



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE 2099 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**JOTHAM KANJAH MWAI.....1<sup>ST</sup> CLAIMANT**

**JOSEPH KISANYA INDIAZI.....2<sup>ND</sup> CLAIMANT**

**VERSUS**

**MUSIARA LIMITED (GOVERNORS CAMP).....RESPONDENT**

**RULING**

The Claimants herein filed the claim herein vide Memorandum of claim dated and filed on 21<sup>st</sup> November 2014 in which they prayed for –

**1<sup>st</sup> Claimant – Joham Kanjah Mwai**

- (a) Payment in lieu of notice of 4 months basic salary  
at Kshs.63,058 x 4 Kshs.252,232.00
- (b) Monthly travelling allowances at 5,000 x 4 Kshs.20,000.00
- (c) Long service payment at basic salary of  
Kshs.63,058 x 20 x Kshs.1,008,928.00
- (d) Long service payment monthly travelling allowance
- (e) 5000 x 20 years x Kshs.80,000.00
- (f) Leave travel allowance inclusive taxes Ksh.6,340.00
- I) Annual leave days due 10.25 days at  
Kshs.63,058 x Kshs.30,778.31
- (g) Jubilee pension Kshs.1,891 x 9 months Kshs.17,019.00
- (h) Employer's jubilee pension  
Kshs.1,891 x 9 months Kshs.17,019.00

**Grand Total Kshs.1,430,976.31**

**2<sup>nd</sup> Claimant – Joseph Kisanya Indiazi**

- (a) Payment in lieu of notice of 4 months basic salary

at Kshs.30,668 x 4 Kshs.127,672.00

(b) Long service payment at basic salary of

Kshs.30,668 x 20 x Kshs.294,412.80.00

(c) Long service payment monthly travelling allowance

(d) 5000 x 20 years x Kshs.80,000.00

(e) Unpaid leave travel allowance inclusive taxes Ksh.6,340.00

I) Annual leave days due 15 days at

Kshs.30,668 x Kshs.21,905.71

(f) Jubilee pension Kshs.920 x 9 months Kshs.8,280.00

(g) Employer's jubilee pension 920 x 9 months Kshs.8,280.00

(h) Overtime for years 2010 to 2014

x 12 = = Kshs.126.03 per hour

126.03 x 6 hours x 365 days x 4 years Kshs.1,104,022.80

**Grand Total Kshs.1,566,003.31**

They prayed for the following orders –

(a) Full payment of Kshs.1,430,976.31 to the 1<sup>st</sup> claimant.

(b) Payment of Kshs.1,566,003.31 to the 2<sup>nd</sup> claimant in full.

(c) Costs of the suit

(d) Interest at Court rate of (a) and (b) above.

Judgment in the claim was delivered on 28<sup>th</sup> April 2017 and awarded inter alia as follows –

*“The court awards;*

*(i) Four (4) months' notice pay to the claimants*

*(ii) Service gratuity calculated at 24 days salary for each completed year of service to the claimants.*

*With regard to the payment of terminal benefits, the court is satisfied that the respondent correctly computed the terminal dues in respect to the 1st and 2nd claimants as it stated in a letter dated 17<sup>th</sup> November 2014, to the claimants written by RW1 Mr. Peter Kihara, produced before court by the claimants themselves and is confirmed by the oral testimony of RW1 in court.”*

The respondent was aggrieved and filed a notice of appeal dated 28<sup>th</sup> April 2017 seeking to appeal against the whole judgment. However by consent dated 24<sup>th</sup> November 2017 the parties agreed to compromise the matter in the following terms –

*GAJ/CCA/3402/2014 24<sup>TH</sup> NOV, 2017*

*Deputy Registrar*

*The Employment & Labour Relations Court*

*NAIROBI*

*Dear Sir,*

RE: ELRC CAUSE NO. 2099 OF 2014

JOTHAM KANJAH MWAI AND ANOTHER -VS- MUSIARA LIMITED (GOVERNOR'S CAMP)

We the undersigned Advocates should be grateful if your Honour would record the following:

'BY CONSENT

In consideration of the Respondent forbearing to pursue its intended appeal against the judgment delivered herein on 28<sup>th</sup> of April, 2017 and to withdraw the Notice of Appeal filed on 17<sup>th</sup> of November, 2017, the Claimants hereby withdraw their respective claims against the Respondent, and both parties confirm that the dispute between them in the above suit be and is hereby marked as fully settled.'

