**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 125N of 2009**

**Kenya Plantation & Agricultural Workers Union.....CLAIMANT**

**Kilifi Plantations Limited.....RESPONDENT**

## RULING

### Background

1. An award was delivered on 4 March 2010 by retired Justice Chemmutut. The award was in respect of a dispute concerning some 47 members of the Claimant Union who had been employees of the Respondent.

2. In the award the Court awarded the Claim as per a schedule of 43 employees (Grievants) which had been submitted by the Respondent showing payments made to them in terms of terminal dues.

3. On 8 June 2010, the Claimant union filed an application seeking to review the award delivered on 4 March 2010.

4. The parties appeared before the Court on 21 July 2010 and the Respondent was directed to file its response to the application on or before 4 August 2010.

5. After several adjournments, the application was eventually heard on 1 February 2011.Mr. Khisa for the Union submitted that the payment schedule which formed the basis of the award had errors, that the Grievants own schedule had not been taken into consideration by the Court and that the Respondent did not hold a hearing before making the decision to terminate Grievants.Mrs. Onyango (now Lady Justice Onyango) responded on behalf of the Respondent. A decision on the application was to be made on Notice.

6. Due to circumstances which I need not to narrate here, Justice Chemmutut ceased being a judge of the Industrial Court before he could prepare and deliver his decision.

7. On 28 September 2012 the parties appeared before me and they signalled their agreement to my proceeding and delivering a decision based on the proceedings and submissions taken by Justice Chemmutut and on the pleadings.

### Submissions by Union

8. The Union submitted that the Grievants had been summarily dismissed and therefore pursuant to Sections 18(4) and 44 of the Employment Act were entitled to gratuity. It was the case of the Union that it had agreed with the Respondents on a payment schedule which included an element of gratuity and that the Court had based its award on a unilateral schedule prepared by the Respondent, ignoring the schedule filed in Court by the Union.

9. It was the Union's further submission as gleaned from the face of the application that the Grievants were denied natural justice as stipulated in Section 41 of the Employment Act and Clause 10(ii) of the Collective Bargaining Agreement which was effective from 1 June 2007 to 31 May 2009 and which was binding upon the parties.

10. The Union in its application made reference to submissions by the Respondent's on 11 March 2009, unfortunately I have not been able to find such submissions on record. Indeed there first recorded proceedings relating to the Cause is for 6 July 2010.

**Submissions by Respondent**

11. The Respondent filed Grounds of Opposition on 4 October 2010 and in the main they opposed the review application as being frivolous, vexatious, misconceived and otherwise as an abuse of the Court process.

12. Mrs. Onyango submitted that the Union had not demanded gratuity and therefore were not entitled to an award in respect to gratuity.

13. The Respondent further contended that the Grievants were not denied a hearing because they had refused to meet with the Respondent when called to do so and that the summary dismissal was merited by their conduct.

**Applicable law and Evaluation of Parties Submissions**

14. The primary statutory foundation for the Industrial Court to review its judgments, awards, orders and decrees is Section 16 of the Industrial Court Act, 2011.The section provides:

*The Court shall have power to review its judgments, awards, orders or decrees in accordance with the Rules.*

15.The Rules referred to in Section 16 are the Industrial Court (Procedure)Rules 2010.It is rule 32 of the rules which is applicable and the relevant part provides:

32(1) *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) On account of the award, judgment or ruling being in breach of any written law; or*

*(d) If the award, judgment or ruling requires clarification; or*

*(e) For any other sufficient reasons.*

16. The remaining parts of the rule set out to whom the application should be made, how it should be made and how the Court should proceed. The issue therefore is whether the application by the union can fit into any of the categories set out in rule 32 of the Industrial Court (Procedure) Rules 2010.

17. The Union has, first, not claimed or alleged or even asserted that it had discovered new and important matter or evidence after the delivery of the award.

18. Second, the schedule with the details of the gratuity which the Union is claiming was filed in Court on

26 June 2009 through the Claimants Second Supplementary Memorandum. The schedule was before the Court before it made its determination and therefore the Union cannot be heard to complain that there is some mistake or error apparent on the face of the record. This ground is closely linked to the fourth ground of review on the basis of a clarification. The Court made a decision to make an award based on the schedule presented by the Respondent rather than the one by the Union. Therefore on these 2 limbs, the Union cannot succeed. The Court had all the material presented by the parties before it made the award.

19. The third [here treated as fourth] ground for an application for review is on account of the Court's determination being in breach of some written law. The Union did not explicitly submit so but I believe their ground for review is based on the claim of the Grievants not being given a hearing. The Union argued that the termination or dismissals was against the rules of natural justice.

20. A glimpse of the award however indicates that the issue of natural justice was presented before Justice Chemmutut. The Judge in the award cited at length from page 5 to 6 the letter of dismissal of the Grievants and the contents of the letter indicate that the Grievants representatives were called by the Respondent's management but refused to atten a meeting unless the Union Branch secretary was present.

21. In this type of scenario, I do hold that the ground for review for breach of the rules of natural justice must also fail.

22. The Union has in any event not given any sufficient reasons which would necessitate my interfering with the decision of the Court pronounced on 4 March 2010.An appeal would have been a suitable option for the Union.

23. I decline the invitation by the Union to review the award and dismiss the application dated 31 May 2010.

24. There will be no order as to costs because of the continuous/on-going relationship between the parties.

Dated, delivered and signed in open Court at Nairobi this 26th day of October, 2012.

Justice Radido Stephen

**Judge of the Industrial Court**

**Appearances**

Mr. Meshack Khisa instructed by Kenya Plantation & Agricultural Workers Union

For Claimant Union

Mr. Masese instructed by the Federation of Kenya Employers

For Respondent