



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 859 OF 2012

(Before Hon. Justice Hellen S. Wasilwa on 30th May, 2018)

REUBEN KIOKO MUTYAENE.....CLAIMANT

VERSUS

KENYA COMMERCIAL BANK LIMITED.....RESPONDENT

RULING

1. The Application before Court is the Application dated 15th May 2017 filed by the Claimant/Applicants and brought under rule 3(1) and 16 of Employment and Labour Relations Court Procedure Rules, Section 25(2), 32(1)(a), (b), (c), (d), (c); Fair Administrative Action Act Section 5(2) (b) (c) and Employment Act Section 47(3) seeking orders for reasons:-

- i. That there was mistake/error in calculating the award.*
- ii. That the award and judgement was in breach of law in as far as gratuity or service pay was not considered in the award.*
- iii. That the Hon. Judge failed to consider all facts and evidence in making her decision.*
- iv. That the Hon. Judge did not consider violation of the claimant's fundamental rights including discrimination at place of work.*
- v. That the award of Kshs 2,041,084.00 was not commensurate/proportionate with the claimant's legitimate expectations.*
- vi. That the lawsuit occasioned unwarranted legal costs and expenses totaling to Kshs 38,759.00.*
- vii. That in ordering the award the Judge did not take into account all relevant factors stipulated in the employment Act section 49(4).*
- viii. That Justice was delayed.*
- ix. That the Collective Bargaining Agreement applicable was defective, illegal and unconstitutional in as far as the termination and suspension clauses are concerned.*
- x. That the Respondent's failure to issue Certificate of Service is wanting and detrimental to the Claimant.*

2. The Claimant had submitted and prayed for Kshs. 1,890,072.00 being 12 monthly gross salary which the Hon. Judge in her judgement page 11 paragraph 4 noted that the Claimant had prayed for Kshs. 1,746,072.00, this was not the case. The Gross salary was based on Basic salary of Kshs. 147,506 + Kshs. 10,000-owner occupier allowance. This is per 2011-2-13 CBA submitted vide supplementary Documents and pleaded viva voce on 3rd July 2014.

3. That the half salary of Kshs. 67,663.50 paid in March and April 2011 was based on Basic salary of Kshs. 135,327.00 hence salary withheld was Kshs 157,506.00-67,663.50= Kshs 89,842.50x2 months= Kshs 179,685.00.

4. The correct outward ought to be Kshs 2,227,263.00 arrived as follows:-Kshs.157,506x12=Kshs.1,890,072+179,685 +157,157,506 = Kshs.

2,227,263.00.

5. They aver that the Judge erred in the judgement as the calculation was erroneous, not uniform and did not conform with the claimant's actual Gross salary of Kshs 157,506.00.

6. They also aver that the calculations in the Benefits and Compensation Form computed on 10.10.2017 are faulty in as far as the Basic pay of Kshs 135,327 and leave allowance of Kshs 6,137 are concerned and the monetary award of Kshs 2,041,084.00 which reduced to Kshs 1.2 million after taxation and lawyer's fees was not commensurate/proportionate with the Claimant's legitimate expectations.

7. In their grounds for opposition and submissions, the Respondent opposed the review on grounds that the application was bad in law, incompetent, misconceived and an abuse of the Court process as the application failed to meet the requirements as set out under Rule 33(1) (a)(b)(c)(d) of the Employment and Labour Relations Court Procedure Rules, the Applicant was also guilty of inordinate delay and the Applicant has not shown any other sufficient reason why the award should be reviewed.

8. They aver that the Claimant did not show any new evidence which was not within their knowledge or could not be produced by them before the award was made as the issue of violation of fundamental rights and discrimination is not a new issue which could not have been brought by the Claimant during the trial of the suit.

9. They further aver that the allegations that the Judge did not take into account correct salary is untrue since the judgement was arrived at based on the evidence on record and the pleadings of the parties.

10. The Respondent submit that a mistake or error on the face of record must be one that stares one in the face, as it were, and on which there cannot be two opinions and since the Claimant is bound by his pleadings, he cannot fault the trial Court's failure to rely on them while calculating the award.

11. They state that the application is entirely based on new evidence which was all along was in his possession and cannot form the basis of a review application which application lacks merit and should therefore be dismissed as it shows no any sufficient reason why the award of the Court should be reviewed and or set aside and the matter heard afresh.

12. I have considered the averments and submissions of both parties. Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules states as follows:-

1) "A person who is aggrieved by a decree or an order from which an appeal

2)

3)

4) 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.

13. It is therefore envisaged that this Court can review its own orders, judgements or decree on account of the reasons stated above.

14. In case of this application, the Applicant contends that the application for review be allowed on account of an error on the record in the calculations of the award. The Applicant avers that the judgement was based on his basic pay and not gross pay as envisaged and in this case a wrong figure was computed for his judgement.

15. In the evidence adduced the Claimant stated that his last salary was 135,327 and owner-occupier house allowance of 10,000/= making total to be 145,327/= as per his last payslip of 24/2/2011. However, as per the Collective Bargaining Agreement of 1/3/2011, this amount rose to 147,506/=.

16. In calculating his salary Hon. Judge Onyango used the figure of 147,506 (page 11 of judgement) to calculate his dues. The error being alleged by the Claimant is not visible.

17. On failure to award damages for fundamental rights including discrimination at work, this is an issue that is appealable and cannot be handled as a review.

18. I do not find any error on the record as alleged. I therefore find this application has no merit. I dismiss it accordingly with no order as to costs.

Dated and delivered in open Court this 30th day of May, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kilonzo for Respondent

Claimant in person – Present