



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1712 OF 2014

ANGELA WOKABI MUOKI CLAIMANT

VERSUS

TRIBE HOTEL LTD RESPONDENT

RULING

1. The respondent, Tribe Hotel Ltd by application dated 29th January, 2017 is seeking for a review of the court judgment and award under Rule 32 of the Industrial Court (Procedure) Rules, 2010 [Employment and Labour Relations Court (Procedure) Rules, 2016] and on the grounds that there is substantial new evidence which was not reasonably available to the Respondent at the time of the hearing demonstrating that the Claimant abused her position by wilfully defrauding the Respondent through fraudulently obtained, undeserved and unapproved salary increments. There was collusion with other employees to fraudulently and improperly confer on them benefits. There was an error of law and a fact in the judgement which tilts the balance for a review of the same.

2. Other grounds in support of the review application are that the Claimant was the sole human resource manager of the Respondent and was wholly relied upon for her professional capacity to advise the board and to ensure compliance with human resource laws and regulations. The Claimant was not an innocent bystander but used her position and influence and authored of various letters to defraud the Respondent.

3. New evidence reveals the Claimant intentionally and deliberately created a discrete internal system concealed from the board through which she fraudulently increased her own salary in abuse of her position and trust placed in her and earned an undeserved Kshs.17,054,222.00 which she owes the Respondent. The Respondent policy was to increase salaries annually by taking into account the general economy but the Claimant took advantage of her position to increase her salaries without approval by the Respondent. New evidence has emerged to reveal the Claimant misrepresented to the finance department of her salary increments which were never questioned believing the same to be genuine and had been approved by the board which was not the case.

4. The Claimant signed her own contracts and used the same to defraud the Respondent. There were no checks and balances. The Claimant created an environment where she discretely increased her salaries without authority. Such illegal increments are an unjust enrichment and in abuse of office and the Respondent claim damages.

5. New evidence has emerged that the contracts upon which the court based its judgement upon are fraudulent and illegal and the only contract the Respondent was aware of was the one dated 29th August, 2008. The other contracts submitted in court are not signed by the Respondent. The contents of such contracts are questionable on the term; notice period; the changed amounts; and lack of approvals by the

Respondent board. Such an illegal contract cannot be enforceable in law. The change of contract from 3 years to 5 years was illegal as the change did not factor the terms of the on-going contract for 3 years that had not lapsed.

6. New evidence has emerged that the Claimant while in the employment of the Respondent was looking for new employment so as to avoid scrutiny by the Respondent. The Claimant with other employees conspired to put the Respondent to huge financial loss by giving backs false information that led to employees borrowing money on information that the employees were on permanent employment terms and not on contract which the Claimant knew was false and fraudulent. Such evidence is available where Josphat Cosmas Onyango is reported to have been employed permanently while the Claimant had changed his contract to be for 5 years. A letter was issued to Barclays Bank with such falsified information. Mr Onyango's contract was also extended for 20 months without the respondent's knowledge and approval and by the employee conspiring with the claimant.

7. The judgement of 29th September, 2016 at paragraph 85 has an error as the court has relied on an erroneous contract indicated to be for 5 years and signed by the Claimant but no such contract existed on the record.

8. There is an error in the judgement as the Respondent was willing to pay the Claimant her terminal dues but the failure to pay was because she submitted two conflicting contracts one for Kshs.3, 255,770.23 and another for Kshs.11, 272,864.60.

9. There is an error at paragraph 99 of the judgment where the court held the Claimant had resigned but shifted the burden on the Respondent to regularise the position which is contrary to section 35 of the Employment Act.

10. There is an error where the court found the Claimant had intention to resign but proceeded to award compensation at 12 months. There is evidence that the Claimant immediately got new employment with Panari.

11. The Respondent is seeking for orders that; the judgement of the court be set aside; hearing to commence *de novo*; and in the alternative the court be pleased to review its judgement to conform with the outcome of the application for review.

