



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1017 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 28th May, 2020)

JAMES OTIENO.....1ST CLAIMANT

WILFRED NUNU.....2ND CLAIMANT

MICHAEL OTIENO.....3RD CLAIMANT

EZEKIEL OTIENO4TH CLAIMANT

MOSES OTIENO.....5TH CLAIMANT

VERSUS

SPRING FUSHION (AFRICA)

INTERNATIONAL COMPANY LIMITED.....RESPONDENT

RULING

1. The application before this Court is the Claimants' Memorandum of Review dated 20th December 2019 which has been filed on the grounds that:-

a. There is error apparent on the face of the record.

b. The judgment requires clarification.

c. There is sufficient reason to review.

2. The Claimants aver that this Court did not clarify the reason for awarding the 1st to 4th Claimants a compensation of 10 months, the 5th Claimant a compensation of 4 months and 2nd and 3rd Claimants a compensation of 3 months. They aver that since all their redundancies were declared unfair, there was no reason for this court to issue a discriminative award. It is their position that they ought to have been awarded an equal maximum compensation of 12 months.

3. The Claimants aver that the Court erred in failing to give reasons why overtime and public holidays was not awarded, having established that the Respondent did not produce employment records as required by section 74 of the Employment Act. As such, they are entitled to the same.

4. The Claimants aver that this Court erred in awarding Mr. Michael Otiemo service pay of Kshs. 9,200.00 instead of the Kshs. 36,918 sought, having found that he was entitled to an award for service pay. They urged this Court to award the balance of Kshs. 27,718.00. It is their position that the award of house allowance should be reviewed as it was not based on the years of service. They also seek an award on cost, interest and certificate of service.

5. In particular, they seek the following orders:-

a. That the Honourable Court be pleased to review and vary the judgment given on the 15th January 2019.

b. That the Honourable Court to award the Claimants as hereunder:-

1. James Otieno, 1st Claimant

Compensation (14,000 x 2)	KShs. 28,000.00
Public holidays	KShs. 32,000.00
Overtime	KShs. 255,999.90
NHIF	KShs. 15,360.00
Total	KShs. 331,359.9

2. Wilfred Nunu, 2nd Claimant

Compensation (14,950 x 12)	KShs. 179,400.00
Less awarded	<u>(KShs. 44,850.00)</u>
	KShs. 134,550.00
House allowance	KShs. 15,697.50
Less awarded	<u>(KShs. 13,650.00)</u>
	KShs. 2,047.50
Overtime	KShs. 82,944.00
Public holidays	KShs. 8,000.00
Total	KShs. 227,541.50

3. Michael Otieno, 3rd Claimant

Compensation (18,400 x 12)	KShs. 220,800.00
Less awarded	<u>(KShs. 55,200.00)</u>
	KShs. 165,600.00
House allowance (15 months)	KShs. 115,200.00
Less awarded	<u>(KShs. 36,000.00)</u>
	KShs. 79,200.00
NHIF	KShs. 5,440.00
Service pay (admitted)	KShs. 9,995.00
Less awarded	<u>(KShs. 9,200.00)</u>
	KShs. 795.00
Overtime	KShs. 331,776.00

<i>Public Holidays</i>	<i>KShs. 39,360.00</i>
<i>Total</i>	<i>KShs. 622,171.00</i>

4. Moses Otieno, 4th Claimant

Compensation (18,400 x 12) KShs. 220,800.00

<i>Less awarded</i>	<i><u>(KShs. 184,000.00)</u></i>	<i>KShs. 36,800.00</i>
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House allowance (58 months) KShs. 160,080.00

<i>Less awarded</i>	<i><u>(KShs. 139,200.00)</u></i>	<i>KShs. 20,880.00</i>
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NHIF KShs. 7,680.00

