



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF**  
**KENYA AT NAIROBI**  
**CAUSE NUMBER 620 OF 2014**

**FAITH WAITHAKA.....CLAIMANT**

**VERSUS**

**FLEXENCLOSURE KENYA LIMITED.....RESPONDENT**

**RULING**

1. By a memorandum of review filed on 20<sup>th</sup> May, 2016 the claimant sought that the judgement of the court delivered on 8<sup>th</sup> April, 2016 be reviewed. The claimant stated that the court omitted to award the claimant the prayer for commission yet it was contractual.
2. The claimant further complained that the court did not award her for discrimination yet the respondent clearly discriminated against the claimant by terminating her services while she was pregnant.
3. The parameters for review of the courts judgement are well set out under rule 32 of the court rules. The rule provides as follows:

*“A person who is aggrieved by a decree or an order of the court may apply for a review of the award, judgement 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; or*

*(b) An account of some mistake on the face of the record*

*(c) On account of the award judgement or ruling being no breach of any written law.*

*(d) If the award, the judgement or ruling requires clarification or*

*(e) For any other sufficient reason.*

4. The applicant herein has complained that the court did not award her commission yet it was part of her contract. the claimant further stated that the court omitted to award her compensation on account of discrimination yet her dismissal was on account of pregnancy. The burden of proof in civil claims is on the person who wants the court to believe or disbelieve that a particular fact, subject of the claim has occurred or not occurred.

5. It is indeed true that the claimant was entitled to commission, however no sufficient evidence was produced either as exhibit in the memo of claim or in her oral testimony to show she reached the sales level that entitled her to any commission. On the question of termination on account of pregnancy hence discrimination, the court also did not get sufficient evidence to show that the termination was not out of redundancy but due to her pregnancy.

6. Although the matter proceeded ex-parte, this did not lessen the burden on the part of the claimant to adduce evidence in support of her claim. The claims of commission and dismissal on account of pregnancy therefore largely remained unsubstantiated hence not safe to make a judgement in favour of the claimant.

7. In any event if the claimant is of the view that the court erred in not making the findings complained about, the best course would be to appeal and not file an application for review. The court is therefore of the view that the application for review does not raise matters contemplated by rule 32 of the court rules but rather issues which ought to be taken on appeal against the judgement of the court.

8. The court therefore dismisses with costs the application for review.

9. It is so ordered.

Dated at Nairobi this 29<sup>th</sup> day of September, 2017

**Abuodha J. N.**

**Judge**

Delivered this 29<sup>th</sup> day of September, 2017

**Abuodha J. N.**

**Judge**

In the presence of :

.....Claimant

..... Respondent