12. The application is supported by the affidavit of **Eyuru Salem Mukulu**, the human resource manager of the Respondent and on the basis that there are new and compelling information that was not available to the court during the hearing and judgement of 29th September, 2016 was in error and should be set aside, reviewed and hearing to commence *de novo*. The Claimant acted fraudulently, abused her office and caused contracts to be written increasing her salaries without approval of the Respondent which is illegal and should be put into account.

13. In reply, the Claimant filed a **Replying Affidavit** and avers that the application by the Respondent is incompetent and in abuse of the court process and should be dismissed. The application is based on the provisions of Rule 16(1) of the Industrial Court (Procedure) Rules, 2010 which are not applicable for review applications. Notice of Change of Advocates has not been served upon the Claimant to replace the firm of *Taibjee and Bhalla Advocates* to *Benjamin Musyoki Advocate*. On 17th November, 2016 when parties attended court for the taxation of the bill of costs, Musyoki advocate was denied audience as there was no change of advocate. On 2nd February, 2017 the claimants advocate who happened to be in court opposed appearance by Musyoki advocate in seeking interim orders as there was no change of advocate filed. Application premised on the affidavit of Salem Mukulu dated 29th January, 2017 ought to be struck off as it has not complied with mandatory provisions of the Oaths and Statutory Declarations Act. The affidavit is not commissioned before a Commissioner for Oaths but before an advocate.

14. The Claimant avers that Ms Mukulu is a stranger to the matters herein, a foreigner in Kenya working for the Respondent without a work permit and that is illegal.

15. The application is not filed timeously as required under Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules. The Respondent waited until the Claimant obtained Certificate of Taxation so as to make their application.

16. There is no evidence that the alleged material records could not be available during the trial save that Ms Mukulu now has new records but does not explain where such records were before.

17. On 1st October, 2014 the Respondent filed defence; on 10th November, 2014 filed documents and hearing commenced on 26th April, 2016 when the Claimant closed her case. On 19th May, 2016 the Respondent filed Supplementary list of documents without leave and at the defence hearing on 30th May, 2016 this was directed as being irregular as the Claimant had closed her case.

18. The Respondent further explained that the documents in the Supplementary list had been discovered by an expert from a computer the Claimant had been suing and despite objections by the claimant, the court admitted such documents, the Claimant was recalled in her evidence due to the new documents admission and was cross-examined by the Respondent.

19. The Respondent made further attempts to introduce new documents at the hearing on 30th May, 2016 which was disallowed by the court. It is not therefore correct that there is new evidence that was not available to the Respondent at the time of hearing. The contract challenged for 5 years was issued when the general manager was Mark Somen who signed it. The respondent's witness testified to the letter of appointment and confirmed that it was from the Respondent and not a forgery. Mr Mark Somen was never called to testify to the letters he issued to the claimant. Mr Hirjit, the finance controller confirmed the letters of appointment was not a forgery. This was confirmed by Mr Hamed for the Respondent.

20. That the Claimant testified to the issue of new contracts to employees was to address the case of high staff turnover due to short term contract and as human resource manager, the Claimant signed the over 238 contracts. The Claimant has not concealed any facts from the Respondent board as she was not a member or part of its resolutions. Where there was a policy on pay increase, such has not been produced and such cannot be produced after judgement herein. The claimant's salary was increased after probation; it was further increased after the Respondent learning she had been head hunted by Sankara Hotel and an offer made to match.

21. The Claimant also avers that she earned a house allowance and to avoid the tax effect, it was increased to cover the same. This was similar to what other senior management team earned. The Finance Controller had the right to consult with the board in his capacity as such and the one in supervision of the claimant. This officer used on annual increments schedules for all employees and not just the claimant. The signed documents by the Claimant are not new and such records have been with the respondent.

22. The Claimant also avers that all banks have eligibility criteria to verify loan applications one being to ask for an employment letter. The Claimant only did letters to confirm if any employee had a disciplinary case to warrant termination of employment. Mr Onyango had a contract like 233 other employees of the Respondent who have been phased out unfairly but only Mr Onyango was bold to challenge his unfair treatment by the respondent, in Cause No.417 of 2016. There is an MOU between the Respondent and Barclays Bank signed to have the employees' access facilities and all required documents were issued by the financial controller.

