



REPUBLIC OF KENYA
INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 341 OF 2010

KILIOPA OMUKUBA OKUTOYICLAIMANT

VERSUS

TELKOM KENYA LIMITEDRESPONDENT

RULING

This is an application dated 11th December 2012 brought as a Notice of motion under Rule 32 of the Industrial Court Procedure Rules seeking a review of the court judgement on 12th October 2012 where part of the claim dated 19th March 2010 was confirmed and that the judgement as read has a mistake or error on the face of the record, there is a breach of the law, the same require clarification or there are sufficient reasons to warrant the court to review this award. This application is not supported by an affidavit.

The application is opposed by the respondent in their Replying Affidavit Lawrence Karanja the legal advisor of the respondent.

The claimants state that in the judgement of the court it was noted that dues process had not been followed in the summary dismissal of the claimant as required under section 41 of the Employment Act and that the procedures adopted by the respondent in reaching the summary dismissal were unfair and in the finding of the court, the dismissal was found to be unfair. That the remedies for unfair termination are well set out under section 49 of the Employment Act. That upon the court making this finding, it went back and found that in the circumstance of the case there were police investigations ongoing on arson and that there were no good grounds advanced for unfair termination whereas the burden of proving unfair termination rested with the claimant and that same was not discharged.

That in the court finding that there was unfair termination and again finding that there no unfair termination on the basis that the claimant failed to prove the unfair termination was contradictory and hence the application for review of the court judgement. That there was therefore an error or mistake on the face of the record, the same is in breach of the law or requires clarification. That a decretal amount of kshs.450, 003.60 has been paid to the claimant. That on the court finding that there was unfair termination, the maximum compensation of kshs.507, 324.00 should also be awarded.

On the other hand the respondents are opposed to the review application of the claimant on the grounds that they have fully complied with the court award in full as there was no error on the judgement and the same is valid and in accordance with the law and the terms of the claimants prayers. That the application raises new legal arguments that are material for appeal against the judgement as opposed to an order for

review and that the claimant should lodge an appeal.

The respondent further states that in law there is a maximum compensation of 12 months' salary and the court can award a lowered amount and in the practice of the court, awards of 4 to 6 months have been made. That since the court awarded severance pay the tit could not award compensation as this was a fair compensation. That by reopening this case the claimant will be bending over backwards to allow the current application which challenges findings of the court by way of review as opposed to an appeal. And that the application should be dismissed.

I have read back my judgement dated 12th October 2012 subject of this review, where there was a firm finding that there was unfair termination though noting that investigations were ongoing which investigations were not in the control of the respondent. Indeed upon the finding of unfair termination, a court should award a reasonable compensation other aspects of the case notwithstanding.

A Court can review a judgement where a new and important matter of evidence is produced that was not possible to be produced at the time the decree was passed or on account of some mistake or error apparent on the face of the record or for any other sufficient reason. Therefore the criteria for the court to apply in an application for review are;

- a. Discovery of new and important matter or evidence;
- b. There is an error or Mistake apparent on the face of the record; or
- c. For any other sufficient reason.

The Court reading of these principles that apply in an application for review only apply where the aggrieved party has not preferred an appeal as a good ground for appeal in not necessarily a good ground for review. In an application for review, the error or omission must be self evident and it is not sufficient to say neither that the Court would have taken another view nor that the judge proceeded on an incorrect exposition of the law and therefore reached an erroneous conclusion of the law. Therefore a misconstruction of the law or other provisions of the law is not a good reason for a review.

I note the error apparent on the court record and I will therefore make an award for the unfair termination equivalent to 3 months pay of the claimant's last salary with the respondent. This is the amount of Kshs. 126,831.00.

The application is allowed with a review of the court judgment dated 12th October 2012 with an award of kshs.126, 831.00 payable within 30 days. Each party will bear their own costs.

Delivered in open court this 13th Day of June 2013.

M. Mbaru

Judge

In the presence of:

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