the record or any other sufficient reason;

c) The Respondent has not demonstrated or proved the existence of a clerical or arithmetical mistake or error apparent on the face of the decree;

d) The grounds relied upon by the Respondent invite the re-evaluation and re-consideration of the whole evidence and proceedings. The grounds call for the re-hearing of the matter.

7. The Claimant goes on to depone that the Respondent cannot blame him for failure to place its submissions on record as directed by the Court. This cannot be a ground for review of judgment and the Court cannot be invited to consider submissions that were not on record.

8. When Counsel for the parties appeared before me on 11th February 2019, they agreed to dispense with the application by way of written submissions. From the record, the Claimant filed his submissions on 26th February 2019. The Court did not see any submissions filed on behalf of the Respondent.

9. 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 Procedure Rules. Rule 33(1) provides as follows:

(1) A person who is aggrieved by a decree or an order of the Court may apply for a review of the award, judgement 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 order made; or

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

(c) on account of the award, judgment or ruling being in breach of any written law; or

(d) if the award, judgment or ruling requires clarification; or

(e) for any other sufficient reasons.

10. In its application, the Respondent faults the Court on matters of evaluation of evidence and curiously for failure to consider submissions that were not placed on record prior to delivery of the judgment. In the written submissions filed on behalf of the Claimant on 26th February 2019, reference was made to the decision in ***Grace Akinyi Kemunto v Gladys Kemunto Obiri & another [2016] eKLR*** where it was reiterated that misapprehension of issues of fact or law is not a ground for review.

11. This remains good law from which I will not depart. If indeed this Court made a mistake either on evaluation of evidence or application of the law, it cannot correct itself; it can only be corrected by the Court of Appeal.

12. That said, the Court finds and holds that the Respondent's application dated 17th December 2018 is misguided. The said application is therefore dismissed with costs to the Claimant.

13. It is so ordered.

DATED SIGNED AND DELIVERED AT MALINDI THIS 13TH DAY OF MAY 2019

LINNET NDOLO

JUDGE

Appearance:

Mr. Nyongesa for the Claimant