23. The Respondent has never offered to pay the Claimant her terminal dues and she was terminated from her employment and the judgement is not an error to this effect. The termination had a negative impact of the Claimant and the non-issuance of a certificate of service affected new employment search.

24. To go through trial again will prejudice the Claimant and no material has been presented sufficient to warrant the grant of the orders for setting aside judgment to commence *de novo* or for a review of the same.

25. Both parties made oral submissions in court.

Determination

Whether the court should set aside judgement of 29th September, 2016;

Whether the hearing should commence *de novo*;

Whether the Respondent should be allowed to make a claim for general damages; and

Whether the court should review its judgement of 29th September; 2016.

26. Before going into the issues set out above, the question of when the Respondent changed his advocates after judgement came into question. The application subject for the orders sought above was filed on 2nd February, 2017. The Notice of Change was filed on 5th December, 2016 but this was not on the court file until at the hearing of the application on 15th February, 2017. Without challenging the integrity of the judicial system, where the Respondent as able to obtain the consent of previous advocates on 23rd November, 2016 they only filed the notice of change on 5th December, 2016, never served the claimant's advocates and such a vital document was not on the court file for some reason not clear until 15th February, 2017.

27. The challenge to Ms Mukulu affidavit on the basis that it has not complied to the law, I find this affidavit is dully commissioned.

28. On the question of the applicable Rules of the Court, the invocation of Rule 32 and 16 of the Industrial Court (Procedure) Rules is erroneous. The rules have since changed by amendment published in August, 2016 and now in place are the Employment and Labour Relations Court (Procedure) Rules. To apply Rule 32 or 16 thereof in terms of the orders sought is a gross error.

29. I will however address the substantive questions set out by the Respondent in the application before court.

30. On the issues set out above, they are intertwined or inter-related but I will make effort to deal with each separately.

31. On the question as to whether the court should set aside its judgement of 29th September, 2016 on the basis that there are new information available to the Respondent that warrant the same and that the Claimant acted in a fraudulent manner in making contracts for herself and that she abused her office in this regard and that the Respondent is entitled to general damages as a result of the monies the Claimant paid herself and the financial loss the Respondent incurred. In this regard I refer to **Patel versus East Africa Cargo Handling Services Ltd (1974) EA 75** as per **Duffus P.** who detailed:

The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as SHERIDAN J. put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication.

32. The matter of new evidence and information now available to the Respondent though set out, its source, time of such sourcing and by who is not set out. It is part of the record herein that the production of new and important records of the Respondent is a matter gone into on different occasions during the main hearing.

33. The Rules of the Court are quite generous to parties before this court. The practice of the court has

also been to encourage parties to exchange documents before hearing can commence and where necessary, seek leave to produce any further documents before close of hearing. In this regard, while filing the defence on 10th November, 2014 the Respondent attached documents;

34. On 30th May, 2016 the Respondent was allowed to file more documents despite the Claimant closing her evidence and had to be recalled;

35. On 30th May, 2016 the Respondent applied to produce more documents which application was declined. The court has therefore made a finding on the production of more documents. This is on the basis that the employer as the custodian of work records issued the Claimant with a signed employment letter. Such records were presented at the hearing by the Respondent. Time was allowed to the Respondent to amend and file new records. Despite the court refusal to allow the filing of more documents on 30th May, 2016 the Claimant actually encouraged the Respondent to file its documents. The Claimant readily accepted the same to be used by the Respondent and was thus admitted as part of the court records.

36. I take it; the board of directors at the Respondent company has its meetings and are recorded. Such records where salary payments and increments for all employees and the Claimant were considered ought to have been documented. Where the salaries of the Claimant were agreed at a set rate, such board records ought to have been sufficient evidence. Where there were salaries increments, similar board records ought to set this out. I find no such records.

