REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 922 OF 2014

GRACE ITUNGA.....CLAIMANT

- VERSUS -

COMMONWEALTH WAR GRAVES COMMISSSION.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 22nd June, 2018)

RULING

On 18.05.2018 the Court entered judgment for the claimant against the respondent for:

a. The declaration that the termination was procedurally unfair as it was abrupt as the one month notice in section 40 of the Employment Act, 2007 had not been served upon the labour officer and the claimant.

b. The respondent to pay the claimant **Kshs.1, 429, 560.00** by 01.07.2018 failing interest to ran thereon at court rates from the date of this judgment till full payment.

c. The respondent to pay the claimant's costs of the suit.

On 28.05.2014 the respondent filed an application for review by the notice of motion under rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016. The respondent prayed that the judgment delivered on 18.05.2018 be reviewed in the following terms:

a. That the declaration that the termination was procedurally unfair as the one month notice had not been served upon the labour officer and the claimant is set aside.

b. That the award of Kshs.1, 429, 560.00 and costs are set aside.

The respondent prayed that costs of the application be provided for.

The application was filed through Hamilton Harrison & Mathews Advocates and urged by learned counsel Michi Kirimi Advocate as well as supported by the attached Advocate's affidavit.

The respondent's ground for review is that the notice under section 40 of the Employment Act, 2007 was in fact issued to the claimant by the letter dated 12.04.2013 as exhibited at pages 47 to 48 of the claimant's documents. Further the notice to the labour office was produced in evidence at pages 7 to 8 of the documents attached to the witness statement of Rod Carkett. The claimant testified that she attended the meeting of 12.04.2013 and receiving the notice that followed. The declaration that the termination was procedurally unfair for want of the notices therefore constitutes an error apparent on the face of the record in light of the evidence before the Court. The judgment should therefore be reviewed to prevent miscarriage of justice, the application having been made without undue delay.

The claimant has opposed the application for review by filing on 18.06.2018 the grounds of opposition through Gitobu Imanyara & Company Advocates. The grounds of opposition are as follows:

a. The Notice of Motion dated 28.05.2018 is frivolous, vexatious and incurably defective and incompetent.

b. No valid or lawful case is made out for review of the judgment of the Honourable Court dated 18.05.2018.

c. Judgment of the Honourable Court was on the basis that, "**The Court finds favour with the submissions by counsel for the claimant that the letter of 30.05.2013 could not serve as both redundancy notice and letter of termination nor could it**

combine the two. Further, as counsel for the claimant submitted, the Court follows the holding by Ndolo J in Charles Nyangi Nyamohanga –Versus- Action Aid Kenya [2015] eKLR…."

d. There is no error apparent on the face of the record to warrant a review of the judgment.

e. Setting aside of the judgment will result in a miscarriage of justice.

f. The right remedy, if any, to the respondent is to appeal and not a review.

g. The sole reason for the application is to embarrass the Honourable Court and is not in good faith, as it does not attach the proceedings before the in support of the outrageous claims made therein.

h. The claimant is entitled to a restatement of the orders made in the judgment and for the dismissal of the application with costs.

The claimant opted to rely on the grounds of opposition and the applicant made both oral and written submissions and filed authorities.

First, it was that an application for review was made where an appeal had not been preferred and without undue delay. The Court returns that there was no dispute that an appeal had not been preferred and that the application was without undue delay.

Second, the ground for review is that there is an error apparent on the record. It is clear that review is available where the applicant establishes an error apparent on the record. As submitted for the respondent in **Bernard Damunga Ndunda –Versus- Kerio Valley Development Authority [2013]eKLR**, the Court held that under rules 32 and 33 of the then Industrial Court (Procedure) Rules, 2010, the Court enjoyed jurisdiction, despite the applicant's preferred appeal, to rectify the mistake or incidental error in the judgment as was established by the applicant. As further submitted, in **Kenya Game Hunting & Safari Workers Union –Versus- Lewa Wildlife Conservancy [2015]eKLR**, the Court found that the judgment would be reviewed on account of an error apparent on record where the applicant established that in the judgment, the Court had gone beyond the dispute as had been referred to the Court and a review was proper to meet the ends of justice.

