

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT KISUMU

PETITION NO. E002 OF 2025

(Before Hon. Justice Dr. Jacob Gakeri)

IN THE MATTER OF CONTRAVENTION OF THE
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER
ARTICLES

10, 19, 20(1), 22(1), 23(1), 28, 29, 31, 39, 41, 49,
50, 162(2), 258, 259(1)(b) OF THE CONSTITUTION
OF KENYA

AND

IN THE MATTER OF SECTIONS 41, 44, 45, 49 OF THE
EMPLOYMENT ACT NO. 11 OF 2007

AND

IN THE MATTER OF SECTIONS 4 AND 6 OF THE FAIR
ADMINISTRATIVE ACTIONS ACT, CHAPTER 7L OF
THE LAWS OF KENYA

BETWEEN

TITUS OWINO MUGANDA.....
....PETITIONER

VERSUS

BROOKSIDE DAIRY
LIMITED.....1STRESPONDENT

NATIONAL POLICE SERVICE.....2ND

RESPONDENT

OFFICE OF THE DIRECTOR OF PUBLIC

PROSECUTIONS.....3RD

RESPONDENT

RULING

Before the court for determination is the applicant's Notice of Motion dated 4th November, 2025 filed under Certificate of Urgency seeking Orders that: -

- 1. Spent.*
- 2. The court be pleased to review its Judgment dated 29th July 2025 and vary its Orders to include specific figures as decretal sums.*
- 3. Costs be provided for.*

The Notice of Motion is expressed under Sections 1A, 1B, 3A and 80 of the Civil Procedure Act and Order 45, 51 Rules 1 and 2 of the Civil Procedure Rules and is based on the grounds enumerated on its face and the Supporting Affidavit of the applicant.

The applicant's case is that Judgment had an error apparent on the face of the record that the Petitioner had not indicated his salary yet he had attached copies of

payslips for 2 months August and September 2023, produced by the respondent as well.

That parties could not agree on the decretal sum for the last four (4) months.

Respondents case

By a Replying Affidavit sworn by Anne Kariuki, the affiant deponed that the instant application was a veiled attempt by the applicant to by pass Section 49(2) of the Employment Act on statutory deductions having declined the respondent's computation on the erroneous assumption that the award was not subject to statutory deduction.

That the applicant's salary for August 2023 and 11 days of September was earned and ought to have been paid less liabilities, the applicant may have had and had availed a final dues letter and had taken advance leave of 13.90 valued at Kshs.24,7555.06 and unreconciled overnight of Kshs.289,821.76.

According to the applicant these items were not recoverable from the applicant's salary.

That according to the respondent's welfare laundry allowance and telephone allowance ought not be part of computation.

Applicant's submissions

As to whether the applicant had made a case for review of the Judgment under Order 45 of the Civil Procedure Rules, counsel submitted that it had as the applicant only sought the specific amounts awarded under each award.

Reliance was placed on **Benjoh Amalagamated Ltd V Kenya Commercial Bank Ltd** [2014] eKLR and **Republic V IEBC ex parte Nasa [2017]** eKLR on clarification of Judgment to facilitate enforcement.

Reliance was also placed on Rule 74(1)(c) of the Employment and Labour Relations Court (Procedure) Rules, 2024 (hereinafter the ELRC Rules, 2024) to urge that the absence of figures in the Judgment led to a deadlock as parties could not agree.

On gross salary counsel submitted that it included basic salary and allowances and benefits as per Section 18(4) of the Employment Act.

Reliance was placed on **Postal Corporation of Kenya V Andrew K. Tanui** [2019] eKLR, where the court adopted the reasoning of Byram Ongaya J in **Banking, Insurance & Finance Union V Maisha Bora Sacco** [2018] eKLR.

Counsel urged that the applicant's gross salary was Kshs.91,154.29 comprising a basic salary of Kshs.53,428.13 welfare (variable) laundry allowance Kshs.300, telephone Kshs.714.29 and holiday pay (August) Kshs.3,561.88.

On liabilities, counsel argued that they were never pleaded and proved and thus not adjudicated and cannot defeat the decree, citing **Fredrick Saundu Amolo V Principal Secretary Ministry of Agriculture** [2018] eKLR to urge that the sums cannot be deducted from the decretal sum.

