



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS
COURT OF KENYA AT NAIROBI
CAUSE NO. 801 OF 2013

JOHN NG'ANG'A KURIA.....CLAIMANT /APPLICANT

VERSUS

KENYA BROADCASTING CORPORATION.....RESPONDENT

RULING

1. The Claimant/Applicant sought through his review application dated 30th October 2015 and filed on 2nd November 2015 for a review of the decision of the Court made on 28th September 2015. The review was sought under Section 16 of the Industrial Court Act 2011, Rule 32(1)(b),(c) (d); Rule 32(2), (3), (4), (5) & (6) of the Industrial Court (Procedure) Rules 2010. He stated that the grounds of the review were that the judgment required review on the grounds of some mistake apparent on the face of the record, on account of the decision being in breach of written law and on account of the judgment needing clarification. He stated the grounds as follows:-

1. The Court has not made a formal declaration on the dismissal and/or retirement of the Claimant as pleaded.
2. The Court has made no finding or rejection on the claim or lost earnings, lost benefits in terms of house allowance and medical allowance, loss of 80 days leave and loss of pension in the sum of 73,719,706.60 as pleaded.
3. The Court has made no finding on rejection on the claim for exemplary damages as pleaded.
4. The judgment violates written law in making reference to and basing findings on the provisions of Employment Act 2007 whereas the applicable law in this matter is the Kenya Broadcasting Act (Cap 221, Laws of Kenya); the contract between the parties and/or the Employment Act Cap 226 (repealed) the termination of the employment of the Claimant having been implemented in the year 2005 – a matter which is specifically pleaded and before the enactment of the Employment Act 2007.
5. The applicable law regarding the heads and formula for compensation is as set out in the contract of employment and/or the minimum applicable in the Employment Act Cap 226 (repealed). The

judgment in its entirety is silent and makes no reference and specific finding to the issue of lost earnings, benefits, lost leave days, loss pension as raised by the Claimant before coming to the consideration of an award of twelve months compensation resulting in gross miscarriage of justice.

6. Clarification on issues raised upon which no determination was given as no analysis and reasoning is given in the judgment and award on the claims made by the Claimant.

7. Reference to Section 12 and termination in the public interest as opposed to the Corporation interest is misleading.

2. The Claimant/Applicant also sought costs of the application be provided for. His review application was supported by his own affidavit sworn on 30th October 2015. The affidavit basically reiterated the points raised in his memorandum for review.

3. The Respondent filed grounds of opposition on 18th January 2016. In the grounds, the Respondent asserted that the

1. Application was incurably defective, does no lie and is an abuse of Court process.

2. The application is scandalous, mischievous and vexatious, lacks merit and ought to be dismissed.

3. There is no mistake or error apparent on the record of the proceedings regarding the award made on 28th September 2015 in Cause No. 801 of 2013.

4. There was no breach of any written law in regard, and on account of the award and judgment made on 28th September 2015.

5. The award and judgment made on 28th September 2015 was clear and cogent and requires no clarification.

6. The said judgment was a clear and reasonable finding of the honourable court on the Claimant's claim in terms and in accordance with the prayers sought in the amended plaint dated 3rd July 2013 and the Claimant's submissions filed therein.

7. The honourable court properly analysed, and gave reasons as to why the Claimant was awarded the sum of Kshs. 1,272,000/- and further, as to why the Respondent's counter-claim was dismissed.

8. The honourable court relied on, and employed the correct provisions of law i.e. the Employment Act and the Kenya Broadcasting Corporation Act in its analysis, reasoning and findings in making the award dated 28th September 2015.