As to the content of an error apparent on record that would justify a review, the Court follows the opinion of the Court of Appeal in **Muyodi –Versus- Industrial and Commercial Development Corporation and Another [2006]1 EA** (Tunoi, O'Kubasu and Deverell JJ.A) thus, "**An error on the face of the record could not be defined precisely or exhaustively, as there was an element of indefiniteness inherent in its very nature to be determined judicially on the facts of each case. There was a real distinction between a mere erroneous decision and an error apparent on the face of the record. An error that had to be established by a long drawn out process of reasoning or on points where there may conceivably be two opinions could hardly be said to be an error apparent on the face of the record. However, where an error on a substantial point of law stared one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out: Nyamongo and Nyamongo –Versus-Kogo applied.**"

Again in **Maurice Otieno Owiny –Versus-Mombasa Container Terminal Ltd & Another [2017]eKLR**, (O.Makau J) in declining a review stated thus, "**7. An error apparent on the face of the record is one which speaks for itself and does not require legal or factual arguments to prove it. In this case, the applicant has not pointed out any error on the face of the record. In my view his argument tilts more towards pointing at the error of judgment which goes to the merits of impugned judgment. In that regard, his remedy lies in an appeal to a higher court and not review by the trial court**."

The court has carefully considered the useful submissions and authorities as cited for the applicant by learned counsel. In the present case the applicant's case is that there is an error apparent on the face of the record because the Court failed to consider that the letter dated 12.04.2013 as delivered to the claimant and the letter dated 12.04.2013 to the Labour Officer, Nairobi Area amounted to a sufficient one month notice under section 40 (1) (a) as read with (b) of the Employment Act, 2007, to the claimant and the Labour Officer, as to the reasons for and the extent of the intended redundancy.

The redundancy came by the letter dated 30.05.2013 and effective the same date.

The letter of 12.04.2013 to the claimant was categorical thus, "**The Commission will now commence consultation with you regarding these changes. The purpose of this consultation period is to explore any options for avoiding redundancy or limiting the impact of this redundancy. It is also an opportunity for you to make any suggestions you might have, ask any questions or raise any concerns. Additionally it is also a way for the Commission to identify any support we may be able to offer you during this time. No decisions will be taken until consultation has taken place. I will therefore set up a separate consultation meeting and confirm the time, date and location of this meeting to you in the very near future. We will also notify the local Labour Office, as required, as soon as possible.**" The Court returns that the letter was not conveying a decision that the respondent had decided to or intended to render the claimant redundant in a month's time. Whereas the letter had earlier stated thus, **"….I am therefore writing to confirm that we are placing you at risk of redundancy.**", the Court finds that the letter was clear that such redundancy decision as against the claimant had not been made – it was not a notice that the claimant would be rendered redundant any time after lapsing of a month from the date of that letter. It was a letter, in the findings of the Court, there was possibility of a redundancy against the claimant but which could be avoided by reason of planned consultations, and, after such consultations the applicant would make a decision. The Court finds that as at the time of that letter, it is clear that the applicant had not made a decision on redundancy, so that there was no intended redundancy as envisaged in section 40 of the Act that would form the subject of the one month notice of intended redundancy as envisaged in section 40(1) (a) as read with (b) of the Act. Similarly, the Court returns that the letter by the respondent fell short of the one month notice to the Labour Officer as to the reasons for and the extent of the intended redundancy when the applicant wrote on 12.04.2013 to the Labour Officer thus, "**In accordance with the Kenyan Labour Law I write to advise you that we have notified a member of staff that they may be at risk of redundancy and that we have commenced consultations as at today, 12 April 2013. Should you require any further information please do not hesitate to contact me.**" Needless to state, the extent and reasons for the termination were never stated, the employee to be rendered redundant remained anonymous, and, in view of the letter to the claimant of the same date, the redundancy decision had not been made.

Further, the Court took it that it was after such consultations that the one month notice was to be issued to the claimant and the Labour Officer, if after the consultations, it was decided that the claimant was to proceed on redundancy. The prescribed one month notice could not issue to the claimant prior to her identification or targeting for redundancy.

