



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 104 OF 2017

JULIET MWONGELI MUEMA.....CLAIMANT

-VERSUS-

SMOLLAN KENYA LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 22nd November, 2019)

RULING

The Court delivered the judgment in the suit on 29.03.2019 for the claimant against the respondent for:

- 1) The declaration that the act of the respondent in failing, neglecting and refusing to install or provide the claimant with a screen reader, voice command or any other technology to help her overcome her disability and subsequently the demotion of the claimant amounted to an act of discrimination on the basis of disability and that it offended Articles 10, 27, 28, 41 and 54 of the Constitution.
- 2) The declaration that the claimant's rights and guarantee for fair labour practices and reasonable working conditions under Article 41 were thereby violated by the respondent.
- 3) The declaration that the claimant's rights to be treated with dignity as provided for under Article 28 and 54(1) of the Constitution was thereby violated by the respondent.
- 4) The declaration that the respondent violated sections 12 and 15 of the Persons with Disabilities Act, Article 5 and 27 of the Convention on the Rights of Persons with Disabilities as well as Sections 5(3), and 10(5) of the Employment Act, 2007.
- 5) The declaration that the decision by the respondent vide the email dated 21.10.2015 to move the claimant to the position of a reliever and subsequently causing her to assume the position of an Assistant Merchandiser vide a text message on the 23.11.2015 amounted to a demotion which was discriminatory, unprocedural, improper, unlawful, wrongful and oppressive.
- 6) The Respondent to pay the claimant **Kshs. 1, 500, 000.00** for compensation on account of constitutional rights violation under Articles 10, 27, 28, 41, and 54 of the Constitution of Kenya; and the respondent to pay the claimant by 01.07.2019 failing interest to be payable thereon from the date of this judgment till full payment.
- 7) The respondent to pay the claimant's costs of the suit.

The respondent filed an application for review of the judgment on 22.07.2019 through Patrick Rono & Company Advocates. The application was under sections 1A, 1B, 63(e) and 80 of the Civil Procedure Act, Order 45 rule 1(1) and 1 (2), order 40 rule 1(a) of the Civil Procedure Rules and any applicable provisions of the law. The substantive prayers are for orders:

- a) That the Honourable Court be pleased to review its judgment or decree delivered or granted on the 29.03.2019.
- b) That upon review its judgment or decree delivered or granted on the 29.03.2019, the Honourable Court be pleased to order and find that the variation in the claimant's salary was not occasioned on grounds of discrimination by the claimant's employer –the respondent herein.
- c) That the costs of the application be provided for.

The application is founded upon the supporting affidavit of Jullient Corazon Otieno and the following grounds:

- a) There is a glaring error apparent on the face of the record in so far as the Honourable Court found that the claimant was discriminated upon on grounds of her visual disability by relying on the fact that the claimant's salary variance was an indication of the alleged discrimination.
- b) The respondent (applicant) has obtained new important and material evidence comprising of salary pay slips or receipts which could not be adduced in evidence as part hearing of this case had already taken off and in the circumstances new evidence could be introduced.
- c) The variance in salary was due to the fact that the claimant had worked on public holidays and paid accordingly.
- d) Thus variation in salary was not on account of discrimination but on account of working during holidays. Thus there is an error apparent on record justifying review. Granting the application will meet ends of justice.

The claimant opposed the application by filing her replying affidavit on 25.09.2019 through John Mwariri Advocate of Kituo Cha Sheria. It is urged for the claimant as follows:

- a) The Court found that the claimant was moved from a Merchandiser to an Assistant Merchandiser and her salary did not remain the same but it started to fluctuate. That finding was based on comparison of the consolidated pay for October 2013 and November 2015 and pay slips were admitted in evidence by consent of the parties.
- b) The Court based its judgment not merely on fluctuation of salaries but rather the satisfaction and dignity that an employee draws from the employment and which the Court found the employment did not confer. The Court's interpretation looked at the facts holistically rather than the issue of pay. The respondent should not be allowed to move on the narrow interpretation of the judgment and there is no error on record as alleged.
- c) The award was for discrimination and denial of reasonable accommodation and was just in the circumstances of the case.
- d) There is no serious reason given for failure to produce the alleged payslips at the hearing the respondent being the custodian of such employee documents and record. Thus there is no new evidence that was not available at hearing with due diligence of the respondent.
- e) The application is filed about 4 months after judgment was delivered and no reason has been advanced. The applicant also failed to annex the decree to be reviewed.
- f) The grounds raised can only be dealt with on appeal and not review.
- g) The application is an afterthought filed after the letters by the claimant's advocate on satisfaction of the judgment sum.

The parties have filed their respective submissions on the application. The Court has considered the parties' respective positions and makes findings as follows:

- a) The judgment was delivered on 29.03.2019 and the respondent's application for review filed on 22.07.2019. As submitted for the claimant, the applicant has failed to explain the delay of slightly below 4 months in filing the application. The Court finds that the application has been filed after undue delay and as submitted for the claimant it was an afterthought coming after the claimant's advocate wrote and served letters on satisfaction of the judgment terms.
- b) As submitted for the claimant the applicant has not established that there is fresh evidence which with due diligence could not be provided at the hearing. The applicant has not offered any or a reasonable explanation about the difficulty of availing at the hearing the alleged fresh evidence by way of alleged payslips which have been discovered. The date and circumstances of discovery of such alleged new evidence has not been stated at all. It is true that the alleged payslips were employee records in the respondent's or applicant's possession throughout the proceedings. The alleged fresh evidence is not exhibited on the supporting affidavit. Thus the Court returns that the alleged reason for review has not been established at all.
- c) The Court returns that the consideration of fluctuating salaries was not the only and main reason for the finding of discrimination and award of damages. The Judgment is clear on the deliberation that the claimant was denied equality before the law when she was denied reasonable accommodation and that apart from fluctuating earnings, she was demoted and made to work under another employee of similar rank when she could work comfortably without such subjugation – so that she was subjected to indignity at work as she was pulled down unnecessarily and unfairly so. As submitted for the claimant, the applicant appears to be asking the Court to rethink differently as set out in the judgment, and such arguments would only be properly ventilated on appeal. The application will therefore be declined.
- d) For avoidance of doubt, the Court's findings in relation to the discrimination in issue was expressed in order (1) of the judgment thus, **"The declaration that the act of the respondent in failing, neglecting and refusing to install or provide the claimant with a screen reader, voice command or any other technology to help her overcome her disability and subsequently the demotion of the claimant amounted to an act of discrimination on the basis of disability and that it offended Articles 10, 27, 28, 41 and 54 of the Constitution."**

- e) The Court also observes that the applicant clearly failed to invoke and cite the Court's rules on such applications for review and though the provisions are substantially similar to the provisions of the Civil Procedure Rules cited, such omission serves as an

impetus to dismissal of the application.

In conclusion the application for review filed for the respondent herein on 22.07.2019 is hereby dismissed with costs.

Signed, dated and delivered in court at Nairobi this Friday, 22nd November, 2019.

BYRAM ONGAYA

JUDGE