



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1236 OF 2012

WILSON NGARUIYA NJOROGE.....1ST CLAIMANT

DAVID NJUGUNA NG'ANG'A.....2ND CLAIMANT

VERSUS

JOMO KENYATTA UNIVERSITY OF

AGRICULTURE AND TECHNOLOGY.....RESPONDENT

RULING

1. On 22.3.2019, I entered judgment in favour of the 1st and 2nd Claimant for a sum of KShs. 2,414,745.00 and KShs. 1,770,899 based on their monthly gross salary of KShs. 155,790 and KShs. 114,274, respectively. However, the Respondent was aggrieved by the said decision and brought the Application dated 21.11.2019, seeking the following orders from this Court–

a. THAT this Honourable Court be pleased to review and or vary in part the judgment of 22.3.2019 as relates to the salary arrears, notice pay and award due to 1st and 2nd Claimant.

b. THAT this Honourable Court be pleased to make other or further orders which it deems fit and just to grant in the circumstance of the case.

c. THAT the costs of this Application be provided for.

2. The application is based on the grounds set out on the body of the motion and the Supporting Affidavits sworn by Dr Rose Ndegwa and Mr. Walter Akwhabi 21.11.2019. In brief, Respondent's case is that there is a mistake or error apparent on the face of the record in relation to the salary applied by the court in arriving at the impugned judgment and as such the judgment should be reviewed and the award of damages varied downwards. Further, the amount of kshs. 77,895 and kshs 57125 admitted by her counsel as being rightful salary arrears for 5 months for the claimants respectively, was so admitted through a genuine mistake while unaware that the Claimants' salary was used to service loans owed to Equity Bank Limited. Consequently, she contended that the said awards should also be varied to kshs. 63,000 and kshs. 46,350 respectively. She filed claimants' pay slips for the suspension period.

3. The Claimants opposed the Application vide the Replying Affidavit sworn by their counsel, Ms Judy Nzula Mbindyo on 11.3.2020. In brief, the claimants admitted that there is an error apparent on the face of the record with respect to the salary used by the court in assessing the award of damages and as such the judgment should be reviewed. However, it is their case that the salary to be used in assessing their damages should be the one they were getting immediately before the suspension. They filed their respective pay slips showing their respective gross monthly salary as kshs. 80,120 for the 1st claimant and kshs. 39,320 for the 2nd claimant.

4. The Application was disposed of by way of written submissions.

Applicant's submissions

5. The Respondent submitted that both parties are in agreement that there was an error apparent on the face of record and consequently, a review of the impugned judgment is justified. She further submitted that compensation for unlawful termination payable should only be based on the basic salary plus house allowance as the other allowances were dependent on actual performance of the contract. Accordingly, she argued that the Claimants are only entitled to KShs. 48,240.00 (25,200.00 + 23,040.00) and KShs. 35,820 (18,540 + 17,280.00) respectively. She maintained that bus fare allowance, acting allowance, telephone allowance, management support allowance and entertainment allowance were predicated upon the actual performance of the contract, and as such they should not form part of the compensation for unfair of termination of the Claimant's employment.

6. The Respondent relied on *Postal Corporation of Kenya vs. Andrew K. Tanui* [2019] eKLR where the Court observed that gross salary was the amount calculated by adding up one's basic salary and allowances before deduction of taxes and other deductions. The court further held that each case should be examined carefully to identify the nature of the allowances given and whether they form part of the gross salary.

7. The Respondent further relied on *Richard Erskine Leakey & 2 Others vs. Samson Kipkoech Chemai* [2019] eKLR where the Court declined to award the Claimant telephone allowance, provision for security guards, provision for fuel, cost of medical premium and annual insurance, amounts due for outpatient and medicines, amount in lieu of leave, proportionate AAR premiums for Claimant's wife, cost of AAR cover for unspent term of contract as they were predicated on actual performance of the contract. The Respondent also placed reliance on *Michael Njoroge Ng'ang'a vs. Home Afrika Limited* [2020] eKLR for further emphasis.

8. In conclusion, the Respondent submitted that, based on the said gross salaries, the Claimants are entitled to the following award–

Relief	1 st Claimant (KShs)	2 nd Claimant (KShs)
Notice	48,240.00	35,820.00
Compensation	578,880.00	492,840.00
Withheld salary	63,000.00	46,350.00
Total	690,120.00	575,010.00

Claimants' submissions

9. On the other hand, the Claimants submitted that the pay slips relied upon by the Respondent were for the period when they were on suspension on half salary and without allowances. Relying on their earlier pay slips, they contended that their claims ought to be computed using the salary for the period immediately before their suspension which was KShs. 80,120.00 and KShs. 39,320.00 for the 1st and 2nd Claimants respectively. Consequently, they submitted that the amount withheld was KShs. 44,480.00 and KShs. 39,320.00 for the 1st and 2nd Claimants respectively and as such, the award for withheld salaries should be KShs. 222,400.00 (KShs. 44,480.00 x 5) and KShs. 63,850 (KShs. 12,770.00 x 5) respectively.

10. As regards the award of salary in lieu of notice and compensation for unfair termination, the claimants submitted that section 49 (1) (c) of the Employment Act provides that the compensation is based on the employee's gross monthly wage or salary. Consequently, they contended that they are entitled to the following award–

Relief	1 st Claimant (KShs)	2 nd Claimant (KShs)
Notice Pay	80,120.00	39,320.00
Withheld salary	222,400.00	63,850.00
Compensation	961,440.00	471,840.00
Total	1,263,960.00	575,010.00

Issues for determination and analysis

11. I have carefully considered the application, affidavits and submissions filed and formed the opinion that it is common ground that there exists a mistake or error apparent on the face of the record and that the impugned judgment should be reviewed and the awards made varied downwards. The only issues for determination are: -

- (a) What constitutes gross salary for purposes of computing salary in lieu of notice, compensation for unfair termination of the claimants' employment and withheld salary.
- (b) What is the rightful award to the claimants.

