



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**

**CAUSE NO. 561 OF 2014**

**(Originally Nairobi Cause No. 464 B of 2011)**

**WILLY KOSGEI**

**CLAIMANT**

**v**

**MOI TEACHING & REFERRAL HOSPITAL**

**RESPONDENT**

**RULING**

1. Marete DKN J delivered judgment on 20 December 2013 in which he dismissed the Claimant's claim alleging unlawful termination with costs to the Respondent.
2. The Claimant was aggrieved and through a motion dated 26 February 2014 he sought review of the judgment. The grounds upon which the Claimant sought review were
  - a) THAT the ruling as delivered by the Honourable Justice D.K. Marete on the 25<sup>th</sup> of December 2013 did not consider material evidence as adduced by the claimant leading to the judgment as delivered.
  - b) THAT- In according to the Industrial Court Rules and Procedures 2010, Rule No. 32, there are additional issues arising which issues were not covered during the hearing stage.
  - c) THAT:-there are critical issues of law which the Honourable Court overlooked as to have led to the judgment delivered.
  - d) THAT:-the Honourable Judge admitted the evidence from the respondent without considering the facts and evidence as adduced by the claimant.
3. The motion was placed before Rika J on 6 March 2014, and he ordered that it be placed Marete J for the Claimant to explain why he wanted Marete J to disqualify himself from the case. The motion was adjourned severally until 18 September 2014 when Nduma J ordered that the application be heard by any other Judge.
4. On 14 October 2014, Onyango J directed that the file be transferred to Nakuru at the request of the Claimant.
5. I heard the motion on 3 November 2014.

**Claimant's submissions**

6. The Claimant stated that he was relying on the grounds on the face of the motion and his supporting affidavit and further affidavit.
7. He submitted that the judgment should be reviewed because the Respondent did not comply with

- directions as to filing of submissions.
8. He further contended that the Court overlooked the provisions of Article 236 of the Constitution and the Service Commission Act. He urged that the Respondent being a public hospital was bound by the Service Commission Act.
  9. He further submitted that his case was reported to the Police but before the investigations were completed he was dismissed despite the Police exonerating him and that he was not afforded a fair hearing during the disciplinary hearing.
  10. On review, the Claimant seeks that the Respondent be ordered to pay him Kshs 5,508,499/-.

### **Respondent's submissions**

11. The Respondent relied on the replying affidavit sworn by one Sylvia Nyariki on 31 March 2014 and submitted that the Cause was dismissed because the Claimant failed to prove the facts on a balance of probability.
12. It was further submitted that the Claimant had not satisfied the conditions for review and that his option was to prefer an appeal.
13. The replying affidavit referred to deposed that there was inordinate delay in bringing the review application.

### **Evaluation**

14. Rule 32 of the Industrial Court (Procedure) Rules, 2010 provide for the grounds for review. The Industrial Court judge has a more extensive power of review than that provided for under the Civil Procedure Rules.
15. In so far as the Claimant has set out extensive reasons why he seeks a review, the same do not meet the threshold of review on account of discovery of new matter or evidence which he could not have known by time of hearing.
16. The second ground for review is that there is an error or mistake apparent on the face of the record. The Claimant in the affidavits in support of the motion has not indicated which errors or mistakes were apparent on the face of record.
17. The Claimant further attacked the judgment on the basis that it was in violation of the Constitution and the Service Commission Act.
18. For one the Service Commission Act was repealed by section 34 of the Public Service Commission of Kenya Act No. 4 of 2012, and the Claimant was purportedly dismissed on 20 November 2010.
19. Further the Claimant cannot seek to rely on any statute enacted pursuant to the functions of the Public Service Commission of Kenya pursuant to Article 234 of the Constitution.
20. By dint of the Article, the authority of the Public Service Commission is in respect of persons employed in the public service. Public service is defined in Article 260 to mean the

*collectivity of all individuals, other than State Officers, performing a function within a state organ.*

21. And state organ is defined to mean

*a commission, office, agency or other body established under this Constitution.*

22. By the stretch of the imagination, the Respondent is not established under the Constitution nor does it qualify as a *state organ* to bring its employees within the purview of public service.
23. The Claimant is basically challenging the findings of fact and application of the law by the Judge to those facts. In as far as the issue of unfair termination is concerned, his option is to appeal. He cannot get 12 months compensation and pay in lieu of notice as they are linked to unfairness of termination.
24. On service pay, the entitlement can either be statutory or contractual. The applicable statutory provision is section 35(5) as read with 35(6) of the Employment Act. Because the Respondent runs a pension scheme to which the Claimant was a member according to the pay slip he annexed

- to the Statement of Claim, he would not be entitled to service pay.
- 25.The Claimant did not plead in his Statement of Claim salary to retirement age at 60 years. He cannot seek the same now tabulated as Kshs 4,848,216/- through an application for review.
- 26.The Claimant further challenged the judgment for not awarding him leave allowance. Leave allowance has no nexus to unfairness of termination but the Claimant did not equally seek the same in the initial Statement of Claim, otherwise he would have been entitled to pay in lieu of accrued leave at time of dismissal.
- 27.The Claimant has not met the case for review and the Court therefore dismisses the motion dated 26 February 2014 with no order as to costs.

**Delivered, dated and signed in Nakuru on this 5<sup>th</sup> day of December 2014.**

**Radido Stephen**

**Judge**

**Appearances**

Claimant in person

Respondent Onyinkwa & Co. Advocates