

REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 139 (N) OF 2009

MOSES KIPROTICH RUTTO AND OTHERS.....CLAIMANTS/RESPONDENTS

VERSUS

TELKOM KENYA LIMITED.....RESPONDENT/APPLICANT

RULING

1. The Respondent/Applicant seeks a Review of the judgment of this Court. In the Application for review dated 30th July 2014, the Respondent seeks to review the decision as regards the award to Evans Jegegu Koyi the only successful Claimant. The Respondent asserts that the Claimants all accepted the terms of the Voluntary Early Retirement and received payment accordingly. The Respondent/Applicant states in its Memorandum of Review that there is an error apparent on the face of the record in that the Court had held that parties had failed to file their final submissions and the decision was made without the benefit of the final submissions. The Respondent also stated that the Court in paragraph 10 of the Judgment had held that the computation of the successful Claimant Mr. Koyi of Kshs. 2,808,095.07 as balance on the VER was unchallenged by the Respondent. The Respondent asserted that the Respondent had filed its final submissions on 17th September 2012 and these were acknowledged by the Court vide its stamp of the same date and through filing fee receipt No. 0004005 dated 17th September 2012. The Respondent asserted that it challenged the computations of the Claimants through these submissions.
2. The Claimant/Respondents were opposed to the Application. The Claimants filed a Memorandum in Opposition to Review of Judgment on 24th September 2014. In the Memorandum the Claimants asserted that there was no serious challenge to Koyi's case. The Claimant/Respondents submitted that reviewing the case would be reopening the case and thus a retrial would have to ensue. The Claimants submitted that the Respondent/Applicant had not made payments as ordered by the Court. They thus urged the Court to dismiss the application with costs.
3. The Application for review was urged by Miss Oyombe who submitted that the Application grounded on Rule 32(b) of the Industrial Court (Procedure) Rules 2010 on account of error or mistake on the face of the record. She submitted that in the Judgment delivered on 24th March 2014 the Court noted the final submissions were not on record. She stated that the true status is that the Claimants case was heard and the Respondent was to avail a witness but the Court disqualified the witness the Respondent had intended to call as he had sat through the testimony of the Claimants witness. The Respondent, it was submitted, was denied the opportunity to call the Respondent's witness who had sat in Court. Miss Oyombe submitted that the Respondent filed submissions and received a receipt and thus challenged the decision in relation to Mr. Koyi. She submitted that the Respondent challenged the computations and the finding that there were no submissions was erroneous and the decision should thus be reviewed and the Application for Review be allowed as prayed.
4. Mr. Namasake for the Claimants opposed the Application and submitted that when the case came up for hearing it was handled by a senior lawyer, Mr. Okeche. He submitted that Mr. Okeche let the witness sit in Court and the witness was thus disqualified but Mr. Okeche was not denied an opportunity nor was he prevented from calling another witness. Mr. Okeche instead closed his

case without calling any witness. Mr. Namasake submitted that the main issue about recalculation of terminal benefits was not challenged at all. He submitted that there was no evidence then or even now challenging the calculations. He stated it is only afterwards that the applicant brought in new evidence and there is no way that one can be allowed to bring in new evidence once case is closed. He submitted that the main case for the Respondent was that the Claimants had signed a certificate of discharge. He stated that Mr. Koyi signed and indicated the recalculation of his dues was wrong and the Court agreed and awarded him the judgment sum now being challenged. He submitted that the parties did file submissions but it was he who gave the Respondent a copy of submissions and that is not an error that can be attributed to Court. He submitted that if we have to reconsider the final submissions then the case would have to be retried and involve the 16 Claimants. He urged the Court to dismiss the Application for Review as the Court made the proper determination.

5. Miss Oyombe in a brief reply conceded that when she inherited the file she noted that the submissions though filed were not on her file and borrowed the copy from Mr. Namasake and made a copy for her file. She submitted there is a receipt on the file which is proof of filing. She denied introduction of new evidence. She submitted that the Respondent was not asking the Court to reopen the entire case but sought the Court to reconsider the challenge to the computations. She thus urged the Court to allow the Application.
6. The Respondent's Review Application is brought under the correct provisions of the law. The Claimants challenge is also premised on the correct statutory underpinning. The Respondent asserts that there was a challenge in the final submissions to the computations. I noted in my Judgment that there was no set of final submissions on record on behalf of the Respondent. I have perused the file yet again and in spite of the submissions made there is no copy of the Respondent's submissions. The position obtaining on 24th March 2014 when Judgment was delivered still holds. In an Application for Review where the main attack is on error or mistake apparent on the face of the record, the Applicant has a duty to show the error or mistake. In this case, the mistake or error is stated to be the non-consideration of the Final Submissions for the Respondent. The long and short of it is that there are no Submissions for the Respondent on the file. The Respondent's Counsel admits that she had to copy Mr. Namasake's copy for their file. The Court did not have the submissions on record, a position that still subsists.
7. There is no new evidence that has come to the possession of the Respondent that was hitherto not available or could not be produced by the Respondent during the trial. Mr. Okeche for the Respondent was not barred from calling any other witness nor from adducing evidence that would have led the Court to arrive at a different conclusion. From the foregoing it is clear the Respondent's Review Application is devoid of merit as there is no mistake or error apparent on the face of the Record nor is there cause to review the decision made for any other reason. The Review Application is dismissed with costs.

Orders accordingly.

Dated and delivered at Nairobi this 22nd day of December 2014

Nzioki wa Makau

JUDGE