



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 1867 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

MERCY MUTHONI DORCAS.....CLAIMANT

VERSUS

GITHUNGURI DAIRY AND COMMUNITY SACCO LIMITED.....RESPONDENT

RULING

The Applicant filed a Notice of Motion on 4th July 2017 seeking review of the Judgment delivered on 27th October 2016 by Njagi Marete J. The application is based on grounds that the Judgment is erroneous as it refers to cause 1867 of 2013 at Kericho as opposed to Nairobi and that the reliefs granted by the Court are insufficient as the court failed to address the issue of unpaid leave, service pay and early retirement. Further, that there was no proof of the counter-claim and that the Claimant's dues should not pend further.

The application is supported by the Affidavit of Mercy Muthoni Dorcas, the Claimant, sworn on 3rd July 2017 in which she reiterated the grounds on the face of the application.

In response to the application, the Respondent filed its Grounds of Opposition on 8th November 2018. It avers that the Applicant seeks that this Court sits as an appellate Court, that there are no new facts that have been discovered since the delivery of Judgment and that the Labour Commissioner is yet to render its report as directed.

The Application proceeded by way of written submissions with only the Claimant having filed her submissions.

Claimant's Submissions

The Claimant submitted that the application for review is founded on Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016. She submitted that the Judgment ought to be reviewed as there is an apparent mistake or error on the face of the record for reason that it refers to ELRC Kericho while the matter was filed in Nairobi.

She submitted that despite the Judge finding that the claimant was entitled to the reliefs sought, the reliefs awarded were insufficient as it failed to give any reasons or to address the claim as prayed. She submitted that section 50 of the Employment Act makes it mandatory for the Court to be guided by the provisions of section 49 when determining a complaint or suit involving wrongful dismissal or unfair termination. It was therefore her submission that she is entitled to the claims sought as she had reasonable expectation that she would have worked for the respondent for 26 years until she attained retirement age. She further submitted that the Court should in the alternative consider an award of damages for unfair termination.

Analysis and Determination

The provision for review of decree or orders are set out under Section 33(1) of the Employment and Labour Relations Court (Procedure) Rules 2016 which states:

(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;

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

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

(d) for any other sufficient reason.

(2) An application for review of a decree or order of the Court

under subparagraphs (b), (c) or (d), shall be made to the judge who passed the decree or made the order sought to be reviewed or to any other judge if that judge is not attached to the Court station.

The applicant seeks review of the judgment for reason that the the title of the Judgment reflects that the Cause was filed at the Employment and Labour Relations Court at Kericho whereas it was filed in Nairobi. This is a mistake or error apparent on the face of the record which would justify review of Judgment by way of rectification.

In respect of the claims for unpaid leave for 3 years, service pay for 3 years and retirement package, the Claimant submitted that the reliefs awarded were insufficient as there were no reasons given to address the Claimant's claim as prayed for in the Memorandum of Claim. It was her submission that the Judgment favours the Respondent more than it favours her.

The Court of Appeal in *National Bank Of Kenya Limited v Ndungu Njau [1997] eKLR* held thus:

"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law."

The argument of the applicant is that the relief granted by the Court "appears" not sufficient as it failed to give reasons or address the claimant's claim as prayed for in the Memorandum of Claim being –

- (a) One month's salary in lieu of notice Kshs.25,056
- (b) Unpaid leave for 3 years, 2 days per year worked Kshs.52,618
- (c) Service for 3 years, 15 days per year worked Kshs.37,584
- (d) Early retirement package, 26 years to retirement Kshs.7,819,472

Total claim Kshs.7,934,732

It is further the applicant's argument that Section 50 of the Employment Act makes it mandatory for the court to be guided by Section 49 of the Act and that the applicant had reasonable expectation to be granted the prayers sought.

These are not grounds of review as set out in Rule 33 of the Employment and Labour Relations Court (Procedure) Rules. Interference with the judgment on these grounds would be tantamount to this court sitting on appeal on its own judgment or on the judgment of a colleague. There is no discovery of new facts, there is no error on the face of the record except in respect of the reference to Kericho instead of Nairobi as already stated above, there is no other sufficient reason for interference with the award. The reasons advanced by the applicant in support of the review application are grounds for appeal and not review.

Besides the foregoing, there is no decree or order in respect of which a review may be anchored. Rule 33 of the Employment and Labour Relations Court (Procedure) Rules is clear, it refers to an application being made by a person who is aggrieved by a decree or order. It is therefore mandatory on an applicant to extract or cause to be extracted a decree or order in respect of which the application for review is to be made. What the applicant attached to the application and asked the court to review is the judgment, and not the decree.

For the foregoing reasons I will and do allow the application for review only on the basis of the error indicated as "In the Employment and Labour Relations Court of Kenya at Kericho" to read "**In the Employment and Labour Relations Court of Kenya at Nairobi**" on the title of the judgment which is clearly an error. I however find no basis for the review of the judgment as prayed with the result that the application is dismissed.

There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27TH DAY OF SEPTEMBER 2019

MAUREEN ONYANGO

JUDGE