



**Kiilu v JD Sharma & Sons (Cause 488 of 2016)  
[2022] KEELRC 1713 (KLR) (27 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1713 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 488 OF 2016**

**J RIKA, J  
MAY 27, 2022**

**BETWEEN**

**ISAIAH KITUU KIILU ..... CLAIMANT**

**AND**

**JD SHARMA & SONS ..... RESPONDENT**

**RULING**

1. The respondent filed an application dated December 16, 2019, seeking review and/or variation of the judgment delivered on November 29, 2019.
2. The application is based on the affidavit of Deepak Bhardwaj, who describes himself as the respondent/judgment-debtor herein, sworn on December 10, 2019.
3. In issue is an award of Kshs 57,405, made in favour of the claimant, in underpayment of salary for the period 2013 to 2015.
4. The respondent has exhibited the Regulation of Wages [General] Amendment Orders over the period in dispute, and the claimant's pay slips covering the period, to show that there was no underpayment.
5. The respondent also submits that the claimant was paid salary for days worked in February 2016, through the Labour Office. A receipt is exhibited from the Labour Office.
6. In his Replying Affidavit sworn on February 27, 2020, the claimant does not seem to dispute the Wage Orders and pay slips exhibited by the respondent. He instead argues that the respondent has not explained why he did not produce these documents at the hearing. The respondent cannot seek to produce these documents now.
7. Parties agreed that the application is considered and determined on the strength of their affidavits and submissions on record.



**The court finds: -**

8. The court exercises its review jurisdiction, under Rules 33 and 34 of its Procedure Rules, 2016.
9. The respondent cites other rules, alien to the proceedings of the E&LRC.
10. Rule 33 requires the applicant to show that there is a new and important matter or evidence, which after the exercise of due diligence, was not within the knowledge of the applicant.
11. The receipt from the Labour Office is not a new and important matter or evidence. It was always available to the respondent. No explanation is given why it was not produced at the hearing. In its judgment, the court stated that the prayer for days worked in February 2016, was not disputed, and awarded the item, at Kshs 8,912. If the respondent did not dispute this item then, he cannot dispute it now, alleging there is a new and important matter or evidence. The prayer for review of the order, awarding salary for days worked in February 2016, is declined.
12. The court, in awarding underpayment of salary stated that the claimant had shown he was a machinist, and that he was underpaid under the Regulation of Wages [General Amendment] Order.
13. The relevant Wage Orders, contained in the Gazette Notices, were not placed before the court, in support of the claim for underpayment. The Wage Orders are correctly described by the claimant as pieces of legislation. They do not fall in the same category as evidence. The law required the claimant to be remunerated at a specified rate, which the court may have concluded in error, not to have been paid. Parties are not to be prejudiced by non-production of relevant pieces of legislation before the court, at the time of the trial. It is presumed that the court has access to all laws governing the subject matter of the dispute before it. Parties do well, by bringing to the attention of the court, all relevant laws, but cannot be prejudiced if they have not assisted the court, in accessing the laws. It was therefore not a failure which should have prejudiced the respondent, if he did not supply the court with the relevant Wage Orders at the hearing, in disputing the prayer for underpayment.
14. It does not appear that the claimant himself, anchored his prayer for underpayment, on the relevant Wage Orders. He said nothing, on whether his prayer for underpayment was based on the Wage Orders, now availed to the court, in his Replying Affidavit. He did not contest the Wage Orders exhibited by the respondent. His argument is that the respondent could have produced them at the hearing. The court as observed above, does not think that non-production changes the position of the law, on what rates were applicable to the claimant. He was paid in accordance with the Wage Orders.
15. There is clearly an error apparent on the face of the record, on award of salary underpayment.
16. Review of the order granting that prayer at Kshs. 57,405.92 is granted. The order is set aside.

In sum, it is ordered: -

- a. The application by the respondent is partly allowed.
- b. The order awarding the claimant salary underpayment of Kshs 57,405.92 is reviewed and set aside.
- c. No order on the costs.

**DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 27<sup>TH</sup> DAY OF MAY 2022.**



**James Rika**

**Judge**