That the computation ought to be:

- | | | | |
|-------------|----|-------------|-----------------------|
| 1. Salary | in | <i>lieu</i> | of |
| notice..... | | | |
| | | | Kshs.91,154.29 |
| 2. Salary | | | for |
| August..... | | | |
| | | | Kshs.91,154.29 |

3.11 days in September.....	
Kshs.70,042.42	
4.2 months salary.....	
<u>Kshs.182,308.58</u>	
Total.....	
<u>Kshs.434,659.00</u>	

Respondent's submissions

Counsel submitted that all awards under Section 49(1) of the Employment Act were subject to statutory deductions.

Reliance was placed on the sentiments of Mbaru J in **Benjamin Langwen V National Environment Management Authority** [2016] KEELRC 38 (KLR) that Section 49(2) of the Employment Act was mandatory.

On the other liabilities, counsel argued that the Replying Affidavit of Anne Kariuki included the advance leave and unreconciled over night as liabilities and ought to be deducted.

As regards telephone, laundry and welfare were payable as part of the salary counsel urged that the payslips on record had different figures as gross pay Kshs.70,042.42 for July 2023 and Kshs.91,154.29 for August 2023.

Counsel submitted that welfare and holiday allowance were variable while laundry allowance and telephone allowances were fixed.

That the payslip for January, February and June 2023 showed the gross salary as Kshs.54,442.42.

Counsel urged that allowance such as laundry, welfare telephone and holiday ought not to be included in computation of gross salary of an employee as they were based on actual performance as held in **Richard Erskine Leakery & 2 other V Simon Kipkoech Chemai** [2019] eKLR. Counsel urged the court to exclude welfare, laundry and telephone allowance in the computation of gross salary.

Analysis and determination

The only issue for determination is whether the applicant's Notice of Motion is merited.

It is common ground that the court has jurisdiction to review and clarify its Judgment and Rulings.

Section 80 of the Civil Procedure Act, Order 45 of the Civil Procedure Rules and Rule 74 of the employment and Labour Relations Court (Procedure Rules) 2024 are clear on this power and require no emphasis.

According to the applicant there was an error apparent on the face of the record in that in its Judgment delivered on 29th July 2025 the court stated that the Petitioner had not indicated his salary yet he had attached copies of payslips for August and September 2023, which the court saw but had different figures as gross salary.

For unexplained reasons the Petitioner filed payslips which raised a basic question, as to what his regular gross salary was.

In his amended Petition dated 7th March 2025, the Petitioner made no reference of his salary yet he was claiming one month's salary in *lieu* of notice.

Regrettably, the respondent did not ameliorate the situation by filing copies of payslips from which the court could readily ascertain its employee's salary.

In the considered view of this court, provision of an employee's payslip for two months with two conflicting

amounts cannot be said to be an indication of the employee's salary. A payslip is not part of pleading. It is part of the supportive evidence.

To that extent, the court is not persuaded that there was an error apparent on the face of the record.

At any rate as held by the Court of appeal in **Nyamongo & Nyamongo V Kogo** [2001] EAI 70,

“There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which was to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal”.

Be that as it may, the court is satisfied that a case for clarification of the Judgment delivered on 29th July 2025 has been made out under Rule 74(1)(c) of the Employment and Labour Relations Court (Procedure) Rules, 2024.

It is correct that the court did not compute the actual amounts awarded to the Petitioner but made specific awards namely;

- (a) *One (1) month's salary in lieu of notice.*
- (b) *Salary for August 2023.*
- (c) *11 days of September 2023.*
- (d) *Two months gross salary.*

On gross salary general, the sentiments of the Court of Appeal in **Postal Corporation of Kenya V Andrew K. Tanui** (supra) cited by the applicant's counsel are instructive.

In **Banking Insurance & Finance Union (Kenya) V Maisha Bora Sacco Ltd** (supra), the court held;

"... The Act does not define the meaning of "gross salary" The Black's Law Dictionary 9th Edition defines "gross income" as the total income from all sources before deductions exemptions or other tax reductions. Thus the

court returns that gross salary under the Section means the monthly basic salary and allowances as per the contract of service...”

