REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 379 OF 2013

ELVIS KIPCHUMBA **CLAIMANT**

v

M.C. TOET TRANSPORTERS LIMITED **RESPONDENT**

RULING

1. Elvis Kipchumba (Claimant) instituted legal proceedings against M.C. Toet Transporters Ltd (Respondent) on 30 October 2013, alleging unfair/unlawful termination and seeking, *a declaration that the termination was unfair and or unlawful, three months' salary in lieu of notice, gratuity payment, accrued leave, compensation for unlawful termination, certificate of service and costs and interest.*
2. The Respondent was served but did not file a Response. On 4 April 2014, the Court fixed the Cause for mention on 8 May 2014 for purposes of giving directions.
3. The record of proceedings for the day for giving directions capture Ms. Mambo holding brief for Ms. Orina as informing the Court:

> Is for mention for directions. Respondent was served with mention notice and pleadings. No appearance. No witnesses. Fix case for judgment. We rely on documents.

4. After the address by Ms. Mambo, Ongaya J directed that judgment would be delivered on Friday 16 May 2014. On the date set for judgment, none of the parties were present but the record bears that the judgment was delivered.
5. In the judgment, Ongaya J rendered himself thus,

> that there is no oral or affidavit evidence to establish the claims and prayers as made in the memorandum of claim. In the circumstances, the court finds that there is no evidence on record to justify the making of the judgment and orders prayed for.

6. The Judge dismissed the claim with no orders as to costs.
7. The dismissal aggrieved the Claimant, and on 1 October 2014, he filed an application for review of the judgment.
8. The grounds/reasons upon which the review application are anchored are for the sake of brevity, *that the Claimant was unable to attend Court for hearing due to ill health after a road accident hence the course of action taken by the advocate; that the advocate made a mistake in opting not to call the Claimant to give evidence and the mistake should not be visited upon the Claimant; that the Claimant had a good case and should be given another chance; that the Court ought not to have given the directions or accepted the option of deciding the Cause on the basis of the*

record; that the Claimant's case was unopposed and oral testimony would only have served to confirm the pleadings; that the judgment contravened Article 159(2)(d) of the Constitution; that the Court has the power to review the judgment; the application had been brought without delay; that the Claimant should be given an opportunity to be heard, this being a fundamental principle of justice and that no prejudice would be occasioned to the Respondent.

9. Ms. Gacanja appeared on behalf of the Claimant on the review application. She submitted that the Claimant's case was unchallenged and cited my very own decision in *Pamela Atieno v Alina Security Services Ltd* (2014) eKLR.
10. Ms. Gacanja referred to my holding at paragraphs 14 to 16, and I need to quote the said paragraphs for the sake of clarity

> *14. The legal effect of the failure is that there are no real disputes of fact arising because the averments by the Claimant have not been denied, no contrary evidence has been produced to controvert the same or facts pleaded or alleged in opposition.*
>
> *15. Under this scenario, the Court ought to consider a robust approach and award appropriate relief as sought. This is unlike the practice and procedure obtaining under the Civil Procedure Act and Rules where the party claiming must move on to formal proof.*
>
> 16. *The distinction comes in because in complaints of unfair termination there is a statutory obligation on an employer to produce in legal proceedings a written contract with prescribed particulars to prove or disprove an alleged term of employment asserted by the employee (section 10(3) and (9) of the Employment Act) and that it complied with a fair procedure before taking the decision to terminate (section 41 of the Act).*

11. The *Alina* decision cannot help the Cause of the Claimant herein. In the *Alina* case, the Claimant gave testimony to support the facts as pleaded in the Memorandum of Claim and this is well captured in paragraph 9 of the judgment. On that ground alone, the present case is clearly distinguishable and the holding cited by Ms. Gacanja must be understood in that context.

11. Before discussing the merits of the instant application a brief outline of the statutory context of pleadings before the Court would be in order.

The statutory scheme

12. The starting point must be rules 4 and 5 of the Industrial Court (Procedure) Rules, 2010 which provides that

> (4) A party who wishes to refer a dispute to the Court under any written law shall file a statement of claim setting out—

(*a*) the name, the physical and the mailing address and full particulars of the claimant;

(*b*) the name, the physical and mailing address and the description of the respondent;

(*c*) the name, the physical and mailing address of any other party involved in the dispute;

(*d*) ***the facts and grounds for the claim specifying issues which are alleged to have been violated, infringed, breached or not observed and in the case of trade dispute the rights of the employees not granted or to be granted, any other employment benefits sought and the terms of collective bargaining agreement on which the jurisdiction of the Court is being invoked;***

(*e*) any principle or policy, convention, law or industrial relations issue or management practice to be relied upon; and

(*f*) the relief sought.

(5) (1) ***A statement of claim filed under rule 4 shall be accompanied by an affidavit verifying the facts relied on.***

(2) Where a claimant, in the course of hearing seeks to adduce additional evidence, the claimant may, with the leave of the Court, file a further affidavit or adduce oral evidence.

13. Further, rule 14(4) is also material and it provides that

(4) ***Pleadings may contain evidence:***

Provided that the Court may require the evidence to be verified by an affidavit or sworn oral evidence.

14. And lastly, rule 21 which relates to determination of suits on basis of documents provides that

(21) ***The Court may, subject to an agreement by all parties, proceed to determine a suit before it on the basis of pleadings, affidavits, documents filed and submissions made by the parties.***

15. In the instant case, the Claimant's pleadings were in compliance with rules 4 and 5 of the Industrial Court (Procedure) Rules, 2010, but it is doubtful and it is open to debate whether the pleadings were in tandem with rule 14(4) or whether the Court ought to have required a further affidavit deposing as to the evidence to be filed.
16. The Claimant wants to fault the Court for acceding to his request. The Claimant's advocate ought to have known the law and when seeking directions should have informed the Court of the full directions it wanted to be given. That much on the statutory scheme, now the application on the merits.
17. The review jurisdiction of the Employment and Labour Relations judge pursuant to rule 32 of the Industrial Court (Procedure) Rules, 2010 is much wider than the jurisdiction given under the Civil Procedure Rules.
18. The Court is enjoined to consider whether the Claimant has brought himself within the contours of the rule or satisfied the test for grant of a review.
19. The Claimant did not suggest that there was discovery of new and important matter of evidence not previously available, that there was an error apparent on the face of the record, that the judgment was in breach of a written law or had a mistake needing clarification.
20. The application therefore falls for determination on the *sufficient reasons* ground. The fulcrum upon which the Court and the employment relationship turn is fairness or fair labour practices.
21. The Court took the option suggested by the Claimant. He knew the evidence available to satisfy the test set out in section 47(5) of the Employment Act, 2007. He also knew the remedies he was seeking some of which were contractual/statutory entitlements.
22. But he decided not to lead any evidence. The Claimant made his bed and he cannot now seek review.
23. The upshot is that the application is dismissed with no order as to costs.

Delivered, dated and signed in Nakuru on this 13th day of February 2015.

Radido Stephen

Judge

Appearances

For Claimant Ms. Gacanja instructed by Manyoni Orina & Co. Advocates