



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 194 of 2010**

**SAMUEL SEVERIN MWALA.....CLAIMANT  
VERSUS**

**PZ CUSSONS EAST AFRICA LIMITED.....RESPONDENT**

**H.M. Mudeizi for Applicant/Respondent**

**Evans Ongicho for Respondent/Claimant**

**RULING**

This is an application for review of an award delivered by Justice Stewart Madzayo on the 28<sup>th</sup> October 2011.

The Award granted the Claimant/ Respondent:-

1. 3 Months salary in Lieu of Notice in the sum of Ksh.188,120.
2. Severance pay for 26 Years in the sum of Kshs.1,932,432.
3. Issuance of a certificate of service by the Respondent to the Claimant.

The order was to be complied with in 30 days from the date of the award, however an application for stay of execution of the award was filed on 3<sup>rd</sup> /11/2011 on a certificate of urgency and interim orders were granted on 25<sup>th</sup>/11 2011 staying the execution of the Award/Decree pending the hearing of an application to review the Award of the Court filed simultaneously with the aforesaid application for stay of execution.

For reasons not clear to the Court the application for review was not heard. The matter was next mentioned before me on 14<sup>th</sup>/11/2012 when Mr. Ongicho, Advocate appeared for the Claimant in the absence of the Respondent. The matter was further mentioned on 20<sup>th</sup> /11/2012 when Mr. Evans Ongicho appeared for the Claimant and filed a consent signed by himself and M/S. Hasna Mudeizi Advocate in which it was agreed that the Application for Review in terms of Rule 32 (1) and (4) of the Industrial Court (procedure) Rules ,2010 be determined by way of the documents filed by parties read together with the Court's notes made by the previous judge.

The grounds for review are as follows:-

1. The court erred by substituting the summary dismissal of the Claimant /Respondent with a normal

dismissal which substitution entitled the Claimant/Respondent to terminal benefits in terms of the applicable law and CBA executed by the parties on 28<sup>th</sup>/11/2007.

2. That the court erred in awarding service pay for every year worked when the Claimant/Respondent did not qualify for the same under the law and CBA since he was a Member and contributor of the NSSF Fund and was not declared redundant to warrant such severance pay for every year worked.

It was submitted therefore that the judgment violated Sections 35(6)(d) of the Employment Act, 2007, Section 15 and 49 of the Labour Institutions Act No.12 of 2007 and Clauses 14 and 23 of the CBA dated 28<sup>th</sup> November 2007.

The Claimant/Respondent opposes the Application for review and has filed a Replying Affidavit for the purpose.

The nub of the opposition is that the grounds for review of the Award in terms of Rule 32(1)(c) and (e) have not been satisfied in that the application does not disclose a breach of any written Law in the award since the Law applicable is the Employment Act 2007 and not the Labour Institutions Act; that though he was a member of NSSF the contributions were from himself and not the employer and therefore there was no benefit as envisaged under Section 35(5) of the Employment Act and that the CBA provided for severance pay.

He finally states that, he had prayed for reinstatement and was ready and willing to return back to work if terminal benefits were not payable.

Furthermore, the Court is empowered under Section 12(3) of the Industrial Court Act 2011 to provide any other appropriate relief as it may deem fit to grant.

He urges the Court to dismiss the Application for review with costs.

The Court notes at the outset that the Claimant/Respondent was dismissed on 25/11/09 and therefore the law application to the Claim is the Employment Act, 2007 and other Labour legislation in place at the time including the Labour Institutions Act 2007. It is not in dispute that he earned a salary of Ksh.63,706.50 at the time of the dismissal.

The court in its award summarized the circumstances under which the Claimant was dismissed and found upon a proper analysis that the employer had a valid and fair reason to dismiss the Claimant and consequently substituted the dismissal into a normal termination with effect from 25/11/2009.

Rule 32(1)(a) provides that a review of an award, judgment or ruling may be done where:-

- (a) 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 this 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 terms of R32 (2) an application for review of a decree or order of the Court under sub-paragraphs (b), (c), (d) or (e) shall be made to the judge who passed the decree or made the order brought to be reviewed.

The judge who made the award herein is no longer a judge of the Court and the Rules of the court are silent on whether or not a different judge may review. an award of another judge in these circumstance on grounds (b), (c), (d) or (e) aforesaid

Having said that the Court is of the view that in the interest of Justice and equity, it has to intervene in the best way possible especially on matters apparent on the face of the record and on matters of breach of any written Law.

Firstly the Court found that the summary dismissal of the Claimant /Respondent was unlawful and unfair but did not consider grant of any appropriate remedy by way of compensation, damages or reinstatement in terms of Section 49(1) (c),and 49(3)(a) & (b). This on the face of it resulted in a failure of justice.

Furthermore, the judge made no reference in the award to the provisions of the Collective Bargaining Agreement or any contract of Employment that entitled the Claimant/Respondent to payment of 3 months in Lieu of Notice and Severance Pay for the 26 years completed. This is crucial in view of the payslip of the Claimant/Respondent attached to the Application for review for the month of November 2009, which clearly shows that the Claimant/ Respondent was pensionable by fact of his registration with NSSF to which the employer contributed Ksh.200.00 per month.

Section 35(5) as read with Section 35 (6)(d) clearly provide that it is not mandatory for an employer to pay an employee who is registered with NSSF service pay upon termination for every year worked. The Award does not refer at all to the fact of the Claimant's membership with NSSF.

These are clear errors apparent on the face of the record and the same also amount to a breach of the provisions of the Employment Act, 2007 referred to.

The end result, in my considered view is a gross miscarriage of justice necessitating the Court to consider it appropriate to Quash the award in it's entirely and order that the suit be heard again afresh.

In the final analysis, the Court orders:-

(a)The award delivered by Justice Stewart M . Madzayo dated 28/10/2011 is quashed and the matter be heard *denovo*.

(b) Costs be in the cause.

**It is so ordered.**

**DATED** and **DELIVERED** in Nairobi this 16<sup>th</sup> day of January, 2013.

Mathews N. Nduma

**PRINCIPAL JUDGE**