9. There are no sufficient reasons or grounds justifying the review of Award made on 28th September 2015.

4. The parties urged the review application on 30th May 2016. Mrs. Ameka, counsel for the Claimant, submitted that there were grounds for review and relied on the grounds set out in the memorandum of review as well as the affidavit in support sworn by the Claimant. The Respondent's counsel Mr. Kibe relied on the grounds filed by the Respondent and submitted that there is no mistake or error apparent on the face of the record herein. He stated that the judgment of the court was clear and cogent and did not require any clarification. He submitted that the court need not make any finding on the exemplary damages sought as the Claimant is not entitled to such damages. The parties also sought to file written submissions. The Claimant/Applicant filed submissions on 15th June 2016 and the Respondent filed submissions on 28th June 2016. In his submissions, the Claimant stated that under the provisions of the Industrial Court Act 2011 and the Industrial Court (Procedure) Rules 2010, the Court had power to review

its judgments, awards, orders or decrees in accordance with the rules. He submitted that when he was terminated the Employment Act 2007 was not in operation and that the Court was therefore in error in basing its decision on the procedural and substantive safeguards outlined in the Employment Act 2007 to award 12 months compensation as wages. Reliance was placed on the case of **Godfrey Njunge Samuel v G4S Security Services Ltd [2014] eKLR** where Radido J. held that the Court had been in error in applying the wrong law. The Claimant submitted that the judgment violated written law by making reference to and basing findings on the provisions of the Employment Act 2007 whereas the applicable law in this matter is the Kenya Broadcasting Corporation Act, the contract between the parties and/or the Employment Act Cap 226 (repealed) the termination of the employment of the Claimant having been implemented in the year 2005 – a matter which is specifically pleaded and before the enactment of the Employment Act 2007. The Claimant relied on the case of **Stephen Ndirangu Ndungo v Wanjuki Muchemi [2014] eKLR** where Ongaya J. held that the applicable law ought not to be determined by the date of entry into contract but rather when the cause of action accrued. He submitted that in the case of **Samson Kimani Gachara v Auto Springs Manufacturers [2015] eKLR** Wasilwa J. found that the wrong formula had been used to calculate the applicant's terminal benefits and the judge deemed that an apparent error on the face of the record warranting review. Reliance was placed on the case of **Samuel Severin Mwala v PZ Cussons East Africa Limited [2013] eKLR** where Nduma Nderi PJ held that the decision of the court resulted in a failure of justice and ordered the case to start *de novo* and on the case of **Victoria Mukonyo v Jamii Bora (K) Ltd [2014] eKLR** where this Court allowed an application for review seeking clarification as to correct indebtedness of an applicant. He submitted that procedural fairness was not accorded to him. Also relied upon was the case of **Jayesh M. Santaria v Jambo Biscuits (K) Ltd [2014] eKLR** where the Court granted a review to correct a mistake or error apparent on the face of it. The Claimant submitted that he had set out grounds for review and that the review was merited and should be allowed.

5. The Respondent's submissions were to the effect that the review application by the Claimant was one that could not pass muster as it had not brought the Claimant within the ambit of Section 16 of the Industrial Court Act 2011 as read with Rule 32 of the Industrial Court (Procedure) Rules 2010. The Respondent relied on the case of **Daniel Okoth v Kenya National Commission on Human Rights [2015] eKLR** where Njagi Marete J. held, relying on an Indian case, that no error can be said to be apparent on the face of the record if it is not manifest or self evident and requires an examination or argument to establish it. The Respondent submitted that the issues relied on grounds 4 and 5 of the Claimant's memorandum of review are not grounds for review and relied on the case of **CMC Motors Group Limited v City Council of Nairobi** Civil case No. 75 of 2007 (unreported) where Lessit J. held that it is not a sufficient ground for review that another judge could have taken a different view of the matter or that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. The Respondent also cited the case of **National Bank of Kenya Ltd v. Ndungu Njau [1997] eKLR** where the Court of Appeal (Kwach, Akiwumi, Pall JJA) held that misconstruing a statute or other provision of law cannot be a ground for review. The Respondent submitted that if and should the Claimant be aggrieved by the decision of the court his recourse lay elsewhere and not in this court by way of review.

