



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 912 OF 2013

SHEILA CAROLINE CIIRU.....CLAIMANT/APPLICANT

VERSUS

THE SAROVA STANLEY.....RESPONDENT

RULING?

1. The Claimant/Applicant's application dated 17th June 2015 seeking review of the Court's decision. The Review Application was supported by the affidavit of the Claimant sworn on the same date. The Review was brought pursuant to the provisions of Section 16 of the Industrial Court Act and Rule 32 of the Industrial Court (Procedure) Rules 2010. The Claimant seeks review and states that it is occasioned by the judgment for having failed to correctly tabulate the figures awarded based on Kshs. 34,788.50 instead of the sum of 35,788.50 the Court had alluded to in paragraph 14 and 15. The Claimant stated that she only took only three months of unpaid leave and the suggestion that she had gone on leave was misleading. She asserted she was denied the right to work until the compulsory retirement age of fifty five years and suffered loss of salary and house allowance of Kshs. 1,050,939.80 at the discount of the total amount and had hence demanded payment for damages under Section 12(3)(vi) of the Industrial Court Act. The Claimant submitted that she should have worked for a longer period were it not for the unfair termination caused by the Respondent in violation of ILO Convention 158 and that she qualified for the payment of damages under Section 12(3)(vi) of the Industrial Court Act. She relied on the cases of **Peter Onditi Ogugu v All Pack Industries & IPS (K) Ltd Cause 773 of 2011** (unreported) and **HCCC 1129 of 1991 Medek Sadik Okuto v Kenya Bus Services Limited** (unreported). The Claimant thus sought that the Court orders the balance of leave allowance, balance of gratuity, balance of 12 months compensation and general damages at discount of the total amount. She additionally sought a certificate of service within the meaning of Section 51. She also sought the costs of the application be paid by the Respondent.
2. The Respondent was opposed and its counsel Mr. Mari submitted that in seeking the Review, the Claimant did not prove the sum of her terminal dues to be Kshs. 35,788.50. He submitted that the Claimant's salary fluctuated each month from as low as 30,012/- to as high as 40,514/- and the Court set the sum at Kshs. 34,788.50. He submitted that the Court worked with a fair figure and there was no error anywhere. Regarding general damages he submitted that he did not understand where the Claimant had come up with the prayer for general damages. He submitted that this was a relief awarded in tort and not in breach of contract. He stated that Section 12 does not give this Court the power to award general damages. He submitted that the Court having delivered itself that it would not award general damages, if she felt the Court was wrong and questions the reasoning of the Court her recourse is the Court of Appeal as the Court cannot change its

reasoning as it is *functus officio* as it made its determination. He submitted that the Court had reservation on the termination and awarded her compensation for 12 months on this aspect. The Court had found that the Claimant had notice for 3 months. He submitted that the Claimant cannot seek another relief for a prayer that was granted. He submitted that in Cause 773 of 2012 Rika J. stated what the purpose of review is and that the Court had ordered hearing *de novo*. He submitted that this Court had not committed an error and there is no basis for hearing *de novo* and this case was not fit for review. He thus prayed that the application be dismissed.

3. In her brief reprise the Claimant submitted that the certificate of service issued had corrections that needed to be made.
4. The Court deferred the Ruling to Friday 24th July but due to the visit by President Obama and the closure of roads, the sessions for the judiciary in Nairobi were deferred.
5. In matters review, the Industrial Court (Procedure) Rules 2010 provide as follows under Rule 32.

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; or

(d) if the award, the judgment or ruling requires clarification; or

(e) for any other sufficient reasons.

(2) An application for review of a decree or order of the Court under subparagraphs (b),(c), (d), or (e), shall be made to the judge who passed the decree, or made the order sought to be reviewed.

(3) A party seeking review of a Court decree or order of the Court shall apply to the Court in Form 6 set out in the First Schedule.

(4) An application under paragraph (3) shall be accompanied by a memorandum supporting the application and the Court shall proceed to hear the parties in accordance with section 26 of the Act.

(5) The Court shall, upon hearing an application for review, deliver a ruling allowing the application or dismissing the application.

(6) Where an application for review is granted, the Court may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.

(7) An order made for a review of a decree or order shall not be subject to further review.

6. The Claimant has sought a review. The application was made under the correct provisions of the law. Under Rule 32 as seen above review is an available remedy. However, in order to bring a suit under the purview of review, there must be a few elements. There can be a review 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 on account of some mistake or error apparent on the face of the record; or on account of the award, judgment or ruling being in breach of any written law; or if the award, the judgment or ruling requires clarification; or for any other sufficient

reasons.

7. The Claimant did not demonstrate any of these elements. Indeed, her review application seeks to have an appeal against the decision that this Court made. As correctly pointed out by Mr. Mari, this Court is *functus officio* as far as the determination of quantum and the award of damages is concerned. The Court made a determination and is unable to review it unless there is a mistake or error apparent on the face of the record. I relied on the salary the Claimant was earning and came up with a median. That is what was used to compute her compensation. If I erred in that the only place where this can be corrected is by the Appeal Court since I cannot sit on appeal over my own decision. As far as the award of damages goes, I made a decision and this is an aspect that could have been appealed on and not subject of review.
8. The long and short of it is that the review application is not merited and I dismiss it with no order as costs. The only troubling aspect was the Certificate of Service. If the Respondent looks through Section 51 it will realise what must be contained in the certificate of service. The Claimant is entitled to a certificate of service issued strictly in adherence to Section 51.

Orders accordingly.

Dated and delivered at Nairobi this 27th day of July 2015

Nzioki wa Makau

JUDGE