



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1425 OF 2011

(Before Hon. Justice Hellen S. Wasilwa on 28th May, 2019)

REGINALD ASIBWA.....1ST CLAIMANT

BERNARD WANJARE ODERO.....2ND CLAIMANT

-VERSUS-

KENYA AIRWAYS LIMITED.....RESPONDENT

RULING

1. The Application before the Court is dated 11th January, 2019, brought under Section 16 of the Industrial Court Act, 2012 and Order 45 rule 2 of the Civil Procedure Act and all other enabling provisions of the law seeking for orders:-

1. That the Honourable Court to review its Judgment delivered on 19th December, 2018 by Hon. Lady Justice Wasilwa to an extent allowing the reliefs of overtime/extra hours.

2. That the Claimants be paid additional award for 19 months of Kshs. 7,788,480 being overtime/extra hours worked.

3. That the Claimants be paid 21 leave days.

4. That costs of the application be borne by the Respondents in any event.

2. The application is premised on the grounds that:-

a. There is need to review Court's judgment as there is an error apparent on the face of the reliefs sought.

b. The claims were captured in the pleadings, evidence and submissions.

c. The Court's judgement is silent on the above issues despite having been pleaded.

3. The application is supported by the affidavit of Bernard Wanjare Odero who states that the Respondent witness admitted that there was a claim of outstanding leave days and overtime which was unpaid. On this ground, they urge the Court to allow the application in the interest of justice.

4. The Respondent has filed a Replying Affidavit sworn by one Laura Wandera the Senior Legal Counsel for the Respondent wherein she state that in the Memorandum of Claim dated August, 2011 the Claimant did not include a claim for overtime/extra hours. That the Applicant filed an application dated 11th October, 2018 seeking to include a prayer for extra hours, which application was dismissed on 15th October, 2018.

5. That during the hearing the Respondent's witness David Rimberia, did not admit the claim for outstanding leave days but instead stated that the Claimants were not entitled to productivity allowance which was meant for crew such as pilots. Furthermore, the Claimants failed to lead evidence to support the pleading for extra hours and leave days.

6. That the Claimants are not entitled to the alleged accumulated leave days as evidenced in the Respondent's pleadings and testimony by the

Respondent's witness. As at the time of termination of employment, the 1st Claimant was entitled and paid 20.17 leave days accumulated as at 9th June, 2011, and the 2nd Claimant -13.83 days which were considered in tabulation of their respective terminal dues.

7. That the application has no merit, as it fails to raise any new and important evidence; or to indicate any error or mistake apparent on the face of the record; or any other sufficient reason that warrants a review of the judgment dated 19th December, 2018.

8. That the Court considered all the evidence on record and gave a determination on merit and in any event the Respondent will be highly prejudiced if the application for review is allowed.

Applicant's submissions

9. The Applicant submits that all throughout the pleadings and in the supplementary document filed in Court on 27th July, 2018, there are admissions of pending payments of extra hours worked which was not disputed during the hearing.

10. On the issue of leave days, that the Respondent's Human Resource Manager admitted that there were outstanding leave days for the 1st Claimant of 21 days and negative 13 days which the witness did not justify. They pray for the two reliefs to be allowed.

Respondent's submissions

11. It is submitted that an error on the face of the record should be obvious. The fact that the Court has to refer to pleadings and submissions filed to determine where there was an omission is not self-evident and requires an elaborate argument to be established. They cite the case of **Nyamogo and Nyamogo Advocates Vs Kogo (2001) EA 173** stated:-

“There is a real distinction between mere erroneous decision and error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record... mere error of wrong view is certainly no ground for a review although it may be an appeal.”

12. The Respondent further submits that the issue of omission raised in the application is a good ground for appeal and a review of the same will lead to the learned judge to sit on appeal in her own judgment. That the application lacks merit and ought to be dismissed.

13. I have examined the averments of the parties. The Applicants want this Court to review its Judgement and award overtime and outstanding leave. They contend that the Respondent's witness admitted that this was owing to the Claimants.

14. I have looked at the Court record and I note that the RW1 admitted that at the time of termination, the 1st Claimant had 20.17 days leave outstanding but the 2nd Claimant had negative days of - 13.83 as he had gone on leave when he was not entitled to.

15. On the issue of extra hours of work, the witness indicated that these was payable as an extra duty allowance but that they were not entitled to overtime pay as they were in management.

16. RW1 pointed out that the Claimants were paid 8,518/= per month as extra duty allowance as evidenced in their payslip with effect from 16.7.2010.

17. When the Claimant gave evidence, he was cross-examined by Counsel for the Respondent and admitted that there was no prayer in the claim for extra duty. The Claimants also admitted that they were paid as per their termination letter and the payments include pending leave.

18. It is my finding that there is nothing new brought to my attention to warrant review of my judgement delivered on 19th December 2018. The Claimants are seeking to appeal my judgement through the back door and yet this Court cannot sit on appeal against its own orders. I find the application for review not merited and I dismiss it accordingly.

Dated and delivered in open Court this 28th day of May, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Bernard Wanjare – Claimant – Present

Miss Omondi for Respondent – present