37. To therefore allege that there is new evidence and records that the Claimant acted fraudulently, abused her office and that she gained financially from the Respondent without putting such matters into account as to the role of the Respondent board role is to ignore that the Respondent as the employer has the sole discretion to organise its business and that the Claimant as the employee. The duty vested upon the Respondent as the employer is to ensure that all employees in its business are on a written contract of employment with terms and conditions of such employment. Section 10(7) goes further to set out that;

(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer

38. In court, a senior finance officer of the Respondent testified. Did he notice any fraud with regard to the claimant's salaries and allowances as paid? Mr Hirjit confirmed that the documents issued to the claiming were not a forgery. Indeed where there was such a forgery, there is a different regime of law, criminal process that can adequately address that. Mr Hamed, a director of the Respondent also confirmed that the documents in the possession of the Claimant were not a forgery. If indeed such evidence is on record, when and who made the new discovery of the new evidence of fraud?

39. Mr hamed testified that the Respondent sourced and expert and did a forensic audit of the claimant's computer and documents were obtained that incriminated the claimant. Such material was produced in evidence. The financial controller, Mr Hirjit as an officer of the Respondent and charged with the duty to ensure financial control must have been regulated by a finance policy, guide, regulations or rules to know what was a regular or irregular payment or what was paid required to be approved by the Respondent board or not. For the Claimant to be paid her salaries with increments without the Respondent doing an *own audit* of its systems and policies over payments made to the Claimant from 2008 to 2014 when she was terminated is to require an employee after the fact to give explanations which ought to have been gone into well in advance at the shop floor. To further allege that there was fraud or fraudulent transactions on a matter that the Claimant was supervised to undertake, such is to negate the role of the Respondent board in ensuring effective checks and balances of its employees.

40. The said *company policies* on salary adjustment the Claimant is alleged to have gone contrary to and thus acted in a fraudulent manner have not been submitted for the court to specially see what the Claimant ought to have done and where she failed to attend and therefore engaged in fraudulent activities. Such evidence cannot just be submitted for the sake of it so as to move the court to set aside its judgment and

commence hearing *de novo*. The orders sought by the Respondent would have an impact of recalling all evidence again and to move in that direction there must be a good case. Where there are policies in place to regulate the human resource and financial functions, such were then available during the hearing and cannot be said to be new and important material just been discovered to warrant the orders sought.

41. The new and material evidence relating to the case of Mr Onyango and letters written to the bank, going through appendix 3 and 4 to Ms Mukulu affidavit are letters written by the Claimant on 22nd November, 2011 thus available at the Respondent in the subject employee's file way back before the suit was filed.

42. To thus seek for the introduction of new evidence after the fact of judgement herein is to ask the court to allow the Respondent to open its case as the matter moves along. Such would negate the principle that litigation should come to an end. The Respondent had on three (3) occasions allowed to file their documents and records as set out above;

While filing defence;

The supplementary record; and

During defence hearing on 30th May, 2016.

43. To now seek to start the case all over *de novo* on the basis that there exist new and important records is a matter prejudicial to the Claimant and after judgement delivered after both parties were heard on their merits. To allow such a prayer would be to allow the Respondent appeal their case at the wrong forum by going into the missing gaps identified by the court in the judgment. Such would not only be prejudicial to the Claimant but an illegal manner in addressing questions that this court has already rendered itself.

44. The matter is aptly summed up in the case of **Mbogo versus Shah (1968) EA 93**

... while the court would exercise its discretion to avoid injustice or hardship resulting from inadvertence or excusable mistake or error it would not assist a person who has deliberately sought to obstruct or delay the course of justice.

45. The defence was filed on 10th November, 2014. Judgement was on 29th September, 2016. The Respondent then had over 22 months before judgement to make the discoveries now alleged herein to seek and apply for the filing of new documents and evidence. Since judgement it is now over 4 months to the filing of the application to seek to apply for the judgement to be set aside so as to introduce new records and for hearing to commence *de novo*.

46. In this regard I find no sufficient reason to disturb the judgement on the basis that there is new and compelling evidence to warrant the setting aside of judgement and the hearing to commence *de novo*. The Respondent had sufficient time to argue its case, failure to provide a reasonable defence by the Respondent on the evidence submitted by the Claimant cannot be a sufficient basis for the need to set aside the lawful judgment present herein. Both parties were heard on their merits and judgement rendered. To seek to start hearing afresh would not serve the interests of justice.

