



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1791 OF 2015**

**JOYCE GATWIRI MICHENI..... CLAIMANT**

**- VERSUS -**

**WANANDEGE CO-OPERATIVE**

**SAVINGS SOCIETY LIMITED..... RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 15<sup>th</sup> March, 2019)

**RULING**

The claimant filed a notice of motion on 23.01.2019 through Anne Babu & Company Advocates and brought under rules 33(1) (b) and (d), 33(2) and 33(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016 and section 35(1) of the Employment Act, 2007. The application was supported with the affidavit of the claimant attached to the application. The claimant prayed for orders:

- 1) That the Honourable Court be pleased to review the judgment delivered on 16.11.2018 as regards the order on termination notice and accrued leave.
- 2) The Honourable Court be pleased to enter judgment for the claimant against the respondent for one month salary in lieu of termination notice and 22.5 accrued leave days
- 3) That the costs of the application be provided for.

The respondent opposed the application by filing on 13.02.2019 the replying affidavit of Boniface Muthuma through Ochieng' Opiyo & Company Advocates.

The application came up for hearing on 07.03.2019 and parties recorded a consent order allowing a review of the judgment in terms of the prayer for one month salary in lieu of notice. This ruling is on the second limb of prayer for review to award pay for 22.5 leave days.

The claimant's case is that on 15.10.2018 the parties recorded a consent which was adopted as an order of the Court that the respondent would pay the claimant accrued leave of 22.5 days which was prorated for the nine months she had worked for the respondent. The consent was based on the respondent's evidence that it was policy for the respondent to pay prorated leave for employees who served for less than 12 months. In view of the consent there was an error on record when the judgment stated that the claimant should not be paid prorated leave as per section 28 of the Employment Act, 2007.

The respondent's case is that in the judgment the Court found that the policy on payment of prorated leave was contrary to section 28 of the Act and the same should not be paid.

The Court has considered the parties' respective positions. It is clear that the judgment had an error in denying prorate 22.5 leave days as parties had already recorded a consent in that regard. Nowhere in the judgment did the Court find that the policy was inconsistent with section 28 of the Act. The Court finds that in any event the section was on minimum terms of service on annual leave due and the respondent as an employer was entitled to confer better terms as per the policy to pay prorate leave days where the service was below 12 months. The Court returns that the regrettable error in the judgment was due to an oversight of the consent as recorded at the hearing and especially that the consent order had not been extracted.

There is no vitiating factor such as fraud or mistake established to defeat the consent between the parties on payment of 22.5 prorate leave days.

In conclusion the application for review is now allowed with orders:

1) The judgment at page 8 of 9 is hereby reviewed by deleting, **“Fourth, the Court returns that the claimant had not served for an aggregate of 12 months as envisaged in section 28 of the Act and she is not therefore entitled to payment for accrued leave as prayed for.”**

2) The respondent to pay the claimant the 9 months prorated accrued annual leave as per the consent order of 15.10.2018 and being 22.5 days making **Kshs. 67, 961.25**.

3) The respondent to pay the claimant's costs of the application.

**Signed, dated and delivered in court at Nairobi this Friday 15<sup>th</sup> March, 2019.**

**BYRAM ONGAYA**

**JUDGE**