REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 25 OF 2012

(FORMERLY NAIROBI CAUSE NO. 635 OF 2011)

KENYA PLANTATION AND AGRICULTURAL WORKERS UNION.....CLAIMANT

-VERSUS-

BILASHAKA FLOWERS LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 14th March, 2014)

RULING

The court delivered the judgment in the case on Friday 12.04.2013. The respondent, **Bilashaka Flowers Limited** filed the application for review on 11.02.2014. The application was supported with the affidavit of Jozef Zuurbier filed on 11.02.2014.

The claimant opposed the application by filing, on 26.02.2014, the response to memorandum in support of the review application and the replying affidavit of Thomas Kipkemboi.

The application came up for hearing on 10.03.2014. Prior to the hearing of the application, Mr. Masese for the respondent informed the court that he was aware of the complaint his client, the respondent in the case, had filed to the Judicial Service Commission through its director Jozef Zuurbier unfairly alleging that the presiding judge was not fair or impartial in dealing with the case. Mr. Masese submitted that he was remorseful for the actions by the complainant, he was embarrassed with his client's unfounded feelings and the court should hear the application. Upon considering the submissions, the court made orders thus:

"By consent and submissions of counsel for respondent, the respondent's managing director has withdrawn the complaint made to the Judicial Service Commission about impartiality of the presiding judge. In the circumstances, the judge will hear and determine the application. Hearing of the application at 9.40 am or, soon thereafter. Appeal is withdrawn."

The application was heard as scheduled. For the respondent, now the applicant, it was urged that the grievants Jane Wangeci, Loyford Ntwigah and Benson Mwangi had worked for less than 3 months, they were serving on probationary service at the time of the unfair termination and the reason for their dismissal was absence from duty without justification. It was submitted for the applicant that as found by the court in the judgment, the termination of the grievants was unfair. However, the court had made an error by awarding the 3 grievants the maximum 12 months gross salaries under section 49 (1) (c) of the Employment Act, 2007 because such an award was not proportionate. It was submitted that in making the award, the court had not taken into account the relevant factors in section 49 1 (a) and (4) (b) and (c)

of the Act namely the wages the employee would have earned had the employee been given the agreed or contractual termination notice; the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and the employee's length of service with the employer.

It was submitted that the court ought to have considered that the three employees contributed to their dismissal by absconding duty, they had each served for less than 4 months; and being on probation they did not have expectations for permanent and long service like the other grievants in the case. As between the two sets of grievants, it was submitted that the award of 12 months gross salaries for unfair termination did not therefore uphold the principle of proportionality as provided for in section 3 of the Industrial Court Act, 2011. Such want of proportionality in the award as made in the judgment was an error or mistake apparent on record that justified review. It was further submitted that the three grievants would be entitled to normal termination benefits and not the disproportionate award of 12 months compensation for unfair termination.

For the claimant, the respondent in the application, it was submitted as follows:

a. The judgment was delivered on 12.04.2013; the applicant filed a notice of appeal on 22.04.2013 and took no further step in the appeal process until 10.02.2014 when the application for review was filed; and the applicant belatedly withdrew the appeal after filing the application for review. Accordingly, the application for review was filed belatedly after an inordinate delay and the application should fail on that ground.

b. The kind of ground urged for review, namely that the payment for unfair dismissal is not proportionate, is not a ground for review but it is properly a ground for appeal. The court should not sit on appeal on its own decision and the application for review is misconceived as is an appeal clothed as a review. The court should therefore dismiss the application.

The applicant submitted that the delay in filing the application was occasioned by the negotiations between the parties. It was until Mr. Wafula who had acted for the claimant and therefore leading the negotiations on the issues in the judgment and now set out in the review application left the claimant's employment, the negotiations collapsed and it became necessary to file the application. Thus, the applicant did not deliberately fail to file the application earlier than it was subsequently filed. The delay was necessary because at all material times the parties were negotiating the satisfaction of the judgment.

The court has considered the respective submissions by the parties, revisited the court record and makes the following findings:

1. After the delivery of the judgment on 12.04.2013, the court record shows that parties indeed engaged in negotiations towards satisfaction of the judgment. Accordingly, the court finds that any delay in the filing of the application for review is sufficiently explained by the negotiations between the parties as submitted for the applicant.
2. The court finds that it was an abuse of court process for the applicant to seek to appeal and to belatedly withdraw the appeal after filing for review. Such inconsistent steps in the litigation process are an impetus to ordering the concerned party to pay the matching costs as necessary.

3. The court has considered the need for proportionality in awarding payments for unfair termination under **section 49 (1) (c) of the Employment Act, 2007**. The factors are provided for in section 49(4) of the Act. The court has considered that the three grievants served for a shorter term of less than 4 months and enjoyed lower expectations to continue in the respondent's employment because they were undisputedly serving on probationary terms at the time of the dismissal. As submitted for the applicant, they would be entitled to normal termination benefits and, in the discretion of the court and in the interest of proportionality, the court considers that the judgment will be reviewed so that the three grievants will be awarded 3 months gross salaries for unfair termination instead of the 12 months as ordered in the judgment.

4. In making that finding in 3 above, the court holds that the mistake or error that constitute a ground for review need not be only typographical but may also include an error or mistake in the reason or rationality in the decision subject of review like in the instant case. The court further holds that an error or mistake in the reason or rationality of the decision will most invariably occasion a review if its overall effect or by itself significantly results into manifest injustice to the applicant.

In conclusion, the application for review is allowed with orders:

1. That the judgment is amended in order (b) by inserting after the word "salary" thus, **",except Jane Wangeci, Loyford Ntwigah and Benson Mwangi who shall each be paid three months' salary,"**

2. That the applicant shall pay the costs of the application.

Signed, dated and **delivered** in court at **Nakuru** this **Friday, 14th March, 2014.**

BYRAM ONGAYA

JUDGE