SIGNED

JOTHAM KANJAH MWAI

1<sup>ST</sup> CLAIMANT

SIGNED

JOSEPH KISANYA INDIAZI

2<sup>ND</sup> CLAIMANT

SIGNED

J. A. GUSERWA AND COMPANY

ADVOCATES FOR THE DEFENDANT@

The consent was adopted by the court on 29<sup>th</sup> November 2017 and reduced into the following order –

“IT IS HEREBY ORDERED BY CONSENT;

1. THAT the Honourable Court to release the sum of Kshs.1797,754.80 deposited in Court to the Claimant herein as follows;

a) Jotham Kanjah Mwai Kshs.1309,867.90

b) Joseph Kisanya Indiazi Kshs.487,886.90

Given under my hand and seal of this court at Nairobi this 29<sup>th</sup> day of November, 2017.”

By an application dated and filed on 18<sup>th</sup> July 2018, the 2<sup>nd</sup> claimant seeks the following orders –

1. That the Court does review its Judgment in part delivered on 28<sup>th</sup> April 2017 by Nduma J. to allow overtime relief sought for 4 years for extra 6 hours worked daily for years 2010 to 2014 by the 2<sup>nd</sup> Claimant.
2. That the Court does substitute its orders of dismissing Claimant's Claim for overtime with' orders allowing it as prayed at paragraph (G) in the memorandum of Claim in the sum of Kshs.1,104,022.80/=.
3. That the 2<sup>nd</sup> Claimant be allowed to produce log Books for the motor vehicle KBM 504 for the years 2010 to 2014
4. That costs of this application be borne by the Respondent in any event.

The grounds upon which the application is grounded as set out on the face of the application are the following –

- (a) There is new discovery of evidence regarding 2<sup>nd</sup> Claimant's claim for overtime for years 2010 to 2014 which need to be reviewed
- (b) The Claimant had filed Notice to produce documents on 15<sup>th</sup> June 2015 for production of log sheets for Motor vehicle Registration No. KBM 504P from 2010 to 2014 among others but respondent declined and/or refused to avail them to Court during the hearing of the case.

(c) The 2<sup>nd</sup> Claimant has obtained log Books for the said motor vehicle from a co-driver for the years 2010 to 2014 after Judgment had been delivered and wish to produce to the Court for consideration of review application.

(d) The logbooks were not in possession of the 2<sup>nd</sup> Claimant at the time of the hearing of this case

(e) The 2<sup>nd</sup> Claimant became of possession of log books in the Month of June, 2018.

(f) The delay in filing the review application was not intentional as the new evidence came into knowledge of the Claimant after Judgment and payment of decretal amount had been paid to the Claimants.

The application is supported by affidavit of the 2<sup>nd</sup> claimant sworn on 18<sup>th</sup> July 2019 in which he deposes that throughout the hearing of the case he had maintained that he worked for an extra 6 Hours for the years 2010 to 2014 as computed at relief (g) of the memorandum of claim

That prior to the hearing the Claimants had served the Respondent with a notice to produce documents among them the production of log sheets but the respondent failed, refused and/or ignored but the Human Resource Manager one, Peter Kihara, in his evidence in chief admitted that they removed the tracking system gadget from the said Motor Vehicle.

That the reason for removal of the gadget was to defeat the 2<sup>nd</sup> claimant's claim for overtime.

That during the Month of June 2018, the 2<sup>nd</sup> claimant approached one of his former colleague and requested the colleague to get him the log Books of the Motor Vehicle No. KBM 504P for 2010 to 2014 for perusal and action.

That a perusal of the said logs books confirms his claim for overtime is genuine thus rendering this application necessary.

That there is no basis to deny the 2<sup>nd</sup> claimant the relief for overtime as he had worked faithfully and diligently for the Respondent until the retirement age of 60 years.

