



1. *Civil Appeal*
 2. *Subject of Subordinate Court case.*
 - a. *Unlawful dismissal from employment.*
 - b. *Subordinate court enters judgment for employee against employer for total sum of Kshs. 777,842/=*
- Divided*

Special Damages

i.	<i>House allowance</i>	<i>Kshs. 138,000.00</i>
ii.	<i>Salary and allowance</i>	<i>Kshs.217,550.00</i>
iii.	<i>NHIF and medical scheme</i>	<i>Kshs. 19,272.00</i>
iv.	<i>Leave travelling allowance</i>	<i>Kshs. 2,225.00</i>
v.	<i>Annual Leave 2001 & 2002</i>	<i>Kshs. 23,947.00</i>
vi.	<i>Overtime 86 days & 45 DAYS</i>	<i>Kshs. 108,802.20</i>
vii.	<i>Full Pension</i>	<i>Kshs. 352,000.00</i>
viii.	<i>3 months salary in lieu of notice</i>	<i>Kshs. 18,975.00</i>
ix.	<i>Service pay</i>	<i><u>Kshs. 97,590.00</u></i>

TOTAL *Kshs.777,842.20*

- c. *The employer paid Kshs.491,398.00 dated 10 August 2006 and Kshs.779,665 being pension entitlement.*
 - d. *Balance of Kshs.352,000/= yet to be paid.*
 - e. *Court in its ruling dated 16 August 2007 to the review application of 12 February 2007.*
 - f. *Stated that a sum of Kshs.352,000/= was still due as per decree*
 - g. *Employer appeals.*
3. *Appeal*
 - a. *Appellant's argument*

i. *That Trial Magistrate ought to have held there was an error on the face of the record. The decretal sum being fully satisfied.*

b. *Award of kshs.424,842/= only should have been awarded i.e*

Kshs.777,842.00

<i>Less</i>	<i><u>Kshs.352,000.00</u></i>
<i>Total</i>	<i><u>Kshs.425,842.00</u></i>
<i>Costs</i>	<i>Kshs. 60,000.00</i>
<i>Interest</i>	<i><u>Kshs.125,909.20</u></i>

Less amount paid Kshs.491,381.00
Respondent owed Kshs.120,362.20

or in the alternative

c. Decretal sum Kshs.1,209,739.00
Less paid Kshs. 491,389.00
Less pension Kshs. 352,000.00
Actual Kshs. 456,075.00

Sum due Kshs. 262,274.16

ii. Respondents argument
Decretal sum 22 April 2006 Kshs.1,209,739/=
Part payment Kshs. 491,389/=

The sum of kshs.779,695.29 was a retirement scheme benefit paid and having nothing to do with this case.

Balance of award to be paid Kshs.352,000/=

4. Held: Appeal allowed

5. Case law

6. Advocate

i. G. Kuria instructed by the firm of M/s Lawrence Mungai & Associates for the Appellant

ii. B. M Isindu instructed by the firm of Buton Isindu & co. Advocates for the Respondent

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO.749 OF 2007

KENYATTA UNIVERSITY.....APPELLANT/ORIGINAL PLAINTIFF

VERSUS

JOHN KWENDO OMUKOKWA.....RESPONDENT/ORIGINAL DEFENDANT

**(Being an appeal and cross appeal from the ruling of the Hon.(Mrs) C. W. Githua Ag. Senior
Principal Magistrate**

JUDGMENT

I. Introduction

1. The original suit that was heard before the Magistrates Court at Nairobi was finalized. It concerned a contract of employment in which the respondent John Kwendo Omukokwa sued his former employer for wrongful dismissal.

