



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 1066 OF 2018**

(Before Hon. Lady Justice Maureen Onyango)

**PHYLIS WANGARI NGANGA.....CLAIMANT**

**VERSUS**

**INTRA AFRICA ASSURANCE COMPANY LIMITED....RESPONDENT**

**RULING**

Before me for determination is an application dated 15<sup>th</sup> February 2021. The Applicant seeks orders THAT:

1. The judgment and or order of this court made on 29<sup>th</sup> day of January 2021 in this suit be reviewed and or varied.
2. Costs of this application be provided for.

The application is supported by the affidavit of DANIEL O. RAKORO, Advocate on record for the Claimant/Applicant and on grounds that there is a mistake or error apparent on the face of the record, this being sufficient reason to review the judgment.

The Applicant states that in the judgement of this court delivered on 29<sup>th</sup> January 2021, the court awarded the Claimant/Applicant her dues but omitted to deal with the issue of calculations of severance pay, whether the same should be based on basic pay as opposed to gross pay, which the Claimant believes should have been calculated as pleaded and prayed for. The Applicant states that the Claimant is entitled to severance pay in terms of Section 40(1)(g) of the Employment Act, at the rate of 15 day gross pay based on her last salary of Kshs.42,252 and 15 years worked.

He therefore seeks this court’s indulgence in reviewing and varying the judgement delivered on 29<sup>th</sup> January 2021 by correcting the mistake apparent on the face of the record to read as follows:

- a. Severance Pay..... Kshs.274,638.00
- b. Less amount paid..... Kshs.204,471.00
- c. Amount owed..... Kshs.70,167.00

He states that on 5<sup>th</sup> February 2021, the Claimant wrote to the Respondent on the same and proposed payment of the difference to obviate the need to do a review, but he did not receive a response. He therefore prays for the review owing to the fact that there is sufficient reason to do the same to avert the miscarriage of justice.

As at date of this ruling, this application remains unopposed.

**Analysis and determination**

Having considered the application, the issues for determination are:

1. Whether the Application is merited.

2. Whether severance pay should be calculated on the basic pay or gross pay.

Section 33 of the Employment and Labour Relations Court Procedure Rules (2016) provides for review as follows: -

**33. Review**

**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 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;**
- 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.**

**2. An application for review of a decree or order of the Court under subparagraphs (b), (c) or (d), 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.**

The Claimant herein argued that there was an error apparent on the face of the record as the Court failed to deal with the issue of calculation of severance pay.

In the judgment, the Court made a finding that the Claimant had been declared redundant and was therefore entitled to severance pay. The Court further made a finding that the Claimant was paid severance pay. The Claimant prayed for severance pay at Kshs.274,638. What had been paid to her is Kshs.204,471 based on basic pay.

Section 40(1)(g) of the Employment Act provides for severance pay as follows –

**g) The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days’ pay for each completed year of service.**

I agree with the Applicant that the issue of the tabulation of severance pay was raised by the Claimant but inadvertently not addressed by the Court in the judgment.

I thus agree with the Applicant that there was an error on the face of the record as the Court failed to determine the issue whether severance pay should be based on basic pay or on gross pay.

Section 40(1)(g) refers to “pay” which is equivalent to and used synonymously with remuneration gross pay or remuneration. Severance pay should therefore be based on gross pay and not basic pay. Having been paid severance pay based on basic pay, the Applicant is entitled to recalculation of the same based on her gross pay of Kshs.42,252.

I find that the application is merited and review the judgment, by making an award for severance pay as follows: -

Severance pay at the rate of 15 days’ pay per year worked

( x 13)	Kshs.274,168.00
Less paid	(Kshs.204,471.00)
<b>Difference</b>	<b>Kshs.73,697.00</b>

The Claimant is thus awarded an **additional Kshs. 73,697.00**

The total award is therefore reviewed as follows: -

- i. Compensation..... Kshs.338,016.00
- ii. Difference in severance pay..... Kshs.73,697.00

**Total award      Kshs.411,713.00**

The award is thus reviewed to Kshs.411,713.00

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17<sup>TH</sup> DAY OF JUNE 2021

MAUREEN ONYANGO

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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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, the 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 the 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.

MAUREEN ONYANGO

JUDGE