47. On whether the Claimant should be allowed to file a claim for general damages, the claim is remised on the allegations that the Claimant benefited from fraudulent activities and should refund such monies to the Respondent. As noted above, the court has made an analysis of the contracts under which the Claimant was employed and made a finding. These contract were admitted by the Respondent witnesses that they were not forged. To invite the court to award general damages on this basis is not a matter of new evidence that has been discovered nor is it a good and sufficient cause to set a valid judgement entered after the court heard both parties in their evidence and the Respondent was allowed to make all the necessary and relevant evidence. No dratt defence setting out a claim for general damages has been attached.

48. On the question of the court doing a review of its judgement, Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides that;

(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.

(2) An application for review of a decree or order of the Court under subparagraphs (b), (c) or (d), shall be made to the judge who passed the decree or made the order sought to be reviewed or to any other judge if that judge is not attached to the Court station.

(3) A party seeking review of a decree or order of the Court shall apply to the Court by way of notice of motion supported by an affidavit and shall file a copy of the Judgment or decree or Ruling or order to be reviewed. .

(4) The Court shall, upon hearing an application for review, deliver a ruling allowing or dismissing the application.

(5) Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.

(6) An order made for a review of a decree or order shall not be subject to further review.

49. An applicant seeking review must file a Notice of Motion setting out the new and important matter or evidence which after due diligence was not within their knowledge for production when decree was passed; there is mistake or error apparent on record; there need for clarification; or there is sufficient cause. The Respondent herein has not moved the court by Notice of Motion and has applied the old Rules of procedure, now amended. The question of new or discovered evidence has been addressed above.

50. The errors addressed in terms of the judgement relate to paragraphs 85; 99; and on the award of compensation.

51. Paragraph 85 of the judgement of 29th September, 2016 the court made a finding on the applicable contract of employment based on the overall analysis of the case. This paragraph cannot be read alone and singled out for review on the basis that the court relied upon the wrong contract of employment. The court analysis is with the rationale that the Claimant had a signed contract of employment and even thought the officer and general manager who signed it was not an employee of the Respondent at the time of its date, but the backdating of the same is clearly set out.

52. On the ward thus made, the basis was on the applicable contract at the time of termination. Terminal dues were computed on the basis that there was a valid contract of employment that spelt out the claimant's terms.

53. Paragraph 99 of the judgement and the challenged error is that the court made a finding that the Claimant had made her intentions to resign known but the court made an award for compensation. An intention remains as such, *an intention* until put into action. Where the Claimant had an intention to

resign, she did not and instead was terminated from her employment by the Respondent. This analysis is clearly gone into in the judgement in several paragraphs and not just at paragraph 99. Upon such termination of the claimant, the court made a finding that the same was unfair and thus made an award for compensation.

54. At the time of writing judgement, the court used the material and evidence before it. The failure to issue an employee with a certificate of service upon termination is an act specifically prohibited under section 51 of the Employment Act. Where the Claimant testified that she had made effort to seek the issuance of such a certificate and the Respondent proceeded to issue one with erroneous information and such affected her chances to secure new employment, there was a sanction and an appropriate award. Where the Claimant was able to secure new employment, this was the exact purpose for which the certificate of service is required for. That upon termination of employment, an employee is able to use the certificate of service to seek new employment with other employers and show that they can show their employment history. A certificate of service is not a letter of recommendation. To the contrary, it only states set facts about an employee and must be issued with the termination letter. It is not the duty of the court to go out and find out if the employee was able to secure new employment after judgement if this is not a material factor at the hearing. Once hearing closed, judgement delivered, what became of the parties and particularly to the Claimant in getting new employment should be encouraged.

55. I therefore find no new material, error apparent on the record to warrant the review of judgement sought by the Respondent.

Application dated 29th January, 2017 though lacking in its form as it is not filed through Notice of Motion, its substance thus addressed has no merit and is dismissed with costs.

Dated and delivered in open court this 30th day of March, 2017

M. MBARU

JUDGE

In the presence of:

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