



Mwonzu v Kenyatta National Hospital (Employment and Labour Relations Cause E380 of 2020) [2024] KEELRC 2775 (KLR) (8 November 2024) (Ruling)

Neutral citation: [2024] KEELRC 2775 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E380 OF 2020
AN MWAURE, J
NOVEMBER 8, 2024**

BETWEEN

KENNEDY MUTEMBEI MWONZU CLAIMANT

AND

KENYATTA NATIONAL HOSPITAL RESPONDENT

RULING

1. The Applicant filed a Notice of Motion dated 26th June 2024 seeking orders that: -
 - a. Spent
 - b. This Honourable Court be pleased to issue an order directing that the case number in the final copy of its judgment delivered on 26th April 2024 be amended to represent the correct case number ELRC Cause No E380 of 2020 as opposed to ELRC Cause No E402 of 2020.
 - c. This Honourable Court be please to vary and/or change and/or set aside its ruling delivered on 24th May 2024 pursuant to the judgment delivered on 26th April 2024 for calculating the final award to the Claimant/Applicant based on the basic salary as opposed to gross monthly salary.
 - d. This Honourable Court be pleased to issue an order directing that the final Claimant/Applicant's award in the ruling delivered on 24th May 2024 pursuant to the judgment of the court dated 26th April 2024 was misconceived in law and the same ought to have been calculated based on the gross monthly salary/earnings of the Claimant/Applicant.
 - e. This Honourable Court be pleased to issue an order directing the Respondent herein Kenyatta National Hospital to issue the Claimant/Applicant herein Kennedy Mutembei Mwonzu with a recommendation letter and a certificate of long service spanning over a period of thirteen (13) years within thirty (30) days having found the Respondent terminated his employment unlawfully/illegal.



- f. The costs of this application be provided for.
2. The application is supported by the grounds on the face of it and the affidavit sworn by Kennedy Mutembei Mwonzu the claimant herein.

Claimant/Applicant's case

3. The Claimant/Applicant avers that this Honourable Court delivered a judgment in this matter in his favour, finding his termination unlawful and unfair.
4. The Claimant/Applicant avers that in a ruling delivered on 24 April 2024, this Honourable gave its final award awarding him half (1/2) salary for the period between 4th September 2016 and 14th November 2018, twelve (12) months equivalent of salary compensation for unlawful termination, costs of the suit, and interests at court rates until payment in full.
5. The Claimant/Applicant avers this Honourable Court calculated half (1/2) salary for the period between 4th September 2016 to 14th November 2018 using basic month salary as follows: (25 months X Kshs 23,050=Kshs 576,560/=) and unlawful termination for 12 months equivalent to salary compensation with his basic salary as Kshs 46,101 X 12= 553, 212/=.
6. The Claimant/Applicant avers that the final award was based on basic pay as opposed to gross monthly salary was misconceived in the law as provided under section 49(1) (c) of the [Employment Act](#).
7. The Claimant/Applicant avers that he has been unable to secure employment having worked for the Respondent for thirteen (13) years and was not issued with a recommendation letter even after asking for the same.
8. The Claimant/Applicant avers that this Honourable Court corrects the case number from ELRC Cause No E402 of 2020 to ELRC Cause No E380 of 2020 and grant the prayers sought in the application.

Respondent's grounds for opposition

9. The Respondent filed grounds of opposition dated 11th July 2024 stating that the application is frivolous, vexatious, and an abuse of the court process and the same should be struck out and/or dismissed with costs.

Claimant/Applicant's submissions

10. The Claimant/Applicant submitted Order 45 Rule 1(a)(b) of the [Civil Procedure Rules](#) and Rule 33(1) (a)(b)(c) & (d) of the [Employment Labour Relations Court \(Procedure\) Rules 2016](#) provides for review on the grounds of 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; on account of some mistake or error apparent on the face of the record; if the judgment or ruling needs clarification; and or for any other sufficient reason.
11. The Claimant/Applicant submitted there is a valid reason to seek clarification from this Honourable Court through a review concerning the calculations of his final award outlined in the ruling dated 24th May 2024 as the calculations should have been based on his gross salary, in accordance with Section 49(1)(c) of the [Employment Act](#).



