



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO 2308 OF 2012

SHEM MAINGO.....CLAIMANT

VS

KEMA (E.A) LIMITED.....RESPONDENT

RULING

1. On 11th May 2015, I delivered an award in favour of the Claimant in the following terms:

- a) 6 months' salary in compensation for unfair terminationKshs.1,409,070.00
- b) 1 month's salary in lieu of notice.....Kshs.234,845.00
- c) Salary for July 2012.....Kshs.234,845.00
- d) Prorata leave for 2012 (234,845/30x1.75x7).....Kshs.95,895.00

Total.....Kshs.1,974,655.00

2. Following the award, the Respondent filed an application for review on 3rd June 2015. In its memorandum of review, the Respondent took issue with the adoption of the figure of Kshs.234,845.00 as the

Claimant's monthly salary for purposes of tabulating the claim.

3. By notice dated 4th June 2015, the Claimant raised a preliminary objection to the Respondent's application for review on the following grounds:

- a) That the application dated 18th May 2015 is an appeal against the award of this Court but disguised as an application for review;
- b) That the Respondent being dissatisfied with the award is now seeking to re-open the case to adduce more evidence when a final award has been made contrary to the law and the Constitution;
- c) That the grounds being advanced in support of the review are grounds of appeal as they challenge the rationale of the decision by the Court;

d) That the application dated 18th May 2015 amounts to abuse of the court process and should not be entertained.

4. When the parties appeared before me on 5th June 2015, they agreed to dispense with the preliminary objection by way of written submissions.

5. In the written submissions filed on behalf of the Claimant on 16th June 2015, it is submitted that by its application for review, the Respondent is challenging the award of the Court and the Court has no

jurisdiction to sit on appeal over its own decision. On its part, the Respondent submits that the application seeks orders rightly established under the law.

6. The powers of this Court to review its own decisions are donated by Section 16 of the Industrial Court Act, 2011 and Rule 32 of the Industrial Court (Procedure) Rules, 2010.

7. Rule 32(1) provides as follows:

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;

8. In considering an application for review, the Court must always guard itself against the danger of sitting on appeal over its own decision. It is a well settled principle of law that an erroneous view of evidence or the law though a good ground of appeal, cannot be the basis of a review (see ***Pancras T. Swai v Kenya Breweries Limited (Civil Appeal No. 275 of 2010)*** and ***Anders Bruel T/A Queen Cross Aviation v Kenya Civil Aviation Authority & Another [2013] EKLR***).

9. If indeed I was wrong in determining the Claimant's monthly salary as Kshs.234,845.00 then I made an error in judgment which I have no power to correct on review. I find nothing in the Respondent's application that resembles a ground for review as provided under the law and the preliminary objection taken by the Claimant is therefore sustained. The result is that the Respondent's application is struck out with costs to the Claimant.

10. It is so ordered.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 31ST DAY OF JULY 2015

LINNET NDOLO

JUDGE

Appearance:

Mr. Ondabu for the Claimant

Mrs. Muriungi for the Respondent