Gross salary for computing compensation and salary in lieu of notice and withheld salary.

12. The jurisdiction of this court to award salary in lieu of notice and compensation to an unfairly dismissed employee is derived from section 50 of the Employment Act which provides that, in determining suits involving wrongful dismissal or unfair termination of an employee's contract of service shall be guided by the provisions of section 49 of the Act. Section 49(1) (a) and (c) of the Employment Act provides that: -

“(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of employment is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following -

(a) the wages which the employee would have earned had the employee been given the period of notice which he is entitled under this Act or his contract of service;

(b) ...

(c) the equivalent of a number of months’ wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.”

13. In this case, the claimants have filed copies of their pay slips for May, June and July 2009 which reflect their total earnings before their suspension in August 2009. The said pay slips have not been disputed by the respondent and as such I treat them as authentic. In the said pay slips, the 1st claimant was getting Acting allowance of kshs.880, Basic salary of kshs.25200, Electricity & Water of kshs.4000, Bus Fare Allowance of Kshs.3500, House Allowance of kshs.23040, Entertainment Allowance of kshs.3000, Management Support of kshs. 18,000 and Telephone Allowance of kshs. 2500 totaling to kshs. 80,120. The second claimant’s earnings included Basic Salary of kshs. 18,400, House Allowance of kshs. 17,280 and Bus fare Allowance of kshs. 3500 equaling to kshs. 39,320.

14. Applying the meaning of “wages” under section 49(1) (a) of the Act, the above total earnings for each claimant is as presented by their respective pay slips for July 2009. However, for the 1st claimant it appears to me that the item of acting allowance being kshs. 880 was not part of regular and his fixed gross pay but a temporary allowance which ought to be excluded while assessing the award of damages for notice and compensation. Consequently, I hold that the 1st claimant’s rightful gross salary for purposes of assessing salary in lieu of notice and compensation was kshs. 79,240 while the 2nd claimant’s gross salary was kshs. 39,320.

15. I gather support from *Postal Corporation of Kenya vs. Andrew K. Tanui* [2019] eKLR where the Court of Appeal held that: -

“Gross salary would then be the amount calculated by adding up one’s basic salary and allowances, before deduction of taxes and other deductions. Each case must be examined to identify the nature of the allowances given and whether they form part of the gross salary.”

16. I further rely on *Richard Erskine Leakey & 2 Others vs. Samson Kipkoech Chemai* [2019] eKLR where the Court of Appeal held that: -

“In our view, there are certain allowances that are dependent on actual performance of the contract of employment. When calculating damages due to an employee in the event of unfair or wrongful termination, it is only the emoluments or gross salary of the employee that should be taken into account not allowances and privileges dependent on actual service and performance of the contract.”

17. In this case, however, I am satisfied that all the items in the claimants’ pay slip except the acting allowance, formed part of the gross salary for them for purposes of assessing damages under section 49(1) of the Employment Act because they were regular, fixed and payable every month.

18. As regards the gross pay for purposes of assessing claimants’ half pay during their suspension period the same must be strictly exclusive of allowances which are meant to facilitate the claimants performance of their duties. Such items include travelling allowances, telephone allowance, management support, acting allowance and even entertainment allowance. Since the claimants were not performing their duties during the suspension period, they are only entitled to the fixed salary items including basic salary, House Allowance and Electricity& Water.

19. In this case there is no dispute that the claimants were paid their full house allowance during the suspension period as shown by the pay slips filed by the respondent. Consequently, I find and hold that they are only entitled to the withheld half Basic Salary of kshs. 12,600 plus Electricity & Water allowance of kshs. 4000 (total of kshs.16,600) for the 1st claimant and kshs. 9,270 for 2nd claimant per month for 5 months’ suspension period. However, the court can only award the amount pleaded even if the claimant is entitled to more.

20. I again rely on the Court of Appeal decision in *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR fortify the forgoing decision. I also rely on *Richard Erskine Leakey & 2 Others vs. Samson Kipkoech Chemai* [2019] eKLR where the Court of Appeal held that: -

“In the persuasive decision of the Employment and Labour Relations Court in *Pravin Bowry v Ethics & Anti- Corruption Commission* [2013] eKLR it was expressed:

“The claim for telephone allowance; provision of security guards; provision of fuel; cost of medical premium and annual insurance; amounts due for outpatient and medicines; amount in lieu of leave; proportionate Aar premiums for Claimant’s wife; cost of AAR cover for the unspent term of the contract are all dismissed for reason that these allowances are predicated on actual performance of the contract and not otherwise in the court’s view.”

The rightful award for damages

21. In light of the observations and findings made herein above, I allow the application for review and proceed to vary the award of damages

in the judgment delivered on 22.3.2019 as follows terms: –

1st Claimant

Notice pay – KShs. 79,240.00

Withheld salary – KShs. 77,895.00

12 Months' Compensation – KShs. 950,880.00

Total – KShs. 1,108,015.00

2nd Claimant

Notice pay – KShs. 39,320.00.

Withheld salary – KShs. 45, 350.00

12 Months' Compensation – KShs. 471,840.00

Total – KShs. 556,510.00

22. The above awards are subject to statutory deductions but in addition to costs of the suit plus interest at court rates from the date of the said judgment. However, each party shall bear his own costs of the instant Application.

ONESMUS N MAKAU

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 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered on 24th September, 2020 in the open court.

ONESMUS N. MAKAU

JUDGE