2. After trial, the subordinate court entered judgment against the employer for a total decretal sum of kshs.777,842/=. The breakdown of this sum being described as Special Damages was as follows:

i.	House allowance	Kshs. 138,000.00
ii.	Salary and allowance	Kshs. 217,550.00
iii.	NHIF and medical scheme	Kshs. 19,272.00
iv.	Leave travelling allowance	Kshs. 2,225.00
v.	Annual Leave 2001 & 2002 (45 days)	Kshs. 23,947.00
vi.	Overtime 86 days	Kshs. 108,802.20
vii.	Full Pension	Kshs. 352,000.00
viii.	3 months salary in lieu of notice	Kshs. 18,975.00
ix.	Service pay	<u>Kshs. 97,590.00</u>

TOTAL **Kshs.777,842.20**

3. The employee had his employment terminated for misappropriating the University equipments amongst other things. The Trial magistrate held that this was not so, but I would have found some misconduct. It is unfortunate that the employer failed to appeal against the said decision. I am not permitted by law to interfere with this decision.

4. The employee proceeded to execution. The employer paid kshs.491,398/= by a cheque dated 10 August 2006. This meant from the decretal sum, there was left kshs.352,000 yet to be paid.

5. The employer's pension scheme paid the employee a total sum of kshs.779,665/=. The employer took this sum and deducted Kshs.352,000/= from the decretal sum and interpreted this to mean the pension

paid was inclusive of this sum.

6. The employer returned to court and asked for a review of the court order to read Kshs.352,000/= was inclusive of the pension payments.

7. The court ruled otherwise and stated that the payment of Kshs.532,000/= must be paid as part of the decretal sum.

8. Being dissatisfied with this decision , the employer appealed.

II. APPEAL

9. I kindly requested the two advocates to address me on this issue and how they would wish to pay or be paid.

10. The advocate for the employer stated that there was an error on the face of the record. The decretal sum had already been satisfied by them. It was the amount of Kshs.425,842/= only that should be paid

That is:

Kshs.777,842.00

Less	<u>Kshs.352,000.00</u>
Total	<u>Kshs.425,842.00</u>

Costs	Kshs. 60,000.00
Interest	<u>Kshs.125,909.20</u>

Less amount paid	Kshs.491,381.00
Net balance	Kshs.120,362.20

(Being the amount owed by the employer to the employee)

11. In the alternative, the employer came up with another breakdown being:

Decretal sum	Kshs.1,209,739.00
Less paid	Kshs. 491,389.00
Less pension	<u>Kshs. 352,000.00</u>
Actual	<u>Kshs. 456,075.00</u>

Sum due being Kshs. 262,274.16

12. In response, the respondent argued that if we take the decretal sum of Kshs.1,209,739/= as of 22 April 2006, and if the part payment of Kshs.491,389/= is deducted, there would still be a balance of Kshs.350,000 due and owing.

13. It is correct to state that Kshs.779,695.29 was the sum of pension paid by the Pension Scheme of the employer and duly paid by a third party. It had nothing to do with the court's decretal sum of Kshs.779,842/=.

14. The respondent/employee and appellant/employer admitted that Kshs.350,000/= was a pension scheme due to the employer well in advance and before the current Pension Scheme was in place.

15. Is this double enrichment by the employee? The Trial Magistrate stated that it was not and ordered the sum be paid.

III. OPINION

16. From the admission of both parties, I would find that the decretal sum of Kshs.777,842 included the sum of kshs.352,000 (being pension prior to the start of the current Pension Scheme). The sum thereafter of Kshs.779,695.29 being the Pension Scheme entitlement had in fact nothing to do with the current case. It was paid independently of the Subordinate Courts decretal amount given to the employer.

17. The employer must pay this sum as ordered by the Trial Magistrate in the decree that had never been appealed against.

18. The appeal is dismissed. The cross appeal allowed.

19. There will be costs to the respondent employee to be paid by the appellant employer both in this appeal and in the Subordinate Court and the cross appeal.

JUDGMENT DATED THIS 3RD DAY OF JUNE 2011 AT NAIROBI

M.A. ANG'AWA

JUDGE

Advocates

- i. *G. Kuria instructed by the firm of M/s Lawrence Mungai & Associates for the Appellant*
- ii. *B. M Isindu instructed by the firm of Buton Isindu & co. Advocates for the Respondent*