That Respondent will suffer no prejudice for a lawful claim and that the Court allows the merited application premised on discovery of new evidence.

That during the trial of the suit he was not in possession of the said documents despite efforts to demand from the Respondent.

That in light of the foregoing pointed omissions, he urges the Court to review its Judgment of 28<sup>th</sup> April 2017 for ends of justice be met to the Applicant/2<sup>nd</sup> Claimant.

In response to the application, the respondent filed a replying affidavit of PETER KIHARA, the Human Resource Manager of the respondent in which he states that it responded to the notice to produce documents and produced the documents that were in its custody, but were unable to produce log sheets for motor vehicle registration No. KBN 504P for the period 2010 to 2014 as the said logbooks got lost. That they believed the applicant had taken possession of the same. It denied the averments of the 2<sup>nd</sup> claimant that the tracking system gadget in the motor vehicle was removed to deny him his claim for overtime. He deposes that the tracking system gadget was removed around March 2016 and that the gadget was only used to capture vehicle movement and location.

He further deposes that the claim for overtime was not proved and therefore not awarded by the court in the judgment delivered on 28<sup>th</sup> April 2017. That although the respondent was aggrieved by the judgment and decree and had intended to appeal, there was a compromise and a consent was filed in court by the parties of that free will without coercion, inducement, fraud, misrepresentation or duress. He deposes that the application is made in bad faith to extort money from the respondent.

He further deposes that there is no new evidence as pleaded by the 2<sup>nd</sup> claimant as the log sheets for motor vehicle Registration No. KBM 504P were kept by the applicant and he had conveniently chosen to bring them now, 446 days (15) months (1 year, 2 months, 21 days) after the judgment. He prays that the application be dismissed.

### **Determination**

Rule 33 of the Employment and Labour Relations Court (Procedure) Rules provides for review as follows –

### **33. Review**

**(1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—**

**(a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;**

**(b) on account of some mistake or error apparent on the face of the record;**

**(c) if the judgment or ruling requires clarification; or**

**(d) for any other sufficient reason.**

**(2) An application for review of a decree or order of the Court under subparagraphs (b), (c) or (d), shall be made to the judge who passed the decree or made the order sought to be reviewed or to any other judge if that judge is not attached to the Court station.**

**(3) A party seeking review of a decree or order of the Court shall apply to the Court by way of notice of motion supported by an affidavit and shall file a copy of the Judgment or decree or Ruling or order to be reviewed.**

**(4) The Court shall, upon hearing an application for review, deliver a ruling allowing or dismissing the application.**

**(5) Where an application for review is granted, the Court**

**may review its decision to conform to the findings of the review or quash its decision and order that the suit be heard again.**

**(6) An order made for a review of a decree or order shall not be subject to further review.**

The issues for determination are thus whether the application has been brought within a reasonable time, whether the evidence brought by the applicant constitutes new evidence that could not be produced during the hearing and whether the applicant is entitled to the orders sought.

As has been stated by both parties, the issue of the log sheets was brought up during the hearing and was the subject of a notice to produce. The respondent was unable to find the same as they had disappeared from its custody. The claimant has not explained where he obtained the logs which he himself sought to be produced and which he has produced in original. The same are the property of the respondent that had gone missing. He has not demonstrated what efforts he made to find them and why he could not find them during the hearing.

He has not named the alleged co-driver whom he got the documents from or under what circumstances the co-driver got them. It can only be presumed that the documents were thus obtained unlawfully by the applicant without the authority of the respondent, and are therefore not capable of being used by him against the respondent.

The foregoing notwithstanding, the parties signed an agreement in which the claimants agreed to withdraw their respective claims against the respondent in return for the respondent foregoing its right to appeal against the judgment of this court and by the said agreement the suit was marked settled.

Even assuming the foregoing was not the case, the claim for overtime would still not be successful as the additional documents filed by the claimant do not prove that he worked overtime but only the movement and location of vehicles.

For the foregoing reasons I find the application without merit and dismiss the same.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2019**

**MAUREEN ONYANGO**

**JUDGE**