12. The Claimant/Applicant submitted that the application does not seek to challenge the court's ruling dated 24th May 2024 rather than clarification on the erroneous miscalculation thus seeking review as stipulated under Rule 33(1)(c) & (d) of the [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#).
13. The Claimant/Applicant submitted that Order 45 Rule (2) (1) & (2) of the [Civil Procedure Rules](#) and Rule 33(2) of the [Employment and Labour Relations Court \(Procedure\) 2016](#) provides for jurisdiction to review its ruling delivered on 24th May 2024 pursuant to the judgment it had earlier issued on 26th April 2024.
14. Section 49 (1) (c) of the [Employment Act](#) provides where the termination of the contract of employment of an employee is found to be unjustified, the damages payable to such employee should be; "the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal."
15. The Claimant/Applicant submitted that basic salary is defined in Section 2 of the [Employment Act](#) as an employee's gross salary, excluding allowances and other benefits. Therefore, one cannot reasonably argue that the term "gross pay" in Section 49(1)(c) of the [Employment Act](#) could be interpreted as basic pay, since the definition of basic pay is clearly outlined in the Act.
16. As per the [Black's Law Dictionary](#), 9th Edition, "gross income" is defined as the total income from all sources before deductions exemptions or other tax reductions. Thus, gross pay under Section 49 1 © of the [Employment Act](#) 2007 can only imply basic pay plus all allowances.
17. In [Postal Corporation of Kenya v Andrew K. Tanui](#) [2019] eKLR the court stated that:

"We are not persuaded by the appellant's argument that: 'gross wages' or 'gross salary' does not include any allowances and that it is the same as the 'basic salary' or 'basic wages.' The third ground of appeal fails too."
18. In [Nisha Nilesbbhai Bhavsar v Kensalt Limited](#) [2022] eKLR; the Honourable Court at Paragraph 30 on the issue of gross salary and basic salary stated:

"The pay slips described the Claimant's salary as basic. The various contracts she served under, described it either as gross, or confusedly, as basic gross. The pay slips and the contracts are inconsistent. Salary can never be paid at a basic gross, because basic is what is paid, less all allowances, while gross is basic and all allowances put together. The terms basic and gross are antithetical. Salary is a term of the contract and the law bids the Court, whenever there is ambiguity in the contract, to resolve that ambiguity in favour of the Employee. The ambiguity must therefore be resolved in favour of the Claimant, Nisha."
19. In [Onesmus Kinyua Magoiya v Prudential Life Assurance Kenya](#) [2022] eKLR the court stated that:

"Gross salary is different from basic salary, it is the figure agreed upon between the employer and the employee without factoring in bonus, overtime pay or pay other kind of extra income. The gross salary for the Claimant was Kshs 633,000, and this is the figure the Court shall use in the computation."
20. The Claimant/Applicant submitted that his gross pay was Kshs 75,511/= and while he was under interdiction he was earning a monthly gross of Kshs 37,960.50/= thus the court should have calculated



damages based on Kshs 75,511/= gross pay and should receive the other half of Kshs 37,960.50/= gross for 25 months.

21. The Claimant/Applicant submitted that the court has discretion in awarding costs under Section 27(1) of the *Civil Procedure Act* thus he should be awarded costs and allow the application as prayed.