6. This Court's power to review its decisions is donated by Section 16 of the Industrial Court Act and Rule 32 of the Industrial Court (Procedure) Rules 2010. The Industrial Court Act Section 16 provides as follows:-

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

7. The Industrial Court (Procedure) Rules 2010 provide as follows under Rule 32:-

32. (1) A person who is aggrieved by a decree or an order of the Court may apply for a review of the award, 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; or

(b) on account of some mistake or error apparent on the face of the record; or

(c) on account of the award, judgment or ruling being in breach of any written law; or

(d) if the award, the judgment or ruling requires clarification; or

(e) for any other sufficient reasons.

(2) An application for review of a decree or order of the Court under subparagraphs (b), (c), (d), or (e), shall be made to the judge who passed the decree, or made the order sought to be reviewed.

(3) A party seeking review of a Court decree or order of the Court shall apply to the Court in Form 6 set out in the First Schedule.

(4) An application under paragraph (3) shall be accompanied by a memorandum supporting the application and the Court shall proceed to hear the parties in accordance with section 26 of the Act.

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

(6) 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.

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

8. The Claimant seeks a review on grounds that the Court made a mistake apparent on the face of the record. The Respondent asserts there is no error or any grounds to warrant a review. The cases cited were instructive save that parties also cited cases which they did not avail to Court forcing the Court to research further to ascertain the findings in those cases. For brevity and due to the fact that they were not availed I have not delved into them in the submissions of parties above.

9. The Claimant makes a good case that the decision made an error as the Court applied the Employment Act 2007. Is this grounds for review or an appeal? In the case of **CMC Motors Group Limited v City Council of Nairobi** (*supra*) my sister Lessit J. held that held that it is not a sufficient ground for review that another judge could have taken a different view of the matter or that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. In the case of **National Bank of Kenya Limited v Ndungu Njau** (*supra*) the Court of appeal rendered itself thus:-

A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.

10. Clearly, if I misconstrued statute or proceeded on an incorrect exposition of the law then I would have no business reviewing my decision. I have noted that the decision did not make any pronouncement on the claim in respect of retirement benefits, unpaid leave days as well as lost pension. In the case of **Samuel Mwala v PZ Cussons** (*supra*) my brother Nduma Nderi PJ acquitted himself thus:-

Firstly the Court found that the summary dismissal of the Claimant /Respondent was unlawful and

unfair but did not consider grant of any appropriate remedy by way of compensation, damages or reinstatement in terms of Section 49(1) (c), and 49(3)(a) & (b). This on the face of it resulted in a failure of justice.

Furthermore, the judge made no reference in the award to the provisions of the Collective Bargaining Agreement or any contract of Employment that entitled the Claimant/Respondent to payment of 3 months in Lieu of Notice and Severance Pay for the 26 years completed. This is crucial in view of the payslip of the Claimant/Respondent attached to the Application for review for the month of November 2009, which clearly shows that the Claimant/ Respondent was pensionable by fact of his registration with NSSF to which the employer contributed Ksh.200.00 per month.

Section 35(5) as read with Section 35 (6)(d) clearly provide that it is not mandatory for an employer to pay an employee who is registered with NSSF service pay upon termination for every year worked. The Award does not refer at all to the fact of the Claimant's membership with NSSF.

These are clear errors apparent on the face of the record and the same also amount to a breach of the provisions of the Employment Act, 2007 referred to.

11. In my view, in failing to consider the issues in grounds 2, 3 and 4 of the memorandum of review, this Court fell into error and the judgment made on 28th September 2015 is thus impugned. By applying Employment Act 2007 instead of Employment Act cap 226 (now repealed) my decision was in breach of written law and there was an error that falls squarely within the confines of Rule 32(1)(c) of this Court's rules. In my view, only a re-hearing of the case will accord the judge who will hear the claim an opportunity to evaluate the claim in light of the law cited. In this regard I will order a rehearing of the claim. If there is any money that may have been paid to the Claimant or his counsel the Court orders a refund of the same to enable the parties return to *status quo ante*. The costs of the application will abide the costs of the suit.

Orders accordingly.

Dated and delivered at Nairobi this 19th day of July 2016

Nzioki wa Makau

JUDGE