



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 73 OF 2013**

**UNION OF NATIONAL RESEARCH AN**

**ALLIED INSITUTES (UNRISK).....CLAIMANT**

**VERSUS**

**KENYA MEDICAL RESEARCH INSTITUTE (KEMRI).....RESPONDENT**

**RULING**

1. By an amended memorandum of review dated 10<sup>th</sup> October, 2016 the claimant seeks a review of this court's judgement delivered on 20<sup>th</sup> March, 2015. There is no judgement delivered on this date. The court's judgement was delivered on 23<sup>rd</sup> October, 2015. This ruling is delivered on the assumption that this was the judgement sought to be reviewed.

2. The applicant seeks a review of the judgement on the following grounds:

- a. That the judgement failed to take into consideration the fact that the respondent never accorded the grievant a fair hearing within the meaning of section 41 of the Employment Act.
- b. That the judgement failed to take into consideration the fact that the above named grievant was not paid his correct benefits and entitlements from the date of suspension to the date of his termination of employment.
- c. The judgement did take into account irrelevant factors such as the previous incidences years back which the grievant had been cautioned or warned about.
- d. The above show that a gross miscarriage of justice occurred.
- e. Had these facts been availed to the court, the court would have reached a different result.
- f. That it is critical for the fair determination of the matter having the above issues in mind.

3. In his submission in support of the application the applicant submitted that the judgement sought to be reviewed was wrong on the face of the record as the respondent did not sufficiently prove that the termination of employment was fair and followed due process as the judgement failed to take into consideration the fact that the respondent never accorded the grievant a fair hearing within the meaning of section 41 of the Employment Act.

4. Further that the judgement did not consider that the grievant was not paid his correct benefits and entitlements from the date of suspension to the date of termination of employment.

5. Under rule 33(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 judgement or ruling:-

- a. If there is discovery of new important matter or evidence which after 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 order made;
- b. On account of some mistake or error apparent on the face of the record;
- c. If judgement or ruling requires clarification or
- d. For any other sufficient reason

6. Ground (d) for review provides some latitude for review which if one is not careful could amount to an appeal or calling on a court which has delivered a judgement to reconsider the same. Care must therefore be taken to avoid any possibility of calling upon a judge to sit on appeal over his own decision. It must be noted that an error in apprehending an aspect of a case through mistaken analysis of evidence cannot form a ground for review but a ground for appeal. Further where the existence of an error on a record is contestable between the parties, such error should be resolved by way of an appeal.

7. The applicant complains that the judgement of the court is wrong as the respondent did not sufficiently prove that the termination of employment was fair and that fair procedure was followed in the termination. Paragraphs 3 and 8 of the judgement faulted by the applicant considered the material presented by the respondent in support of the accusations against the grievant, the process he was taken through prior to dismissal and the recommendations of the disciplinary committee.

8. The court further observed that prior to the termination of grievant's services he had a history of disciplinary issues for which he was either warned or surcharged. The court therefore come to the conclusion that the respondent had valid reasons and followed fair procedure in terminating the grievant's services. It therefore cannot be correct that the court failed to consider material that was available in justifying the reason and process for the claimant's dismissal. If it be that the court misapprehended the evidence, then that is for an appeal not review.

9. In conclusion the court finds that the issues raised in the memorandum of review do not fall within the grounds for review contemplated under rule 33(1) of the court rules. The application is therefore found without merit and is hereby dismissed with costs.

10. It is ordered.

Dated at Nairobi this 3<sup>rd</sup> day of March, 2017

**Abuodha J. N.**

**Judge**

Delivered this 3<sup>rd</sup> day of March, 2017

**In the presence of:-**

..... for the Claimant and

..... for the Respondent.

**Abuodha J. N.**

**Judge**