



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT

NAIROBI

CAUSE NO. 1056 OF 2010

KEVIN JAMES WOODS.....CLAIMANT

VERSUS

RIFT VALLEY RAILWAYS (K) LIMITEDRESPONDENT

RULING

Introduction

1. On 28.9.2018 I delivered judgment in this case granting the claimant his claim for withheld benefits plus interest but dismissed the claim for damages for unfair termination for want of prosecution. The claimant was aggrieved and brought the Notice of Motion dated 15.3.2019 seeking for review and for variation of the judgment by awarding damages for unfair termination.

2. The Notice of Motion in support by the affidavit sworn by the claimant's counsel on 15.3.2019 and premised on the grounds set out on the body of the motion. In summary the claimant contended that the claim for unfair termination was prosecuted before Ndolo J. who heard his evidence but when I wrote judgment, I inadvertently dismissed the claim for want of prosecutions that the dismissal was allegedly because I did not have the benefit of the claimant's testimony that was taken by my predecessor. That the record confirm that the claimant pleaded and testified that he was terminated by the respondent after working for 18 months and that he was not paid any of his dues. That he testified that the respondent's letter dated 13.9.2009 admitted owing him USD.101,365.82 and prayed for the unpaid USD.78,278.82 plus terminal benefits sought in the statement of claim.

3. The applicant further contended that the said testimony was not controverted since the respondent never called any witness to testify, and argued that the employer failed to discharge her burden of proving the reason for terminating the contract of service as required by section 43 of the Employment Act. He concluded by stating that the failure to prove the reason rendered the termination unfair within the meaning of section 45 of the Act and he is therefore entitled to damages under section 49, 50 and 51 of the Act.

4. The application was not opposed by the respondent.

Analysis and determination

5. The issue for determination is whether the applicant has met the threshold for grant of the review order sought as provided for under Rule 33(1) of the ELRC Procedure Rules. The said rule provides that:

“33(1) A person who is aggrieved by a decree or order ... 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...;

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

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

(d) for any other sufficient reason.”

6. In this case, the application for review was made in March 2019 and the impugned judgment was passed in September 2018. The time taken before making the application was 6 months. The said delay was not explained by the applicant and I make a finding that the delay of 6

months was unreasonable. Bringing the application after 6 months in my view was an afterthought. Discretionary orders are equitable and equity does not aid the indolent.

7. As regards the merits of the application, I find that it does not expressly and specifically state which of the 4 grounds set out by Rule 33(1) above, it stands. I however assumed that it is referring to a mistake or error apparent on the face of the record. It seems that the claimant is contending that he tendered evidence in court to prosecute the claim for damages for unfair termination before Ndolo J. who took if but when I wrote the judgement I failed to notice it and therefore failed to consider the same. That is however not true.

8. I carefully went through the court record including the typed proceedings by my predecessor who took the testimony of the claimant and found no evidence tendered by the claimant during his testimony that aimed at discharging the burden of proving unfair termination as required by Section 47(5) of the Employment Act. The said section provides that:-

“For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

9. The grounds upon which a termination can be deemed unfair are now well settled and they include lack of a valid and fair reason, and the failure to follow a fair procedure the foregoing is the whole meaning of section 45 of the Employment Act. The record shows that the Claimant never made any effort in his testimony to prove that circumstances of his termination warranted a valid and fair reason and a prior hearing to be accorded.

10. On the contrary, it would appear that the claimant was satisfied with the separation as communicated by the letter, dated 9.9.2008 and his priority claim was only the dues communicated by the letter dated 13.9.2009. The letter dated 9.9.2019 gave 3 months termination notice as required under clause 2.1 of the contract letter and offered to pay salary in lieu under the said letter of contract. The claimant never challenged the validity of the said contract letter, which provided for termination by serving 3 months' notice or payment of salary in lieu of notice.

11. In view of the foregoing, I find that there was no breach of the contract of service by the respondent by serving the termination notice dated

8.9.2008 and opting to pay the claimant salary in lieu of notice. The claimant has not denied that he was paid the said salary in lieu of notice and accepted the same. In this case, therefore, I opine that the reason for termination and prior hearing was not necessary because the termination notice never cited any reason in the nature of misconduct, poor performance or physical incapacity.

Conclusion and disposition

12. I have found that the application was brought after inordinate delay and declined it. I further found that the application lacks merits since there is no mistake or error apparent on face of the record in the impugned judgement. Consequently, the application is dismissed with no costs.

Dated, Signed and Delivered in Open Court at Nairobi this 14th day of June, 2019.

ONESMUS N. MAKAU

JUDGE