



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1194 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 19th December, 2018)

MOSES NJOKA.....CLAIMANT

VERSUS

THE SAROVA STANLEY.....RESPONDENT

RULING

1. The Applicant, Moses Njoka, filed a Memorandum in Support of Review of Judgment, on 01/08/2018 dated 31/07/2018 and brought under Section 16 of the Employment and Labour Relations Court Act and Rule 33 of the Employment and Labour Relations Court (Procedure) Rules 2016 against the Respondent, The Sarova Stanley, seeking a review of the Judgment by the **Hon. Lady Justice Wasilwa in Cause No. 1194 of 2015, dated and delivered on 11th June 2018.**

2. The Applicant representing himself, contends that he is aggrieved by the abovementioned judgment on **“Termination Gratuity”** and wishes to lodge a review on reasons that:-

a) At the cause of action herein, there existed a duly concluded and registered Collective Bargaining Agreement in force.

b) Clause 27(b) (i) of the Collective Bargaining Agreement, within the period of the cause of action of the dispute did provide for “Termination Gratuity” inter alia:-

“Where an employee terminates or is terminated there will be a gratuity paid for long services as follows:-

(i) Between 5 and 10 years’ service one third of the one month’s salary and one third of the house allowance at the rate of pay applicable at the time of termination for every completed year of service”.

c) The Claimant had duly calculated figures for demand on “Termination Gratuity” as envisioned at paragraph 5(4) of its submissions amounting to Kshs. 67,302.00/= (Kenya Shillings Sixty Seven Thousand Three Hundred and Two Only).

d) The Judgment failed to take into consideration of the fact that the provision of Clause 27(b) (i) of the Collective Bargaining Agreement had duly granted for such compensation on “Termination Gratuity”.

e) The above shows there is an omission on the face of the record of the judgment since “Termination Gratuity” is duly provided for in the Collective Bargaining Agreement that covered the Claimant herein.

f) Had this fact been considered, the Court would have arrived at a different inclusive judgment.

g) It is only fair and just for a re-determination of the judgment having the above issue in mind.

3. The Applicant prays for a review of the judgment in the following terms:-

1. That this Court does find and hold that indeed the provision on “Termination Gratuity” was duly provided for in the Collective Bargaining Agreement at the cause of action in dispute.

2. That this Court does find that there was an oversight in its judgment over the matter by having failed to include the amount for the "Termination Gratuity" in the judgment.

3. That therefore, the Honourable Judge does find and deem necessary to review the judgment and incorporate the amount on "Termination Gratuity" in the reviewed judgment.

4. That costs of this Application and suit be provided for.

4. In the Supporting Affidavit sworn by the Applicant, he avers that as a result of the omission on "Termination Gratuity", he feels prejudiced and that since it is an error on the face of the record, a review of judgment is therefore appropriate and that the relief sought in his application be granted.

Respondent's Case

5. The Respondent filed its grounds of opposition on 14/08/2018 dated 09/08/2018 opposing the Claimant's application for review as follows:-

1. The evidence against which the review is being sought was not adduced in the trial.

2. There is no error apparent on the record or at all.

3. The application for review lacks merit.

4. The orders being brought to be reviewed have not been extracted and exhibited in the application.

Applicant/ Claimant's Submissions

6. The Applicant submits that "Termination Gratuity" was inclusive in the Respondent's letter for summary dismissal which was in the list of documents dated 5/08/2018 and that the same was not in contention.

Respondent's Submissions

7. The Respondent submits that while **Rule 33(3) of the Employment and Labour Relations Court (Procedure) Rules 2016** provides that an application for review shall be by way of a Notice of Motion supported by an affidavit, the Applicant brought this application by way of a document he referred to as "Review of Judgment", "Memorandum in Support of Review" and a supporting affidavit. That the Court is not moved in the manner prescribed by law and as such, the Court's jurisdiction over this matter has not been properly invoked.

8. It is submitted by the Respondent that from the Applicant/Claimant's list of documents and from the proceedings, the Claimant did not adduce any evidence on the now sought termination gratuity and that the Claimant did not also produce the Collective Bargaining Agreement to prove his claim. It states that **Section 107(1) of the Evidence Act** provides that:-

"Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

9. The Respondent finally submits that the application herein being defective, incompetent and misconceived, should be dismissed with costs.

10. I have examined all the submissions and the averments of the parties.

11. The Applicant seeks review on the grounds that there is an error on the record. I note that this Court is able to review its orders and rulings under rule 33 of the ELRC (Procedure) Rules 2016 which states as follows:-

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".

12. Where there is an error then, the Court can review its orders. From the claim, Clause 5(5) the Applicant has sought termination gratuity amounting to 67,302/= which this Court did not grant. This prayer was not granted because it was not proved. The Claimant did not exhibit

the Collective Bargaining Agreement document he now seeks to rely upon. However from the Respondent's own documents – the summary dismissal letter to the Claimant, the Respondent had acknowledged dues owed to the Claimant amongst them termination gratuity for 7 years completed service at the rate of 1/3 salary and 1/3 house allowance at the rate applicable at the tie of termination.

13. This being the case, it is indeed true and an omission is error not to grant service gratuity as admitted. I therefore find that this is a proper application that warrants review.

14. I allow the application for review and in addition to what was awarded in my judgement of 11-6-2018, I also award gratuity as prayed being Kshs.67,302. This brings the total award to Kshs.660,439.

15. There is be no orders as to costs.

Dated and delivered in open Court this 19th day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Applicant – Present

Respondent – Absent