



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 8 of 2013**

**RUTH NJERI NGUGI.....CLAIMANT**

**-VERSUS-**

**CROWN FOODS LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 24<sup>th</sup> May, 2013)

**RULING**

The court delivered the judgment in this case on Friday 22<sup>nd</sup> March, 2013 and the orders made in the judgment were:

- a) **The respondent to pay the claimant a sum of Ksh.15, 000 being payment in lieu of annual leave.**
- b) **The respondent to pay half costs of the cause.**

The claimant has applied for review of the orders by filing the memorandum for review on 23.04.2013 supported by the claimant's affidavit sworn on 23.04.2013. The grounds for the review as applied for by the claimant are as follows:

- a) There exist sufficient reasons in terms of rule 32(1)(e) of the Industrial Court ( Procedure) Rules, 2010 because the claimant was prevented from attending court on time and she arrived in court late for the hearing as she was stuck in road traffic jam along the Nakuru-Eldoret Road. In the circumstances the claimant's oral evidence was not tendered during the hearing.
- b) The oral testimony of the claimant was material and would have affected the decision of the court.
- c) The rules of natural justice demand that the claimant is not condemned unheard.

The claimant has explained her failure to give oral evidence at the hearing held on 20.03.2013 as follows:

- a) On the material date she travelled from Eldoret to attend court in Nakuru starting her journey at 5.30 am.
- b) The road was closed at Matharu area due to on-going road construction works resulting in heavy road traffic jam. The morning was also foggy and the vehicle had to slow down in its motion.
- c) She arrived at the court at 10.00am and found that her case had proceeded without her evidence.

d) The failure to attend was beyond her control and was not wilful.

The respondent opposed the application through the grounds of opposition filed on 07.05.2013 and the affidavit of **Kennedy Keango Nyaencha Advocate** sworn on 7.05.2013. The grounds of opposition are as follows:

a) The application lacks merit and is an abuse of court process.

b) It has not been shown that the oral evidence by the claimant was materially different from the documents before the court so that the oral evidence would, when taken, lead to a different finding by the court.

c) The claimant's advocate on record decided to proceed by reliance on the documents on record and without calling oral evidence and the claimant should not be allowed to reopen the case in view of the decision made in the judgment.

In the opposing affidavit it was stated as follows:

a) On 20.03.2013 the claimant's advocate specifically opted to proceed with the matter on the strength of the documents already on record in the petition.

b) On the hearing date the claimant's advocate did not make any application for adjournment in view of the claimant's alleged predicament.

c) The claimant had on previous occasions failed to attend court when required to do so.

d) The respondent had already released the money as ordered in the judgment for transmission to the claimant and there was no sufficient reason established as envisaged in the cited rule 32(1) (e) for the review to be allowed.

Rule 32(1) of the rules of the court provides that a person who is aggrieved by a decree or an order of the court may apply for a review of the award, judgment or ruling:

a) if 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 the record; or

c) if the award, the judgment or ruling requires clarification; or

d) for any other sufficient reasons.

The claimant is asking for review of the judgment on account of, thus **“for any other sufficient reason.”** The claimant's advocate has submitted that the issues for review relate to facts and not law as the reasons for the claimant's lateness at the hearing are clearly explained.

In the opinion of the court, a review based on **“any other sufficient reason”** means a reason other than fresh evidence, error or clarification as envisaged in rule 32 (1) (a), (b) and (c) respectively which necessitate a review and failing which, it would occasion manifest injustice to the applicant seeking the review. The reason must be shown to exist and to rationally lead to injustice if the review is not allowed. The reason must also be shown not to arise from the applicant's negligent or ignorant or deliberate actions or omissions.

In this case, the claimant as the applicant did not give oral evidence at the hearing. The reason given is that there was a traffic jam so that the claimant could not arrive in court on time to give the

evidence. That is the reason advanced by the claimant. Sadly, it was not the reason why the claimant did not give evidence. In the considered findings of the court, the reason why the claimant's evidence was not taken was because the claimant's advocate at the hearing of 20.03.2013 at 9.40 am informed the court, in his own words, thus **"We are now ready. I entirely rely on the statement of claim. I close the claimant's case. We can take the respondent's case."** As submitted for the respondent, the court was not requested to adjourn and to accord the claimant a chance to provide oral evidence. Rule 21 of the rules of the court allowed the claimant to proceed on the basis of the documents on record. The rule states:

**"21. The court may, subject to an agreement by all parties, proceed to determine a suit before it on the basis of pleadings, affidavits, documents filed and submissions made by the parties."**

The court is guided by rule 25 that after close of the hearing, the hearing cannot be re-opened or the facts reviewed except in a good application for review. In this case the hearing was closed and both parties were accorded chance to make their respective submissions. In the circumstances of this case, the court finds that the rules of natural justice have been upheld and the rules of the court governing hearing of the cases before the court were not breached. The claimant was accorded a fair chance in court and the path of justice has been free from impurity.

The court has reflected upon the relationship between the advocate and the client in this case. It is the considered view of the court that a litigant should not suffer the mistakes made by the advocate in the course of undertaking litigation. Nevertheless, the claimant has not pleaded that the advocate on record made a mistake and acted without instructions to proceed as it happened at the hearing. Further, as submitted for the respondent, it has not been demonstrated that the oral evidence would have been substantially different from the material on record that was before the court and was the basis of the court's judgment.

Finally, the court has considered the respondent's submissions on costs that if the claimant had attended court, maybe she could be allowed to get full costs. In view of that submission and the need to ensure proportionality in deciding employment disputes, the court finds that each party shall bear own costs of the application for review.

In conclusion, the application for review is dismissed with orders that each party shall bear own costs of the application.

**Signed, dated and delivered in court at Nakuru this Friday, 24<sup>th</sup> May, 2013.**

**BYRAM ONGAYA**  
**JUDGE**