REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

PETITION NO. 539 OF 2012

TAILORS AND TEXTILES WORKERS UNION ..…… PETITIONER

VERSUS

STITCH MASTERS LIMITED ……..... RESPONDENT

Mrs Kalsi for Respondent / Applicant

Mr Evans Achimba – Grievant in person

RULING

1. The Respondent / Applicant filed an Application for review of the Judgment of the Court delivered on 21st November 2014 on two grounds;

   a. That the Respondent / Applicant has payrolls for the period under claim which were held by the Auditors and Kenya Revenue Authority Officers and therefore could not be produced at the time of the hearing; and
   b. That the Judgment contradicts **Section 48** of the Labour Institutions Act 2007.

2. Attached to the Memorandum for Review are payroll cheques for the period January 2007 to December 2009 marked A – C.

3. It is the Respondent / Applicant's case that the attendance by the Claimant shows breakage of service with very few continuous periods which cannot be forced on the Applicant as a continuous period who of two years and nine (9) months.

4. That the 2nd schedule to the Regulation of wages General Order defines a person who stiches-up pieces already cut by anotherperson as a machinist made to measure under category 5 of the 1st schedule.

5. The Claimant cannot therefore be classified as a tailor which is a person doing the cutting and stitching at the same time.

6. The Court therefore wrongly classified the Claimant.

7. That no notice to produce evidence was given to the Respondent / Applicant as stated in paragraph 32 of the award at page 7.

8. That the judgment be reviewed as follows;

a. the job category is of machinist made to measure whose salary per Legal Notice No. 70 of 2009 is Ksh.7,931.00, and house allowance of 15% = totaling Kshs. 1,189.51 per month.
b. having broken the service between April and August 2009, the underpayment and housing be based on the period September to 4th October 2009 at the above rates.
c. the order for gratuity does not arise given the circumstances in (b) above.

9. **Replying Affidavit**

The Application is opposed vide a Replying Affidavit dated 2nd February 2015.

The Grievant states that the Respondent did not take the Claim seriously. They had all the time to bring the documents sought to be introduced now but did not make any attempt to do so by seeking leave and / or extension of time to do so.

That it would have been easy for the Respondent / Applicant to obtain documents and / or copies from the Auditors for the purpose of introducing them in Court but this did not happen.

10. That Respondent was represented by an Advocate and cannot feign ignorance.

11. That the Auditors returned the documents on 1st January 2014 and the hearing of the case was concluded on 4th June 2014 and Judgment was delivered on 21st November 2014. The Application is therefore based on a lame excuse.

12. The Applicant submits that there is no justification at all for the default by the Respondent to warrant review of the Judgment of the Court in terms of ***Rule 32*** of the Employment and Labour Relations Court (Procedure) Rules, 2010.

13. **Determination**

Rule 32 provides;

"(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 at the time when the decree was passed or the order made."*

14. This is the first ground relied upon by the Applicant who states that the payroll was with the Auditors and was unable to produce it in evidence to show that the Grievant did not work continuously.

15. The finding of the Court was that *"where the performance of the specified work would not reasonably be expected to be completed within a period or a number of working days amounting in*

aggregate to the equivalent of three months, then such a contract ought to be in writing. In this case no such agreement was availed by the employer who has the responsibility of causing the contract to be drawn up in terms of

***Section 9(2)** of the Act."*

16. The Court went on to find;

"*in terms of **Section 9(7);***

*"if in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in **subsection (1)** the burden of proving or disapproving an alleged term of employment stipulated in the contract shall be on the employer."*

17. The Court further found that the Claimant had proved on a balance of probabilities that he had worked for a continuous period of two (2) years and nine (9) months.

18. Nothing has been presented to the Court now within the meaning of ***Rule 32(1)(a)*** which meets the test set out in the Rule.

19. The finding on a point of law as above ought to have been challenged on Appeal if the Applicant felt aggrieved. This Court will not revise its own decision based on the interpretation of the law.

20. In any event, no written contract of employment has been produced before Court. It is immaterial that there were gaps in between as alleged by the Respondent (which allegation goes against the trend of evidence before Court).

21. Accordingly, the Application for review has no merit and the same is dismissed with costs to the Grievant / Respondent.

Dated and Delivered at Nairobi this 19th day of June, 2015.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE