



IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 269 OF 2011

SAMUEL KIRAGOCLAIMANT

VERSUS

KUEHNE NAGEL LIMITEDRESPONDENT

RULING

The application before me arises from a case that I heard and delivered judgment on 9th October 2012. In the judgment I determined that the Claimant was unfairly terminated by the Respondent but declined to award both pay in lieu of notice and general damages and compensation on the grounds that the salary upon which both claims are based was not stated in either the claim or in the Claimant's testimony.

The Claimant, aggrieved by my decision as aforesaid filed an application for review dated 17th June 2013. The grounds for review are that there were errors apparent on the face of the record and that judgment was made and issues considered in breach of written law.

The Claimant has given the grounds upon which the application is made as follows:-

- i. The Honourable Judge was right to find that the Claimant was unfairly dismissed and was therefore entitled to payment in lieu of Notice. The learned judge however erred in finding that she was unable to specify the amount as none was pleaded either in the Memorandum of Claim or stated during the Claimant's oral testimony.
- ii. The Claimant avers that copy of his letter of appointment was attached to the Memorandum of claim. It therefore formed part of the evidence. The said letter of appointment attached to the Memorandum of claim and marked as exhibit 'SK1' has the terms of the Claimant's salary and showed that he earned a gross salary of Kenya Shillings Twenty Six Thousand, Six Hundred and thirty Six only, per month.(Ksh. 26,636/-).
- iii. The fact of the Claimant's remuneration was not contested by the Respondent.
- iv. Similarly the Learned judge was correct to find as she found that Section 49 of Employment Act provides for compensation up to a maximum of 12 Months' Salary. The learned judge however erred in finding that:-
 - a. There was no prayer for compensation.
 - b. There was no evidence of salary adduced to enable the court grant compensation.
- v. The Claimant refers to the last Paragraph of his Memorandum of Claim where he prayed for among other things, Damages and 'any other relief that the Honourable court may deem fit and proper to grant in the circumstances.

The Claimant seeks the following orders:

- a. Awarding payment in lieu of Notice in the sum of Kshs. 26,636/-
- b. Award 12 month's salary for unfair termination at the rate of Kshs.26,636/- per month.
- c. Award to the Claimant the costs of the cause as the court found that he was unfairly terminated. Costs follow the cause.
- d. The court awards interest at court rates to the Claimant as at the time of filing this cause.
- e. That costs of this application be provided for.

The application came up for hearing on 13th November 2013 when Mr. Onyango appearing for the Claimant and Mr. Kinyua appearing for the Respondent agreed to proceed with the application by way of written submissions.

In their submissions dated and filed in court on 9th December 2013 the Claimant submits that he is happy with the decision of the court except the findings to the effect that the Claimant had not adduced evidence of his salary and therefore there was no basis upon which to calculate damages due to him, and that there was no prayer for compensation and therefore the Claimant was not entitled to the remedies under Section 49 of the Employment Act.

The Claimant submits that there is evidence of salary in his Exhibit SK 1 of the memorandum of claim which is his letter of appointment. The letter states that he was hired at a salary of Kshs. 26,636 per month. That the letter of appointment forms part of the evidence on record.

On this basis she submits that there was an error apparent on the face of the record and this being the case, she is entitled to have the judgment reviewed. The Claimant relied on Justice Wasilwa's decision in **John Ojwang Atieno & 13 others V Migori County Government & Another [2013]eKLR**.

On the issue of compensation the Claimant submitted that lack of an express prayer in terms of Section 49 of the Employment Act was an error attributable to the Claimant's former advocate which should not prejudice the Claimant. It was further submitted for the Claimant that the last prayer to the terms "..... **any other relief that the honourable court may deem fit and proper to grant in the circumstances**" is wide enough and should include every relevant remedy contemplated in law and more specifically the remedies contemplated under Section 49 of the Employment Act. That once the court has reached a conclusion that the Claimant had made a case for unfair dismissal he became automatically entitled to the remedies under Section 49 of the Act as a matter of judicial notice. The Claimant relied on the decision of Justice Ongaya in the case of **Samuel Mukohesi Washisino V Rakesh Gudka & Another [2013] eKLR** where the court held that "costs follow the outcome of the case and the court finds that the Claimant is entitled to the costs of this case."

The Respondent filed their submission on 6th March 2014 in which it opposed the application. The Respondent submitted that it is trite law that all material fact of a case must be pleaded and that issues for determination in a case generally flow from the pleadings. Further, that a trial court can only pronounce judgment on the issues arising from the pleadings or such issues as the parties frame for the court's determination. The Respondent relied on the decision of the court in **Chalicha FCS Ltd V Odhiambo & 9 others (1987)KLR** in which the court held that

"cases must be decided on the issues on the record. The Court has no power to make an order, unless it is by consent, which is outside the pleadings."

The Respondent also relied on the case of **Oddjobs V Mubia (1970) E A** where the judge held that

"A court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision."

The Respondent further relied on the case of **Town Council of Awendo V Nelson Oduor Onyango & 13 others [2013]eKLR** wherein the court quoted the case of **Galaxy Paints Co. Ltd V Falcon Guards**

Ltd (2000) EA 885 and the Odd Jobs case. In this case the court held that a party cannot be granted a relief that was not pleaded.

The Respondent further submitted that the Claimant did not plead the amount he was claiming and did not lead any evidence on the same during the hearing. That the law provides that a party cannot be granted submit did not plead.

On compensation the Respondent submitted that the Claimant did not state the salary upon which the compensation could be granted. That it is not enough for a party to blame its previous counsel as the Claimant has a recourse against his further counsel.

On the issue of failure to award costs the Respondent submitted that it established the Claimant's negligence in the performance of his work and that the employer was entitled to take disciplinary action against the Claimant. That it was the procedure used to discipline the Claimant that the court found wanting. That the court was therefore right in holding that each party bears its costs.

I have considered the pleadings by the parties and the written submissions as well as the authorities relied upon by both the Applicant Claimant and the Respondent. The issue I must determine is whether the Claimant has made out a case to justify the review of the judgment I delivered on 9th October 2012.

The applicable law is Section 16 of the Industrial Court Act (and not Section 26 of Labour Institutions Act as submitted for the Respondent), Rule 32 of the Industrial Court (Procedure) Rules, and Section 49 of Employment Act.

Section 16 of the Industrial Court Act and Rule 32 of Industrial Court (Procedure) Rules provide for the power of the court to review its decisions and the circumstances under which such review is permitted.

The court may review its decisions where:-

- a. There is discovery of a 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.

In the present case the claimant has relied on the ground of errors apparent on the face of the record and that the judgment is in breach of written law.

At the outset I wish to point out that I have not seen any argument in the Claimant's application or in the written submissions on the second ground of review to the effect that the judgment was in breach of written law. I will therefore proceed on the premise that this ground has either been abandoned or not proved and therefore the Claimant's application is based only on the ground of error apparent on the face of the record.

The Claimant alleges that the letter of appointment contains a paragraph stating the salary of the Claimant as Shs. 26,636. I agree with the Claimant to the extent that the employment contract appended as "exhibit SKI" of the Memorandum of claim states the salary of the Claimant. Paragraph 4 of the Memorandum of claim under which the Exhibit is quoted only refers to the letter of appointment. It does not state that the salary of the Claimant did not change during the course of employment or even that the salary quoted in the letter of appointment was the Claimant's last salary. There is no reference to salary at all in the body of the claim. No salary was mentioned during the hearing or in the final submissions. There was no basis upon which the court was expected to presume that the salary quoted in the letter of appointment was the last salary of the claimant. For this reason I find that there was no error apparent on the face of the record.

The same applied to compensation. The Claimant pleaded for damages in the claim but did not make any reference to the quantum of damages on the basis upon which damages was to be assessed. There was no mention of Section 49 of the Employment Act. The Claimant picked a figure of Shs. 2,000,000 without any basis. The authorities relied upon in the Claimant's submissions make reference to salary to be earned for the rest of the working life of the Claimant in the quoted case. The Claimant herein did not state how many years he had to retirement or that the salary he would have earned to the date of retirement amounted to the Shs. 2 million prayed for.

I therefore find that there was no error in the judgment on the issue of 12 months compensation.

The Claimant has also submitted on the issue of costs. Costs do not follow the event in the Industrial court. The case relied upon by the Claimant on this issue is quoted out of context. Section 12 (4) of the Industrial Court Act gives this court the discretion to make orders on costs. It provides as follows:-

12(4) In the proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the court considers just.

The order for costs was made by the court out of discretion based on the circumstances of the case.

I am however inclined to review the judgment on the ground that there are sufficient reasons to do so. These reasons are that in the written submissions the Claimant actually referred to the salary as Kshs. 26,636 which is the same salary referred to in the letter of appointment and which the Respondent did not contest. As I found in the judgment, the Claimant was entitled to both Costs and compensation but the court did not have the evidence of the figure to be applied. Now it has been pointed out to the court that the last salary of the Claimant is the sum quoted in the Claimant's submissions and the letter of appointment which is part of the evidence on record. I find that this is sufficient reason to review the judgment. I have relied on the authorities quoted by the Respondent to the effect that the court has power to base its decision on unpleaded matters if it appears from the course followed at trial that the issue has been left to the court for decision. The issue of both notice and damages were in the issues framed by the parties upon which both parties made submissions.

I therefore review the judgment as follows:-

1. Notice

I award the Claimant one month's salary in lieu of notice in the sum of Kshs. 26,636.

2. Compensatory damages

The Claimant was employed on 1st August 2008 and summarily dismissed on 9th November 2010. He had worked for just over two years. As I found in the judgment the Respondent had sufficient ground to carry out disciplinary action against the Claimant. It was only the procedure used that was unfair.

Taking into account the length of service and his contribution to the circumstances that led to his dismissal, I award the Claimant two months' salary as compensation in the sum of Shs. 53,272.

The rest of the judgment remains as delivered.

Orders accordingly.

Read in open Court this 20th day of May, 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Onyango for Claimant

No appearance for Respondent