Overtime KShs. 41,472.00

Public holidays KShs. 39,360.00

Total KShs. 146,192.00

5. Ezekiel Otieno, 5th Claimant

Compensation (19,950 x 12) KShs. 239,400.00

<i>Less awarded</i>	<i><u>(KShs. 78,200.00)</u></i>	<i>KShs. 161,600.00</i>
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House allowance (60 months) KShs. 179,550.00

<i>Less awarded</i>	<i><u>(KShs. 66,300.00)</u></i>	<i>KShs. 143,250.00 (sic)</i>
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NHIF KShs. 18,560.00

Service pay (5 years) KShs. 48,875.00

<i>Less awarded</i>	<i><u>(KShs. 19,550.00)</u></i>	<i>KShs. 29,325.00</i>
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Overtime KShs. 414,720.00

Total KShs. 767,455.00

c. That the Honourable Court to award the Claimants a total sum of KShs. 2,094,719.40.

d. That the court to be pleased to grant the Claimant such other orders on relief as it deem fit and just in the circumstance.

e. Cost of this application to be provided for.

6. The Respondent has opposed the application for review vide the Grounds of Objection filed on 16/1/2020 on the ground that the application is incompetent, misconceived and an abuse of the court process as it does not disclose any apparent error on the face of record or give any other reasons to warrant a review. That the reasons outlined in the application constitute grounds of appeal. Lastly, that the delay in filing this application is inordinate hence the same should be dismissed with costs.

7. The Application was disposed of by way of written submissions with the Claimants filing their submissions on 26/2/2020 and the Respondent on 11/3/2020.

The Claimant's Submissions

8. The Claimants submit that the application has been brought timeously and has sufficient grounds as outlined in rule 33 (1) of the Employment and Labour Relations Court Rules, to warrant an order for review. In their view, the Court's failure to award their remedies as per the ELRC Act without the issuance of a reason was an error apparent on the face of record.

9. The Claimants rely on the case of **Flanney vs. Halifax Estate Agencies [2000] 1 All ER 373** where the Court observed that the duty to give reasons was a function of due process and therefore, of justice. They further rely on the case of **National Bank of Kenya Limited vs. Ndungu Njau [Infra]** where the Court of Appeal held that a review may be granted where it is necessary to correct an error apparent on the face of record. The error must be self-evident but will not be a ground for review if the court misguided itself on the provision of law.

10. It is the Claimants' submissions that the Court misguided itself by basing its award on different periods for different Claimants who were declared redundant. Lastly, they submit that they have established a case to warrant an order for review.

The Respondent's Submissions

11. The Respondent submits that the Claimants did not give a reason for the delay in filing the application. It is submitted that they failed to demonstrate that the judgment contains an error apparent on the face of record, a clarification is necessary or the existence of a sufficient reason to warrant a review.

12. The Respondent has cited the cases of **National Bank of Kenya Limited vs. Ndungu Njau [1997] eKLR** and **Francis Origo & Another vs. Jacob Kumali Mungala [2005] eKLR** where the respective Courts outlined the instances under which an order for review could be granted. This is where there has been new discovery of important matter and evidence which after due diligence was not within their knowledge or could not be produced at that time, there is error apparent on the face of record which is self-evident and does not require elaboration, or that there was any other sufficient reason.

13. It is the Respondent's submissions that the Court's reasoning behind the awards granted have been outlined in paragraphs 14, 15, 16, 17, 18, 19, 20, 21 and 22 of the Judgment. They rely on the case of **Gladys Akinyi vs. Gladys Kemunto Obiri & Another [2016] eKLR** where the Court found that failure to analyze or consider evidence is not a ground for review but is a ground for appeal.

14. I have considered this application. I notice that the Applicants want this Court to sit on judgement on its own case, which is not a review issue. The only recourse the Claimants have is in an appeal. I therefore find the application unwarranted and I dismiss it according.

Dated and delivered in Chambers via zoom this **28th day of May, 2020.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mageto for Claimant – Present

Respondent – Absent