Respondent's submissions

22. The Respondent submitted that interpreting the *Employment Act* and evaluating evidence to determine the applicable salary fall outside the scope of review jurisdiction. The payslips from July and August 2017, as well as February 2018, presented indicate a health worker extraneous allowance of Kshs 15,000. In contrast, the payslip for January 2016 does not include this allowance.
23. The Respondent argued that the monthly salary is subject to appeal and not review citing the case of *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR the Court of Appeal stated that:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”
24. In ELRC No 1358 of 2018 Nairobi *Carolyn Munyua v Industrial Promotion Service (K) Limited* (unreported) the Court stated:

“I subscribe to the position taken by the Courts in the above referenced authorities that “sufficient reason” is a reason sufficiently analogous to those specified in the rule and ought to include the statutory grounds for review. As such, what amounts to “sufficient reason” must be considered in light of clauses (a), (b) and (c) of Rule 33(1)”
25. The Respondent submitted that the Claimant/Applicant did not plead for a recommendation letter as parties are bound to their own pleadings thus the same cannot be granted as review citing the case of *Elizabeth O. Odhiambo v South Nyanza Sugar Co. Ltd* [2019] eKLR in support of that proposition.
26. The Respondent submitted that there it had already availed the certificate of service according to section 51 of the *Employment Act*.
27. The Respondent submitted that the final award was corrected to read ELRC Cause No E380 of 2020 thus it is not an issue for determination and the application has no merit and the same ought to be dismissed with costs.

Analysis and determination

28. The main issue for this court's determination is whether the Claimant/Applicant is entitled to a review of this Court's ruling and/or order delivered on 24th May 2024.
29. Section 16 of the *Employment and Labour Relations Court Act*, Cap 8E, Laws of Kenya, grants this Court the power to review its judgements, awards, orders or decrees in accordance with the Rules.
30. This Court (ELRC) has new rules which were gazetted on vide Gazette Notice No 133 of 16th August 2024 known as the *Employment and Labour Court (Procedure) Rules 2024*.



31. Rule 74 of the Employment and Labour Court (Procedure) Rules 2024 provides for review as follows:
- 1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—
 - (a) if there is discovery of a new and important matter or evidence which, despite 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;
 - (b) on account of some mistake or error apparent on the face of the record;
 - (c) if the judgment or ruling requires clarification; or
 - (d) for any other sufficient reason.
32. Further, Rule 74(2) provides for review of a decree or order of the Court under sub-rule (1) shall be made to the judge who passed the decree or made the order sought to be reviewed or to any other judge if that judge is not attached to the Court station.
33. In this instant application, the Claimant/Applicant is seeking review for amendment of the case number from ELRC Cause No E402 of 2020 to ELRC Cause No E380 of 2020. This court has noted that the changes were made and therefore this prayer is spent.
34. A review can be done where there is an error of the face on record. Section 49(1)(c) of the *Employment Act* provides that compensation is the equivalent of a number of months' wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.
35. The court has noted there was an error of the face on record as it miscalculated using basic salary instead of gross as clearly in *Postal Corporation of Kenya v Andrew K. Tanui (supra)* the Court of Appeal held that gross salary would then be the amount calculated by adding up one's basic salary and allowances, before deduction of taxes and other deductions. Each case must be examined to identify the nature of the allowances given and whether they form part of the gross salary.
36. Therefore, the court holds and finds that it made an error of miscalculating by using basic salary instead of gross salary. The court does not agree with the Respondent's contention that the Claimant ought to have filed an appeal instead of this review application.
- The error is apparent and the court is willing to correct it. Hence the following revisions.
- a. Compensation for unlawful/unfair/illegal termination is Kshs 75,511X 12 months = Kshs 906, 132/=
 - b. Half (1/2) salary from 4th September 2016 to 14th November 2018 is Kshs 37,960/= X 25 months= Kshs 949,600/=
37. Total awarded is now Kshs 1,855,732/= instead of Kshs 1,129,772/=
38. The issuance of recommendation letter was not pleaded and cannot be granted through this application and the same applies to the certificate of long service. The same is declined.
39. Each party to bear their own costs of this application.
- Orders accordingly.



DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 8TH DAY OF NOVEMBER, 2024.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

