



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 8 OF 2015**

*(Before Hon. Justice Mathews N. Nduma)*

**MERCY MARCHIYA.....CLAIMANT**

**VERSUS**

**THE AFRICA POPULATION AND**

**HEALTH RESEARCH CENTRE.....RESPONDENT**

**R U L I N G**

1) The Respondent/Applicant seeks review of the Judgment of the court delivered on 18<sup>th</sup> August, 2017 on the grounds set out on the face of the notice of motion dated 11<sup>th</sup> September, 2017 and filed on even dates as follows:-

- i) THAT the court in the said judgment erroneously awarded compensation of USD 61,249.65 which compensation was neither pleaded nor particularized by the Claimant.
- ii) THAT the court in the said judgment and in considering the provisions of section 49(4) of the Employment Act incorrectly awarded compensation beyond the statutory compensation stipulated under section 49 of the Act.
- iii) THAT the court in the said judgment proceeded to award the said compensation in reliance on the case of **Pravin Bowry v EACC** whilst not considering that the facts of the case are distinguishable from those in the present case.
- iv) THAT the compensation amount is erroneous on the face of the record, in so far as the judgment considers at paragraph 34 that the uncompleted term of the Claimant's contract was 10 ½ months.
- v) THAT the Respondent has discovered new and important evidence which was not within its knowledge.
- vi) THAT there has been no unreasonable delay in making this application.
- vii) THAT it is in the interest of justice that the orders sought be made.

2. The application is further supported by an affidavit of Jairus Stephen Otieno sworn on 11<sup>th</sup> September, 2017.

3. The application is opposed vide a replying affidavit of the Claimant sworn on 19<sup>th</sup> September, 2017. During the arguments, Mr. Lutta for the Claimant admitted that there was a mistake on the face of record in that the court found the balance of the unserved term of the contract was 10 ½ months instead of 10 months and three days. The claimant prayed that the judgment be reviewed only to the extend but all other issues raised are grounds of appeal and not that for review of a judgment.

4. That the Respondent was inviting the court to sit on appeal of its judgment.

**Determination**

5. The court has carefully considered the grounds for review by the applicant and reached the conclusion that the applicant has not satisfied the requirements set out under Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2010 in that:-

- i) The Claim for compensation was specifically pleaded in the amended statement of claim filed on 12<sup>th</sup> March, 2015.

ii) The court only awarded the claimant the equivalent of 10 ½ months salary or compensation which award was not beyond the maximum 12 months salary provided under section 49(1) (c) of the Employment Act, 2010.

iii) That whether or not the court erred in fact and law in relying on the decision in **Pravin Bowy v EACC** is a point that may only be taken on appeal and not on review.

This was tantamount to asking the court to sit on appeal of its own judgement.

6. Accordingly, the Application for review is dismissed except that the award of equivalent of 10 ½ months' salary in compensation is varied and substituted with an award of 10 months and 3 days salary in compensation for the unlawful and unfair termination of employment.

**Dated and Signed in Kisumu this 22nd day of February, 2018**

**Mathews N. Nduma**

**Judge**

**Delivered and signed in Nairobi this 2nd day of March, 2018**

**Maureen Onyango**

**Judge**

**Appearances**

Mr. Otieno for Respondent/Applicant

Mr. Lutta for Claimant/Respondent

Anne Njung'e – Court Clerk