



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 1256 OF 2010
KENYA UNION OF DOMESTIC HOTELS,
EDUCATIONAL INSTITUTIONS,
HOSPITALS & ALLIED WORKERS CLAIMANT
VERSUS
IMPALA CLUB RESPONDENT
RULING

1. **The** claimants filed the application on 20th June 2013 under the provisions of section 16 of the Industrial court Act and rule 32 of the Industrial Court Procedure Rules seeking a review of the court ruling dated 20th March 2013. The application is supported by the annexed affidavit of Eunice Chepngetich Maina. The respondent filed their grounds of opposition to the application as submitted by the claimant and dated 21st August 2013.

2. The memorandum of review outline the background of the case that on 14th October 2010, the claimant commenced action on behalf of the grievants seeking arrears of;

- a. *Basic salary,*
- b. *House allowance,*
- c. *Uniforms,*
- d. *Long service award,*
- e. *Leave and travelling allowance,*
- f. *Costs of the suit and any other relief that the court deemed fit to grant.*

3. The respondent denied the entire claim on the basis that the Collective bargaining Agreement [CBA] upon which the arrears were based was not valid and had fulfilled their obligations according to that CBA and were not bound by any other agreements made afterwards. The claim was heard by several judges and the judgement was delivered on 20th March 2013 by Hon. Justice Stephen Radido after submissions of both parties. The claim was dismissed. The claimant felt aggrieved by the judgement of the court on the grounds that the judgement failed to take into consideration that;

- a. *three of the grievants, Margaret Wangui Waigwa, Christopher Ingosi Shihale and Eunice Chepngetich Maina were forced to retire from employment by the respondent due to participation in this case;*
- b. *the above named were not paid their correct retirement benefits and salary arrears as had been agreed in the CBA;*

- c. *the respondent had released the 3 grievants to go and negotiate for the CBA and they cannot now turn around and say that they were not aware or party to the subsequent CBA signed for and on their behalf by FKE;*
- d. *the statement and documents confirming the retirement and underpayment of the above grievant were erroneously left out of the Statement of Claim;*
- e. *the statement and documents are now available for the court consideration, show that a gross miscarriage of justice occurred;*
- f. *had these facts and documents been availed to the court, the court would have reached a different result;*
- g. *that the said documents are critical for the fair determination of the matter; and*
- h. *The pleadings were incomplete and this would be cured by availing of the necessary document.*

4. This application is based on the grounds that the court should find and hold that the judgment was made erroneously since not all the applicants [claimants] evidence was considered, that the respondent failed to prove the guidelines provided in the 1999 CBA were followed in retiring and paying the grievants and that the court should direct the respondent to pay the named grievants their full employment retirement benefits and salary arrears as stipulated in the relevant CBA and tabulated by the claimants.

5. Eunice Kipngetch Maina in her affidavit depones that she is one of the aggrieved grievants and on behalf of the others supports the application for review of the judgment of the court delivered on 20th march 2013. The review should be done as there is an error on the face of the record and a review would be appropriate. There were documents omitted and not taken into evidence during the hearing and thus not taken into the court's attention and had this been done there would have been a different result.

6. The respondents in the grounds of opposition state that the claimant's application lacks merit and does not meet the requirements outlined under Rule 32 of the Industrial Court Procedure Rules. The documents attached to the claimant's application have no relevance to the issues in question and not information that had the claimant after due diligence was not within their knowledge and could have produced before the award of the court was made. The introduction of the new evidence is an afterthought as it is not new and if accepted will amount to a new trial and thus have no effect to the earlier findings of the court and should be dismissed.

7. In submission the claimants' advocates supported the application for review and noted that some critical documents were not taken into account by the court especially the CBA with salary arrears due to the grievants and thus ask the court to review the arrears by calculating the same based on this CBA. The question that the respondent was not bound by the CBA in issue is not correct as there are letters where the respondent has indicated to the grievants that the respondent was aware of these CBA and the court erred to find the respondent was not a member of the Association and not bound by the applicable CBA. Some grievants were shop stewards who would be released by the claimant to go and negotiate the CBA and thus were entitled to the benefits of the negotiated CBA. On 14th march 2005, in a similar case the respondent admitted there were arrears due and the finding of the conciliator in that case was there was an express admission of these arrears. The investigator found out that the respondent was a member of the Sports Club and was bound by subsequent CBA at the time relevant to this case. In this case the court noted that the pleadings were badly written which had been amended after court directions and the correct dues had been calculated.

8. Had the court taken these facts into account there would be a different award. 3 grievants were retired and their dues were to be calculated as per the current CBA and therefore there was an error in the calculations. The grounds for review have been satisfied as these new records were not in the knowledge of the claimants but the respondent was aware and failed to bring them to the attention of the court.