In **Postal Corporation of Kenya V Andrew K. Tanui** (supra) the Court of Appeal held:

“...In our view, his construction in the latter case that ‘gross monthly wage’ are inclusive of allowance resonates with common sense. In common parlance, basic salary is the base income of an individual, the fixed part of one’s compensation package; while an allowance is the amount received by the employee for meeting service requirements. It is provided in addition to the basic salary and varies from employer to employer...”

From the payslips on record, it is clear that the Petitioners basic salary in July and August 2023 was Kshs.53,428.13, welfare allowance for July was Kshs.15,600 while in August it was Kshs.33,150.00 and in September Kshs.17,550.00.

None of the parties explained why the amount varied or what exactly the allowance catered for.

The court is satisfied it was a monthly allowance and thus part of the gross salary per month. Three months is a reasonable duration to ascertain that allowances form part of the gross salary.

In the circumstances, the court will take the average for the last 3 months, Kshs.22,100.00.

As for laundry and telephone allowance, they were paid in July August and September and the amount did not vary. They were, in the court's view, part of the gross salary Kshs.700 and Kshs.714.22 respectively.

Holiday pay was not payable every month and thus was not part of the gross salary.

Thus, the Petitioners gross pay for purposes of this application was Kss.76,542.35.

In the court's view, the gross salary of the applicant could not exclude welfare allowances as submitted by the respondent or include holiday pay as submitted by the applicant's advocate or be the amount paid in August 2023 and not July 2023.

Having determined the applicant's gross salary, it becomes relatively easier to determine the other awards such as the salary for August 2023, which was **Kshs.76,542.35** and 11 days in September **Kshs.28,066.03** and two months gross salary **Kshs.153,084.70**, Total award **Kshs.334,235.43**

Finally on liabilities and in particular the sum of Kshs.289,821.67, the alleged outstanding balance due from the Petitioner.

Although the respondent attached the company's reconciliation, it did not demonstrate that the company had indeed suffered such loss in its books of accounts as no audited or unaudited accounts were availed to show that the amount allegedly unremitted by the Petitioner was a loss he occasioned.

It is trite law that he who alleges must prove the allegations as required by the provisions of Section 107, 108 and 109 of the Evidence Act.

See also in this regard, **Munya V Independent Electoral & Boundaries Commission and 2 others** [2014] KESC 38 (KLR), **Ann Wambui Nderitu V Joseph**

Kiprono Ropkoi & another [2005] 1 E. A. 344, **Ignatius Makau Mutisya V Reuben Musyoki Muli** [2015] KECA 612 (KLR) and **Miller V Minister of Pensions** [1947] 2 ALLER 372.

In sum, the sum of Kshs.289,821.67 was not proved as a debt owed by the Petitioner and is thus irrecoverable from the court award.

On the 13.90 days taken as advance leave, Kshs.24,755.06, the respondent attached no evidence to show when the applicant applied and was accorded leave.

The respondent's letter dated 22nd September 2023 to the Applicant on final dues was not sufficient proof that the applicant had taken advance leave for 13.90 days and owed the respondent Kshs.24,755.06.

The amount was not proved as owed by the applicant or that he had taken the leave days as alleged.

It is not recoverable from the applicant's award.

On statutory deductions, however, it is trite that salary and allowances payable to an employee are subject to income tax by virtue of Income Tax Act and other statutory deductions consistent with the provisions of Section 19(1)(f) of the Employment Act. These would include the Housing Levy, SHIF and NSSF.

Finally, Section 49(2) of the employment Act provides:

- (1) ...
- (2) **Any payments made by the employer under this section shall be subject to statutory deductions.**

The upshot of the foregoing is that the applicant's Notice of Motion dated 4th November 2025 is successful to the extent that the last paragraph of the Judgment delivered on and dated 29th July 2025 is reviewed as follows:

- (a) *One (1) month salary in lieu of notice*
Kshs.76,542.35
 - (b) *Salary for August 2023* **Kshs.76,542.35**
 - (c) *11 days of September 2023* **Kshs.28,066.03**
 - (d) *Equivalent of two months salary* **Kshs.153,084.70**
- Total Kshs.334,235.43**

Parties shall bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT
KISUMU ON THIS 10TH DAY OF DECEMBER 2025.**

**DR. JACOB GAKERI
JUDGE**

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty

of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI
JUDGE

ORIGINAL