



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 467 of 2010

BENTACK

KILUNDO.....CLAIMANT/RESPONDENT

VERSUS

SCHENKER

LIMITED.....APPLICANT/RESPONDENT

Mr. Ogembo for Applicant/Respondent

Mr. Nyabena for Claimant/Respondent

JUDGMENT

The Application serving before the court is for review of the Decree and Award of this Honourable Court made on 13th July, 2012 by Justice Stewart Madzayo in terms of Rule 32(1) of the Industrial Court Rules and Section 12(3) of the Industrial Court Act No.20 of 2011.

The grounds for review as outlined in the Application may be summarized as follows;

- (a) The Award of 3 months' salary in lieu of notice was against the evidence adduced showing that the employer had justifiable reason to summarily dismiss the Claimant.
- (b) That the contract of employment provided for one month's salary in lieu of notice and not 3 months as awarded by this court.
- (c) That award of payment in lieu of leave not taken was granted without any evidence at all to support the claim; and
- (d) That the court erred in law in awarding payment of gratuity inspite of lack of such a provision in the contract of employment and the Claimant having been a member of NSSF to which the Applicant contributed monthly.

The Application is further supported by the Affidavit of Moses Onyango Nzuya, the Human Resource Manager of the Applicant.

The Application is opposed by the Claimant/Respondent and has filed a replying affidavit dated 2nd April, 2013. He states that the application for review of the judgment of this court has no basis at all in that the Applicant has not shown;

- (i) that there is a disclosure of new and important matter of evidence which after the exercise of due diligence was not within the knowledge of the Applicant;
- (ii) that there is some mistake or error apparent on the face of record;
- (iii) that the award is in breach of any written law; and
- (iv) that the award requires clarification.

These indeed are the legal requirements for a review application in terms of Rule 32(1) of the Industrial Court Rules, 2010.

The court has closely perused the record in the matter including the pleadings by the parties, the proceedings and judgment of the court and has come to the following conclusions of facts and law;

(a) That the trial judge carefully evaluated the evidence by both parties and came to the conclusion that the Applicant had failed to justify the summary dismissal of the Claimant/Respondent in that no evidence was presented to show that the Claimant/Respondent was negligent in his duties and that such negligence resulted in financial loss to the Applicant. To the contrary, the claimant had received salary increment and bonuses on 31st May 2004; 25th May 2005 and 19th June 2008. That this was evidence of his good service to the Applicant/Respondent. The Court further found that the Claimant/Respondent was not given a hearing so as to test the veracity of the accusations made against him contrary to Section 41 of the Employment Act. The Court finally concluded that there was no valid reason to terminate the services of the Claimant/Respondent after working for the Applicant/Respondent for very many years between 1st December 1985 to 26th February, 2010. The Court concluded that the Claimant/Respondent had established on a balance of probabilities that he was unfairly, wrongfully and unlawfully summarily terminated.

The court has considered the grounds for review presented by the Applicant/Respondent and has come to the conclusion that the decision of the court did not violate any written law in its findings on the unlawfulness of the summary dismissal. The test to be applied here is not whether this court would have come to a different conclusion on the facts of the case but rather whether the finding of the court is so grossly erroneous as to constitute a breach of the written law. Alternatively, the Applicant must establish that there are patent errors on the face of the record. This is clearly not the case here. The Court therefore, cannot fault the findings of the court in this respect.

Accordingly, the six (6) months' salary compensation for unlawful dismissal was well within the discretion of the court in terms of Section 49(1)(c) of the Employment Act 2007 and the court will not interfere with it.

With respect the award of 3 months' salary in lieu of notice, the judge did not refer to any contractual provision that entitled the Claimant to 3 months' salary in Lieu of Notice. To this extent, this finding was unfounded and was in breach of Section 35(1)(c) of the Employment Act that provides for payment of one month salary in Lieu of Notice where an employee whose employment has been terminated was paid "salary periodically at intervals of or exceeding one month".

Indeed the letter of appointment of the Respondent/Claimant dated 1st December, 1985 which the judge referred to provides; "*Notice will be one (1) month by either party after completion of the probationary period*". Clearly the Learned Judge, made the three (3) months award not only in breach of the contract of service but also in breach of the law aforesaid. The award is accordingly set aside and substituted with a payment of one months' salary in lieu of notice.

With regard to the award of Gratuity pay calculated at a monthly salary of Kshs.78,116/= for 27 years of completed service totaling Kshs.2,109,132/= a close perusal of the judgment does not indicate

the basis of the award. Clearly the contract of the Claimant did not provide for payment of such gratuity and the payslip relied upon by the Claimant himself for the month of February 2010 clearly shows that the Claimant was registered with NSSF to which the Applicant contributed Kshs.200/= per month. The said payslip also shows that the Applicant had provided the Claimant with a CFC Life Insurance Cover in respect of which a monthly deduction of Kshs.602/= was deducted. A further premium deduction of kshs.317/= was deducted from the gross pay of the Claimant. Also the payslip shows a pension deduction of Kshs.3,752/=.

This being the case, the award for payment of gratuity was contrary to Section 35(5) as read with Section 35(6) a, b, c and d, which provides that an employee whose contract of service has been terminated under Section 35(1)(c) shall be entitled to service pay for every year worked the terms of which shall be fixed, but this Section does not apply where an employee is a member of;

- (a) a registered pension or provident fund scheme under the Retirement Benefits Act;
- (b) a gratuity or service pay scheme established under a Collective Agreement;
- (c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this Section; and
- (d) the National Social Security Fund.

The Court finds that on the face of the pleadings alone, the Claimant was a member of National Social Security Fund and a Pension Fund by the employer. To the extent that the Award of the Court is completely silent on this matter but went ahead to award Gratuity to the Claimant, the award was contrary to written law and the contract of the parties and is therefore set aside.

The judge did not also make a finding of fact with regard to the leave entitlement of the Claimant but went ahead to award payment in lieu of leave days not taken. The judgment provides no basis whatsoever for this Award. For this reason alone, I find that the same is contrary to the law on the burden of prove which provides that he who alleges must prove the claim on a balance of probabilities.

In the final analysis, the Award of the Court dated and delivered on 13th July, 2012 is reviewed to the extent that;

- (a) the award of three (3) months' salary in lieu of notice is substituted with an award of 1 month's salary in lieu of notice in the sum of shs.78,116/=;
- (b) the award of Annual leave days is set aside;
- (c) the award of Gratuity is set aside;
- (d) the award of six (6) months' salary compensation for loss of employment in the sum of Kshs.468,698/=; and
- (e) application to issue a certificate of service to the Claimant are retained.

Total payment to the claimant is Kshs.546,814/= plus interest on the amount from the date of the award on 13th July, 2012.

To the extent that no order of costs was made by the trial judge, each party will meet its costs of this Application.

It is so ordered.

Dated and Delivered in Nairobi this 24th day of May, 2013.

Mathews N. Nduma
PRINCIPAL JUDGE
INDUSTRIAL COURT