



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**ELRC CAUSE NO. 188 OF 2017**

**JACOB RONO LAGAT.....CLAIMANT/APPLICANT**

**VERSUS**

**BOARD OF MANAGEMENT**

**KAGAKI SCHOOL..... RESPONDENT**

**RULING**

1. This ruling is in respect of the Claimant/applicant's application dated 17<sup>th</sup> March, 2020 filed under certificate of urgency via the firm of Ndeda & Associates advocates pursuant to rule 33 of the Employment and Labour relations Court(Procedure) rules 2016 and Order 45 of the Civil Procedure Rules 2010, seeking the following orders;

- 1) **That this Honourable Court be pleased to review judgment of Justice M. Mbaru delivered on 26<sup>th</sup> September, 2019.**
- 2) **That, the costs of this Application be provided for.**

2. The application is supported by the grounds on the face of the application and the affidavit sworn by the claimant, **Jacob Ronoh Lagatt** on 17<sup>th</sup> March, 2020 on the following grounds: -

- (a) That, judgment in this matter was delivered on 26<sup>th</sup> September, 2019 in favour of the claimant as against the Respondent.
- (b) That, there is an error in calculation of overtime as the court calculated overtime indicated in paragraphs 3,4,5 and 6 and arrived at Kshs 40,514 instead of Kshs. 94,514.
- (c) That the error affected his final reward and he thus requests this Court to make the said corrections and award him the correct figure.

3. In opposing the application, the Respondents through one of its directors, **Prof. Miriam kinyua**, swore a replying affidavit dated 23<sup>rd</sup> November, 2020 and filed in this Court on 17<sup>th</sup> February, 2021 on the following grounds;

- i. That the application herein has been brought in bad faith and is an abuse of Court process.
- ii. That the applicant is seeking to review a judgment 6 months down the line after the said judgment was delivered contrary to the law and without any plausible reason given for the delay.
- iii. Further that the claimant had filed a similar application dated 25<sup>th</sup> October, 2019 but withdrew the same on 21<sup>st</sup> November, 2019 and the court ordered him to pay Cost of Kshs.2500/- which has not been paid to date.
- iv. That the overtime as calculated ought to be from December 2013 to December, 2016 and not January, 2012 to December, 2016 in light of limitation of action under section 90 of the Employment Act.
- v. That the claimant worked on rotational basis thus worked for only one week in a month a fact that that was confirmed by the court, he therefore urged court to consider the same while reviewing the calculation of the overtime at paragraph 8 of the judgment.

4. The Application was disposed of by way of written submissions with the applicant filing on 9<sup>th</sup> April, 2021 and the respondent filing on 5<sup>th</sup>

May, 2021.

**Applicant's submissions**

5. The applicant counsel submitted that Section 80 of the Civil Procedure Act empowers this Court to review its judgment while Order 45 of the Civil Procedure Rules sets out the rules of operation. He argues that review is necessary in this case to enable the court correct the error apparent on its judgment and cited the case of **Nyamongo and Nyamongo –v- Kogo [2001] I EA 170**.

6. He submitted that this Court is equally empowered under section 16 of the Employment and Labour Relations Court Act and Rule 33 of this Court's Rules to review its judgment and correct clerical error that are apparent on record.

7. On the issue of delay in filing this application, he submitted that the applicant had indeed filed a similar application earlier in 2019 however since the said application had several errors and failed to attach a copy of the judgment it was forced to withdraw. Further that upon withdrawal of the initial application the Christmas season kicked in and on opening the new year COVI-19 hit Kenya thus delaying the prosecution of this matter further.

8. He urged this Court to allow the application in the interest of Justice.

**Respondents Submissions**

9. The respondents counsel submitted that the delay in filing this application is inordinate and that no plausible reason have been given by the Applicant for the delay contrary to the express provisions of rule 33 of this Court's Rules therefore urged this Court to dismiss the application with costs.

10. He further submitted that if the court allows the review then the Court ought to consider claimants overtime pay from December, 2013 and not January, 2012.

11. I have considered the averments of the parties herein. From the applicant's application, he avers that this court in interpreting paragraph 3, 4, 5 & 6 of the claim calculated, overtime pay at kshs.40,514/= instead of kshs.94,514/= which was in error.

12. The applicant's want the error corrected which is in order as per the law.

13. It is true that arriving at the underpayment not given to the claimant this court should have calculated it as per paragraph 9 of the claim.

14. It is however imperative to note that part of the underpayment claim stood time barred as this claim was filed in 2017 April and therefore any prayer beyond 2014 April was time barred.

15. What the claimant was therefore entitled to is the overtime as per paragraph 9(1)

**½ of 105,472.60 for 2014 = 52736.3/=**

**+ 98,441.30/= for 2015 to 2016**

**TOTAL = 151,177.3/=**

16. Given the amount awarded on this limb of 40,514/=, I agree that there was an error which I correct and allow overtime amount to read 151,177.3/= less 40,514 which translates to 110,663.3/=.

17. However since the prayer is for 94,514/= instead of 40,514, I allow only as prayed and add overtime of kshs.50,000/= not paid. Costs to the applicant.

Ruling delivered virtually this **1<sup>ST</sup>** day of **JULY, 2021**.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:-**

Awuor for claimant present

Kabalika for respondent present

