



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT NAIROBI

CAUSE NUMBER 915 OF 2016

BETWEEN

RICHARD ISAAC MWANGANGI.....CLAIMANT

VERSUS

KENYA NATIONAL EXAMINATION COUNCIL.....RESPONDENT

RULING

1. The Claimant seeks review of the Judgment delivered in his favour, on 9th April 2021.
2. Specifically, he states that the Court did not consider his prayer [iii], for balance of annual leave days.
3. He states that, the Respondent at page 14 of its Final Submissions, expressed its readiness to pay pending annual leave days, once the prayer was established.
4. The application for review is dated 31st May 2021, and is founded on the affidavit of the Claimant, sworn on even date.
5. He states that he pleaded for pending annual leave days; it was stated in the retirement letter that the Claimant had earned leave days; that his payslip exhibit 13 of his documents, showed he was owed 45 days of annual leave; that his claim was based on his pleadings as per paragraph 23 of the Statement of Claim; and he is owed a sum of Kshs. 277,725 in annual leave days.
6. He brings his application under Order 45 Rule 2 [1] of the Civil Procedure Rules, 2010.
7. The Respondent is opposed to review of Judgment, relying on the affidavit of Befly J. Bisem, Corporation Secretary and Deputy Director, Legal Services Division of the Respondent, sworn on 15th July 2021.
8. She responds that the Court considered the prayer for annual leave days, at paragraph 50 of the Judgment, concluding that, ‘*he [the Claimant] did not specify what number of days he is owed on annual leave. The prayer for ‘leave days balance,’ is bare. It was not substantiated through evidence.*’ The prayer needed to be specifically pleaded and established. The Respondent did not concede the prayer, but only expressed its readiness to pay, if the same was established. The Court reached its conclusion based on the evidence before it, and there is no merit therefore, in the application for review of Judgment.
9. Parties agreed to have the application considered and determined, on the strength of their respective affidavits and submissions. Ruling was reserved for 5th April 2022, which unfortunately coincided with the Judges’ Annual Conference.

The Court Finds: -

10. The Claimant pleaded for ‘leave days balance’ in his Statement of Claim, paragraph 23 [iii].
11. He was not specific.
12. The Court made a finding at paragraph 50 of the Judgment, that the Claimant failed to specify the number of leave days owed.
13. The Claimant did however, adopt as part of his documents, a payslip for March 2016, issued by the Respondent. It is a document which

is authored by the Respondent.

14. It is in very small font size, and this is why the Claimant, in his evidence and submissions, ought to have made the Court see, that indeed he was owed 45 days of annual leave, at the time he left employment.

15. It is never sufficient to plead certain prayers ambiguously, and fail to highlight unclear documents while giving evidence or making submissions before the Court. A diligent litigant must hold the torch for the Court, and illuminate documents which are not clearly worded.

16. A re-look of the payslip dated March 2016, when the Claimant was suspended, indicates at the bottom, in very small print, that the Claimant was entitled to 30 days of annual leave; 15 days were brought forward; nil days were utilized; and leave balance was 45 days.

17. The Court was therefore in error to conclude that the prayer for annual leave was not established, this document being part of the evidence on record.

18. There was ambiguity in the Claimant's pleadings, submissions and oral evidence, but the payslip of March 2016 is the saving grace. The document is uncontroverted and speaks for itself.

19. Review jurisdiction of this Court is exercised under Rule 33 of the Employment and Labour Relations Court [Procedure] Rules, 2016. Order 51 of the Civil Procedure Rules, invoked by the Claimant has no application in the proceedings of this Court. The Claimant invokes also, any other enabling laws, and the Court, in exercise of its review jurisdiction under Rule 33 of the E&LRC [Procedure] Rules, 2016, allows the application.

20. The computation made by the Claimant, giving the value of 45 days of annual leave at Kshs. 277,725, is uncontested.

IT IS ORDERED: -

[i] The application for review of Judgment, dated 31st May 2021, filed by the Claimant is allowed.

[ii] Judgment on record, delivered on 9th April 2021, is reviewed with the final orders being –

a. Termination was unfair.

b. The Respondent shall pay to the Claimant: compensation for unfair termination equivalent to 10 months' gross salary at Kshs. 2,861,500; notice at Kshs. 286,150; and 45 days of annual leave at Kshs. 277,725 – total Kshs. 3,425,375.

c. Certificate of Service to issue.

d. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, AT CHAKA, THIS 22ND DAY OF APRIL 2022.

James Rika

Judge