REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT

AT MOMBASA

CAUSE NO. 268 OF 2013

M W M ….....CLAIMANT

VERSUS

M F S ….....RESPONDENT

R U L I N G

INTRODUCTION

1. The Notice of Motion before the court is dated 24/6/2014 and brought by the Respondent in the main suit (applicant). It basically seeks for review and setting aside of this court's entire judgment delivered on 30/6/2014 in order for the applicant to adduce her evidence in defence. The grounds upon which the Motion is premised include, existence of reasons that justify the setting aside of the impugned judgment, existence of new and important evidence which after exercise of due diligence was not within the respondent's knowledge and could not be produced by the applicant at the time the decree was passed and lastly, the existence of some error apparent on the face of the record. The Motion is supported by the affidavit of Mr. Elijah Musili Maanzo sworn on 24/6/2014 which in addition to foregoing grounds for the motion annexes the Human Resource Policy Procedures Manual and Employee handbook dated June 2013 to support the applicant's contention that she had always put in place an anti-sexual Harassment Policy to protect the claimant contrary to the evidence that allegedly misled the court to enter the impugned judgment. In addition he blames the respondent's junior staff for not attending court or notify the Chief Operating Officer of the respondent after the defence counsel served them with a letter advising them of a hearing date.
2. The claimant has opposed the Motion vide her replying affidavit sworn on 17/11/2014 and prayed that it be dismissed with costs. In her view, the Motion is *res judicata* in view of another similar Motion by an interested party dated 10/6/2014 which was dismissed on 3/10/2014. She contends that the jurisdiction to award general damages is donated under Section 12 of the Industrial Court Act. She further contends that the Motion is incompetent by virtue of rule 32(7) of the Industrial Court Procedure Rules (ICPRs). She had maintained that Sexual harassment was pleaded in the suit and the issue raised for determination vide the list of the agreed issues signed by the counsel for the two sides. Lastly, she has observed that the Sexual Harassment Policy annexed to the applicant's supporting affidavit was made in June 2013 after she had been sexually harassed by her boss between 2012 and April 2013.
3. The Motion was disposed of by written submissions which were highlighted in the Open Court on 5/12/2014.

BACKGROUND

4. The suit herein was filed on 21/8/2013 and a response was filed on 13/9/2013. Thereafter the claimant sought leave and amended her claim on 4/11/2013 and the applicant amended her response on 13/11/2013. On 26/11/2013, the parties filed a list of 11 agreed issues for trial and determination by the court. The document was signed by counsel for the two parties. On the said 26/11/2013 both parties attended court and took pre-trial direction rendering pleadings officially closed and the parties fixed the suit for hearing on 18/2/2014 when each party was to call one witness. On 18/2/2014, the applicant's counsel filed further documents (exhibits) and sought adjournment because her witness was away. Despite objection by the claimant, he was granted leave to file the documents out of time and the court adjourned the hearing to 25/2/2014 when the claimant's case was heard and closed. The applicant's counsel again sought for adjournment for lack of witness but was denied and proceeded to close the defence case without calling any witness. Thereafter both parties filed written submissions urging the court to enter judgment in their favour. After considering the facts and the law, the court entered judgment on 30/5/2014 in favour of the claimant and against the applicant in the sum of ksh.98000 being liquidated damages under the employment contract plus ksh.500000 being general damages for sexual harassment by the respondent's Managing Director between December 2012 and 16/4/2013.
5. The applicant was not satisfied with the said judgment and filed a Notice of Appeal on 6/6/2014 challenging the whole judgment. On 10/6/2014, the perpetrator of the said sexual harassment filed a Motion as an Interested Party in the proceedings seeking review and setting aside of the said whole judgment and further leave be given to him to defend himself. All the parties herein were served with the said Motion and were all heard in it before the court dismissed it on 3/10/2014. In the meanwhile the applicant changed advocate and filed the present Motion on 24/6/2014 also seeking review and setting aside of the said whole judgment. However, on 3/12/2014 the applicant abandoned her challenge against the whole judgment and a consent order was recorded by the two parties which limited the Motion only to the award of general damages for sexual harassment. The applicant therefore paid the dues awarded under the contract of employment while the amount for general damages for sexual harassment was deposited in an interest earning account jointly held by the counsel for the two parties herein pending the come of the Motion

APPLICANT'S SUBMISSIONS

6. Mr. Wameyo, learned counsel for the applicant relied on the grounds set out n the body of the Motion and the supporting affidavit by Elijah Musili Maanzo to prosecute the Motion. He submitted that this court has the jurisdiction to grant the prayers sought by the Motion citing Section 16 of the ICA and ICPRs. He contended that the damages for sexual harassment should not have been awarded for reasons that she never pleaded for it. He submitted that she lied that the applicant did not have a sexual harassment policy, she did not plead vicarious liability, and that sexual harassment was not one of the issues agreed by the parties for trial. The counsel further submitted that there existed a policy on sexual harassment in the applicant and that the claimant actively participated in its formulation and as such she should not benefit from her perjury. That the reason why the said policy was not produced as evidence during the trial is because the pleadings on record and the issues agreed by the parties for trial did not require the production of the HR Policy document. In his view, therefore, the much the court would have done without the requisite pleadings, was to penalize the employer with a fine not exceeding ksh.50000 under Section 88 of the Employment Act for non compliance with Section 6 of the Act.

