



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 587 OF 2011**

**TAILORS AND TEXTILES ..... CLAIMANTS**

*VERSUS*

**GLOBAL APPARELS (EPZ) LIMITED ..... RESPONDENTS**

M/S Ochode for Respondent / Applicant

Mr.W. Omondi for Claimant / Respondent

**RULING**

1. The Respondent / Applicant filed an application for review of the judgment of the Court delivered on 24<sup>th</sup> April 2015 in which the Court commuted summary dismissal of the two Grievants; Charles Momanyi and Sylvester Odhiambo to normal termination and ordered the Respondent to pay them terminal benefits, which are otherwise not payable after summary dismissal.
2. In the memorandum in support of the application for review dated 8<sup>th</sup> June 2015, the Respondent / Applicant relies on the following grounds inter alia;
3. The judgment is contrary to Section 44(3), 44(4)a) and Section 44(4)(e) of the employment Act 2007.
4. That the Judgment is grossly unfair and unjust to the Applicant who made every effort to amicably resolve the dispute between itself and the Grievants despite their unreasonable actions.
5. The brief fact of the case as outlined in the Judgment of the Court is that on 2<sup>nd</sup> July 2010, the two Grievants with others were not paid salary arrears pursuant to the General Wages Order that increased the employees' salary by 10% with effect from 18<sup>th</sup> June 2010.
6. That the increment was effected with respect to other employees but not the department in which the Grievants worked. The Grievants protested the non-payment on 2<sup>nd</sup> July 2010 and upon reporting to work on 3<sup>rd</sup> July 2010 the Grievants were locked out by management.
7. The salary increment was effected on 5<sup>th</sup> July 2010 but the Grievants did not return back to work and were dismissed on 12<sup>th</sup> July 2010 for desertion.

8. The Court found that the Respondent had a lawful cause to terminate the employment of the Grievants but not to summarily dismiss them given the circumstances of the case.

9. Application for review of a judgment in the Employment and Labour Court is brought under Rule 32(1)(a) to (e) of The Industrial Court (Procedure) Rules, 2010.

10. It is not specified under which sub-rule this Application has been brought. From the grounds set out on the memorandum for review, it appears the application is brought under Rule 32(1)(c) which reads;

“on account of the award, judgment or ruling being in breach of any written law.”

11. A close perusal and analysis of the judgment by the Court does not disclose an apparent breach of any written law and in particular Section 44 of the Employment Act in that, the facts of the case show that the Respondent was in error in not paying the Grievants their salary increment on 2<sup>nd</sup> July 2010 and when the employees protested the non-payment, the Respondent locked them out the following day on 2<sup>nd</sup> July 2010 and the employees did not return back to work.

12. The payment was not effected until the 5<sup>th</sup> July 2012 by which time the Greivants had left employment.

13. The Court struck an equitable balance by substituting the more punitive summary dismissal the Respondent subsequently meted on the Grievants on 12<sup>th</sup> July 2012, for desertion with termination of employment to allow the employees who had served the Respondent hitherto well to earn their terminal benefits.

14. This in the Court’s view is not a valid ground for the review of the judgment of the Court in terms of rule 32.

15. The Respondent was at liberty to appeal the decision of the Court if it was of the view that the Court had made an error of fact or law.

16. Instead, the Respondent wishes the Court to revisit its own reasoned decision which would be improper. The matter is *resjudicata* before this Court.

17. This application for review is a disguised appeal. The case is distinguishable from the decision of the Court of Appeal at **Mombasa, in Civil Appeal No. 15 of 2015 between JMK –Vs- MWM & another** in that in that case, the Court of Appeal dealt with a situation where the application for review was made by a Grievant who had not been a party to the suit and an adverse finding of sexual harassment was made against him by the lower Court.

18. The Appeal was allowed on the basis that the lower Court contravened the rules of natural Justice in this respect and the Court of Appeal set aside the judgment of the Court and ordered the matter to start *denovo*.

19. In the present case, the Respondent / Applicant participated in the trial and an adverse judgment was made by the lower Court.

20. The Court is satisfied that it reached a proper conclusion of law and fact, and if the Respondent / Applicant is aggrieved by the decision he ought to have filed an appeal against the Judgment.

21. Accordingly, the Application is dismissed with costs to the Claimant / Respondent.

**Dated and Delivered at Nairobi this 20<sup>th</sup> day of November, 2015.**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**