9. The claimant advocate also submitted that this matter has been before several judges and some issues may have been lost. This court should therefore re-look at the new documents and give an appropriate relief.

10. In response the advocate for the respondent submitted that the claimants are asking the court to seat

in appeal as the documents attached as ECM1 is a letter dated 14th March 2013 which the claimants state that they were not aware about it before the award. This is not a new discovery as it was drafted after the court award. In this case the respondent was not bound by CBA after 1999. This fact has not changed and the new documents the claimant is seeking to introduce do not indicate to which CBA they relate to. In ECM1 at clause 1 the CBA refer to the period of 1st January 2011 to 31st May 2011. The claim was filed in 2010 and the claim for arrears relate to a period after the claim was filed. This cannot be new evidence.

11. The rules of review are set out under rule 32 of the Industrial Court Rules, the claimant was the same union that filed the claim and if they had participated in the CBA negotiated, they had knowledge of all the documents the claimant now seek to introduce. There is no evidence that the 3 grievants were forced to retired due to their union activities. This was not a ground in the memorandum of claim and cannot be introduced here as part of review.

12. Despite different judges handling the matter, this is not an enough ground to seek a review as they are all competent. The nature of review sought is to seek new litigation which the court should not allow.

The issues herein are;

Whether is a new and important matter which was not within the knowledge of the applicant?

Whether there is a mistake, breach, or clarification needed; or

Whether there is a sufficient reason.

13. The three issues above interact in this case but the exercise of review entails a judicial examination, that is to say, reconsideration, a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. One procures such examination and correction, alteration or reversal of a former position for any of the reasons of discovery of new and important matter or evidence, on account of some mistake or error apparent on the face of the record or on any other sufficient reason. The court of review therefore only has a limited jurisdiction circumscribed by the definitive limits fixed by the law as set out under Rule 32 of the Industrial Court Rules. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the above grounds is shown; one cannot elaborately go into evidence against and then reverse or order as that would be acting without jurisdiction, and to be seating in appeal. The object is not to enable a judge rewrite a second judgment or ruling because the first one is wrong but rather to address a new and important matter, address a mistake on the record or where established, any other sufficient reason.

14. The court must therefore establish whether there is an evident omission that needs correction to meet the ends of justice and to prevent miscarriage of justice and thus must correct grave and palpable errors. This was the finding in *Nduhiu Gitahi versus Waruguongo [1988] KLR 621*.

15. The Industrial Court Procedure Rules at Rule 32 now outline the grounds upon which a party can seek a review of court orders;

32. Review.

(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) A person seeking review of a decree or decision of the court shall apply to the court by notice of motion supported by affidavit and the Court shall proceed to hear the persons in accordance with section 16 of [the Act](#).

16. Reading the judgment of the court, from paragraphs 8 to 10 the claimants claim is outlined and the issues for arbitration outlined under paragraph 17 of the judgement. These have not been stated as incorrect. Therefore the finding of the court with regard to this issue is articulated under paragraph 24 with a finding that the applicable CBA with regard to the claims before court was the 1999 CBA. The position is reaffirmed under paragraph 28 and 40 with the finding that any subsequent CBA applicable to the parties was supposed to have been registered with the court for the same to become applicable and where the claimants could base their claims.

17. The claimant in seeking review state that there are new documents that were in the possession of the respondent but were never produced in court. The claim was filed on 14 October 2010; various directions were given by the court with final submissions being agreed on in court on 17th October 2011. Where there was a new CBA applicable to the parties herein, the claimant as a trade union was involved and any registration in court as established in the judgement could not proceed without the claimant's knowledge. To therefore introduce a CBA after this process indicating that the claimant was not aware or just got knowledge of it would not be erroneous. The cause of action subject of the claim arose prior to filing the same on 14th October 2010 and where there are new issues that arose with regard to the cause of action, there was time to amend the claim to include these new facts but the same cannot be introduced through a review of the court final order or judgment. The judgement clearly outlines the issues where the 3 grievants as above are part of the employees of the respondent subject of the claim. The court made a finding with regard to the claim and how this related to the grievants. The issue of the 3 grievants being victimized due to their involvement with their union activities was not pleaded and thus the court did not make a finding in this regard. To introduce the issue at this point would be a new claim that should not form part of a review but rather a new cause of action. Where pleadings are incomplete the cure is an amendment rather than a review as the purpose for a review is clearly outlined under Rule 32 of the Industrial Court Procedure Rules.

18. With this clarification and there being no new issue that was not within the knowledge of the claimant before filing the claim and before the court award was delivered, I find no sufficient cause warranting the court to review the judgement here.

The review application by the claimant lacks merit and raise no sufficient grounds to warrant a review by this Court. Application filed on 14th June 2013 will therefore be dismissed. Each party to bear their own costs.

Delivered in open court this 3rd day of April 2014..

M. Mbaru

Judge

In the presence of

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