CLAIMANT'S SUBMISSION IN RESPONSE

7. Mr. Muchiri, learned counsel for the claimant opposed the Motion. He relied on the replying affidavit sworn by the claimant and prayed for the Motion to be dismissed on ground that the issue of sexual harassment was pleaded under paragraph 6 of the Amended Claim and listed as issue number 3 in the list of the issues framed and signed by the counsel for the two parties on 25/11/2013 and filed in court on 26/11/2013. Consequently the counsel contended that the applicant was at all material time aware of the issue of sexual harassment in the pleadings and deliberately ignored it. According to the counsel, the failure to produce the policy document during the trial could not therefore be blamed on the claimant.

8. In addition to the foregoing submissions, the counsel denied that the claimant was guilty of any perjury and maintained the claimant lacked a policy on sexual harassment between December 2012 and April 2013. He observed that the sexual harassment policy annexed to the supporting affidavit to the Motion herein was formulated only in June 2013. The counsel submitted that the applicant had an obligation to put in place an anti-sexual harassment policy to protect the claimant and cited STATE DEPARTMENT OF HEALTH SERVICES- vs -THE SUPERIOR COURT OF SACRAMENTO COUNTY AND ANOTHER, and KIMBERLY RENO -vs- MARIJO BAIRD both precedents being American but on the same subject of sexual harassment. He submitted that the American law being enforced by the said American Courts in the said precedents was similar to Section 6 of the Employment Act of Kenya and it is intended to create strict liability against the employer personally for the harassment of the victims. In conclusion he submitted that the grounds being advanced by the applicant are best suited for an appeal and not for review.

APPLICANT'S REJOINDER

9. In response to the claimant submissions, Mr. Wameyo submitted that the judicial precedents cited by the claimant supported his contention that there is no strict liability on the employer for sexual harassment and that the victim must prove vicarious liability between the perpetrator and the employer.

ANALYSIS AND DETERMINATION

10. After carefully perusing and considering the Motion, Affidavits and the submissions by the two sides, the issue for determination herein is whether the Motion has met the threshold for the grant of review and setting aside of the impugned judgment.

Threshold for grant of Review

11. The threshold for grant of review of decree or judgment of this court is provided for under rule 32 1(a) -(e) of the ICPRs and it includes any of the following:

a. *discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of the person or could not be produced by that person at the time when the decree was passed,*
b. *on account of mistake or error apparent on the face of the record,*
c. *On account of the award, judgment or ruling being in breach of any written law,*
d. *if the award, judgment or ruling requiring clarification'*
e. *for any other sufficient reasons.*

12. The question that arises is whether the applicant has proved the above grounds on a balance of probability to warrant the review sought. After careful evaluation of the affidavits and submissions by the two sides, the court is of a considered opinion that the applicant has not proved on a balance of probability that he has discovered new and important matter or evidence as contemplated under Rule 32(1) (a) above. All the documents produced through the affidavit in support of the Motion are not new to the applicant. She had the custody of the same and knew about them before and at the time the impugned judgment was passed. In any case according to the applicant's counsel the reason why the documents were not produced is because the issue of sexual harassment had not been pleaded and was therefore not an issue for trial. The obvious inference to draw from the foregoing submissions is that failure to produce the said documents was therefore a deliberate choice.

13. In addition to the foregoing failure, the court finds that the applicant has not proved any mistake or error apparent on the face of the record either by her supporting affidavit or her counsels submissions. The only place where error apparent on the record is mention and expounded is on the body of the Motion which is not supported by evidence. Even if the same was supported by evidence, which is not the case, the same would only amount to an accusation of the former applicant's counsel's for professional negligence for failing to seek leave to enjoin the perpetrators of the sexual harassment to the suit or to

prosecute the applicant's defence in a particular manner.

14 Lastly, the applicant has not proved any other sufficient reasons to warrant review of the impugned judgment. The applicant was ably represented by counsel in drafting and filing her defence and exhibits. She was also notified by her counsel in writing about the date for the hearing but failed to avail any witnesses. Lastly the applicant was made ware of the claim for damages for sexual harassment vide paragraph 6A of the amended Claim and responded to the same vide paragraph 9 of the Amended response. The same issue was framed for trial and agreed to by the applicants by signing on 25/11/2013. The applicants counsel also submitted on the issue in the written submissions filed after the close of the hearing. The question to ask is whether the negligence of the applicant and her defence counsel amounts to sufficient reason to warrant review of the impugned judgment. The answer to that question is obviously in the negative. Consequently the court finds that the Motion falls short of meeting the threshold for the grant of review of the judgment herein as required under rule 32 of ICPR

15. As a parting shot the allegation that the court was only limited to ordering the applicant to pay a fine of ksh.50000 is dismissed for being neither here nor there. The court was at all material times aware that it was exercising a civil jurisdiction over this case and as such there was no reason to act *suo moto* in imposing any fine. Likewise the issue of whether sexual harassment creates strict liability or not, is also not in issue now because when the court entered the impugned judgment, it considered the issue on merits based on the facts and the law then before it and made a finding which may be erroneous in the mind of the applicant. Consequently the most honorable duty on the part of the applicant to do is to raise the matter on appeal at the appropriate forum.

DISPOSITION

For the reasons aforestated, the applicant's notice of Motion dated 24/6/2014 is dismissed with costs.

Dated, signed and delivered this 13th February 2015.

O. N. Makau

Judge