The Court finds that as submitted for the applicant, it was after the consultations on all issues of the matter that notices would issue to the affected employee as Maraga JA (as he then was) stated in **Kenya Airways Limited –Versus- Aviation & Allied Workers Union Kenya & 3 Others [2014]eKLR**, thus, "**46. I disagree with Mr. Mwenesi that the appellant's letter of 1st August 2012 did not constitute the notice envisaged by section 40(1) (a) of the Employment Act as it did not have the names of the affected staff and there was no notice addressed to the appellant's individual employees. My understanding of this provision is that when an employer contemplates redundancy, he should first give a general notice of that intention to the employees likely to be affected or their union. It is that notice that will elicit consultation between the parties, and I will shortly show that consultation is imperative, on the justiciability of that intention and the mode of its implementation where it is found justiciable. At that initial stage, the employer would not have identified the employee(s) who will be affected. So that notice cannot have the names of the employees as Mr. Mwenesi contended. It does not have to a calendar month's notice as Mr. Mwenesi contended. The Act requires one month's notice. The period runs from the date of service of that notice. It is after the conclusions of the consultations on all issues of the matter that notices will be issued to the affected employees of the decision to declare them redundant.**"

It is clear that the citation from **Kenya Airways Limited –Versus- Aviation & Allied Workers Union Kenya & 3 Others [2014]eKLR** related to the interpretation of section 40(1) (a) of the Act on notice to the trade union (as opposed to the notice to an individual employee, like in the present case, under section 40(1) (a) as read with section 40(1) (b) of the Act). It appears to the Court that the generality of the initial notice to the trade union under the section and per the citation would be limited to the initial notice to the trade union not disclosing the names of the affected employees, and not, "**the reason for and extent of the intended redundancy**". This being a case not involving a trade union, it would further appear to the Court that the cases are in that regard distinguishable.

Thus, the Court having considered that the letters of the same date, 12.04.2013, one to the claimant and a separate one to the Labour Officer were nothing close to the one month notice envisaged in section 40(1) (a) as read with section 40(1) (b) of the Act in terms of content and intention, the Court upholds its findings in the judgment herein thus, "**The respondent was required to notify the claimant and the labour officer not less than a month prior to the date of the intended date of termination. It is clear that the respondent failed to notify the labour officer. It is also clear that as per respondent's letters of 22.04.2013, 23.04.2013, and 30.04.2013 addressed to the claimant and notes of the meeting of 08.05.2013, all showed that consultations about the redundancy were underway but the relevant one month notice had not been served. The notes of the meeting of 16.05.2013 state that the meeting was to confirm redundancy. The redundancy then came by the letter of 30.05.2013. Whereas the parties discussed the redundancy that was anticipated, the Court returns that the respondent failed to serve the claimant the month's notice prescribed under section 40 of the Act. The Court finds favour with the submissions by counsel for the claimant that the letter of 30.05.2013 could not serve as both redundancy notice and letter of termination nor could it combine the two. Further, as counsel for the claimant submitted, the Court follows the holding by Ndolo J in Charles Nyangi Nyamohanga –Versus- Action Aid Kenya [2015] eKLR that there are two kinds of notices in a redundancy as provided for in section 40 of the Act thus, "First, there is the one month notification of the reasons for and the extent of the intended redundancy to the employee and the labour officer. Second, there is the termination notice under the employee's terms and conditions of employment. The two notices cannot be issued simultaneously and there is good reason for this. Redundancy as a form of termination of employment happens at the behest of the employer through no fault of the employee and since employment is not only a means of livelihood but also a form of identity and dignity, an employee leaving employment on account of redundancy ought to be treated with soft gloves."**

Thus, the Court returns that the claimant was entitled to lament that the termination was abrupt. The pay in lieu of notice did not cure the procedural requirement that a notice be served for obvious reason that the employee is entitled to be properly prepared in view of the looming redundancy. The termination in the present case was therefore procedurally unfair."

Third and finally, the Court returns that in view of the findings, the application for review will fail. The Court further considers that the two letters of 12.04.2013 were specifically not analyzed in the judgment. It is now clear that the Court must have considered them as not amounting to the one month notice under the provisions of section 40(1) (a) as read with section 40(1) (b) of the Act, in terms of their content and intention. That was a subject both parties had submitted about in detail in the final submissions on record. It is now clear that the Court must have agreed with the submissions made for the claimant that a redundancy notice was not the same as a discussion about redundancy being a possibility – a possibility as was expressed in the two letters of 12.04.2013. It might be that the failure to specifically mention as much in the judgment might have guided the applicant to file the present application for review. Otherwise the application for review would have clearly been offering a differing opinion as to the findings by the Court and therefore, a clear case for appeal rather than review, as may have been necessary. In that consideration, the Court returns that the application, one way or the other, served the purpose of setting the record straight, and each party will bear own costs of the application.

In conclusion, the application for review filed and dated 28.05.2018 is hereby dismissed with orders that each party will bear own costs of the application.

Signed, dated and **delivered** in court at **Nairobi** this **Friday 22nd June, 2018.**

BYRAM ONGAYA

JUDGE