



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

SUIT NO. 39 OF 2017

JOSEPH KAMAU NYAKARURA.....1ST CLAIMANT

GABRIEL NJUGUNA KIRUGU.....2ND CLAIMANT

FRANCIS MWANGI MUIGA.....3RD CLAIMANT

GABRIEL MUIRU WAWERU.....4TH CLAIMANT

VERSUS

MUHUGU FARM LIMITED.....RESPONDENT

RULING

1. The Claimants' motion dated 14th March 2018 seeks the review of the orders and decree of Ongaya J. made on 20th December 2017. In the review application, the Claimants'/Applicants assert that the learned judge found that the dismissal of the Claimants was unfair within the meaning of Section 41 of the Employment Act but held that the Claimants had not prayed for compensation in their memorandum of claim. The Respondent is opposed and filed an affidavit to oppose the motion. The decision rendered by Ongaya J. in page 2 of the judgment captured the pleadings made. In the decision the court stated that the Claimants had sought terminal benefits and compensatory damages totaling Kshs. 1,609,920/-. On page 4 of the decision the court returned that on the issue of termination, the same was unfair and that the Respondent had failed to invoke the safeguards of Section 41 on notice and hearing. He found that the dismissal of the 1st, 2nd and 3rd Claimants was unfair for want of due process for want of a valid reason for the dismissal. The learned judge then held at the foot of page 4 that "there was no prayer for compensation in that regard". The 4th Claimant was not accorded the safeguard under Section 41 after his alleged desertion of duty. The learned judge found his dismissal unfair. The 1st, 2nd and 3rd Claimants were dismissed after due notice was paid prior to dismissal. The court in either granting or denying review of the decision or orders of the court must be satisfied that the criteria for review exist. The grounds for review are set out in Section 16 of the Employment & Labour Relations Act 2011. The Section sets out the following:-

The Court shall have power to review its judgements, awards, orders or decrees in accordance with the Rules.

2. The Employment and Labour Relations Court (Procedure) Rules 2016 make provision on the review under Rule 34 as follows:-

34. (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 a 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.

3. The range of reasons for a review set out in the law limit the scope of the applicants. The decision by Ongaya J. reveals an error apparent on the face of the record. The Court found the dismissal to be unfair and proceeded to deny an award for the sole reason that the Claimants had not pleaded the compensatory relief. As is seen from the Judgment, the court was in error as the Claimants pleaded compensatory

damages. In my considered view, the Court should have set out reasons why compensation was not payable. In view of the fact that the 1st, 2nd and 3rd Claimants were given notice pay and the 4th Claimant was absent without leave, the court was bound to consider these factors in deciding to give compensation. I would on my part have given each of the Claimants one month's salary pay as compensation. The Claimants, though successful will have to bear their own costs as the error was on the part of the court and this cannot be visited upon the Respondent. In the final analysis I review the decree of the Court to the extent that the Claimants will each receive one month's pay as compensation. The amount will be subject to statutory deduction as provided for under Section 49 of the Employment Act. Each party to bear their own costs for the motion.

It is so ordered.

Dated and delivered at Nyeri this 18th day of September 2018

Nzioki wa Makau

JUDGE