



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1443 OF 2015**

(Before Hon. Lady Justice Hellen S. Wasilwa on 7<sup>th</sup> September 2016)

C A S.....CLAIMANT

VERSUS

C S L.....RESPONDENT

**RULING**

1. Before me is a Notice of Motion brought to Court under Rule 32 of the Industrial Court Rules 2010 seeking orders that the judgment issued herein on the 13<sup>th</sup> June 2016 be reviewed and the Claimant/Applicant be awarded damages for Sexual Harassment as prayed in her Statement of Claim dated 17<sup>th</sup> August, 2015, and costs of this Application be provided.

2. The Application is grounded on the Affidavit of C A S and is based on the following grounds:

*1. That on the 17<sup>th</sup> of August 2015, the Claimant/Applicant filed a Statement of Claim of even date in which she sought inter-alia her terminal dues and Damages for Sexual Harassment.*

*2. That the suit was heard and both parties submitted on the issues including that of the Sexual Harassment and on the 13<sup>th</sup> June 2016, this Honourable Court delivered its judgment in favour of the Claimant/Applicant and awarded her Kshs. 422,726.85 as prayed in the Statement of Claim.*

*3. That this Honourable Court also summoned the Respondent's Directors on the basis that their Sexual Harassment Policy Statement fell below what was required under Section 6 of the Employment Act 2007 and the Court punished the Respondent's Directors and ordered them to pay a fine of Kshs 30,000.00 and incorporate a Sexual Harassment Policy Statement and the matter is set for Mention on 5<sup>th</sup> September 2016.*

*4. That upon the Claimant/Applicant's Advocates enquiring as to the issue of the damages for Sexual Harassment this Honourable Court stated obiter that if the said prayer had been sought the Claimant could have been awarded.*

*5. That the prayer for damages for sexual harassment was sought as prayer (d) and both parties submitted on the same, and thus the Honourable Court was mistaken as the said prayer was sought by the Claimant/Applicant and it is in the interest of justice that the orders be granted.*

3. The Respondent has filed a Replying Affidavit dated 12<sup>th</sup> July 2016 deposed to by one J M, the Human Resource Manager of the Respondent.
4. In it she avers that the application for review as filed is a non-starter for failing to comply with the Mandatory Provisions of law.
5. She states that, the Respondents state that the Applicant has failed to state that a party can only apply for review on five grounds and the Respondent in this matter has failed to specify under which ground she seeks review. They state that this is not a proper matter for review and that there is a format to be followed which the Applicant has not complied with.
6. They state that the court is *functus officio* and judgement has already been delivered, the court cannot alter its decision as this will be tantamount to sitting on their own judgement as an appeal.
7. The Respondent further states that the applicant seeks to be awarded damages for sexual harassment as prayed for in her claim which is a substantial factual question that would require re-examination of evidence by the court and if the judgment is corrected, it would substantially affect the substance of the judgement and therefore the trial court would essentially be sitting an appeal.
8. They state that the Court has already decided the matter, and if the Applicant is aggrieved by the decision, the proper channel would be to file an appeal against the judgement.
9. They state that the *obiter* referred to is not a proper part of the judgement and is not grounds for seeking a review; they state that that application lacks merit, is totally misconceived and should be dismissed with costs.
10. In Court the Applicant relied on their application and stated that this Court has jurisdiction to hear the matter. They submitted on the issue of sexual harassment and submitted a figure of Kshs. 1,500,00.00 and the Respondent's Advocates submitted that if the Court was to grant the same, it should only grant Kshs. 500,000.00.
11. They state that the Respondents have not stated in the reply that the Claimant is not entitled to the damages. They are seeking to reply on form and not substance and they pray that the application should be allowed.
12. Having considered submissions of both parties, I note that Rule 32 of the Industrial Court (Procedure Rules) 2010 - now repealed provide as follows:

***“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 and 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;***
- 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 cause.”***

13. In the case of the Applicant herein they filed this Application asking Court to review the Judgment and award damages for sexual harassment as prayed in the claim dated 17<sup>th</sup> August 2015.
14. My reading is that the Applicant's contention is that there is a mistake on the record whereby the

Court omitted to award on this prayer which was prayed for by the Claimants and submitted upon by both parties; including the Respondents who offered to pay 500,000/= on this limb.

15. It is my reading that indeed this was an innocent mistake by this Court not to award anything on this prayer even after finding the Respondents guilty of failing to issue a Sexual Harassment Policy in the Judgment and even going ahead to fine them accordingly.

16. The Respondents have submitted that the Court is *functus officio* and cannot make any further award in this Judgment and that doing so will be tantamount to sitting on appeal on its own Judgment.

17. The principle of *functus officio* forbids the adjudication of the Court on same issues more than one. In the instant case, the issue of sexual harassment has already been adjudicated upon and a determination made by this Court stating that the Respondents are guilty.

18. I will not be re-opening that issue. The Respondents even submitted on the matter and indicated that they are willing to pay 500,000/= as damages.

19. That being the case, I find this is a proper case for review and I allow the Application and review my judgment to include an award of 1,000,000/= as damages for sexual harassment.

20. Costs to the Applicants.

Read in open Court this 7<sup>th</sup> day of September, 2016.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Gomba for Claimant – Present

Akong'a for Respondent – Present