



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 383 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**YVONNE ACHITSA ODEDERE.....CLAIMANT**

**-Versus-**

**MASENO UNIVERSITY.....RESPONDENT**

**RULING**

Judgment in this case was delivered on 19<sup>th</sup> October 2017. In the judgment the claimant was awarded the following –

1. 12 months' gross salary as compensation.
2. Salary for 15 days worked in September 2015
3. 3 months' salary in lieu of notice based on gross pay
4. 45 pays' annual leave based on basic pay.
5. Passage/baggage allowance Kshs. 11,745
6. Costs of this suit.

The court directed in the judgment that since the claimant's payslip was not submitted to the court by either the claimant or the respondent, the parties should tabulate the amount payable and file a consent. If they were unable to agree each of them should file their tabulation to enable the court prepare a final judgment.

The parties failed to agree and by an application dated 31<sup>st</sup> October 2017 filed under certificate of urgency on 1<sup>st</sup> November 2017 the claimant seeks the following orders –

1. That the application be certified urgent, heard and orders granted ex parte in the first instance.
2. That the court be pleased to grant an award of Kshs. 2,962,378.95 as the tabulated amount to be paid pertaining to the present claim.
3. Any other reliefs that the court may deem fit to grant.

The application is supported by the affidavit of the claimant YVONNE ACHITSA ODEDERE and on the following grounds –

- a) On the 19<sup>th</sup> of October 2017 the court gave directions to the effect that the claimant submits copies or a copy of her payslip so as to enable the court to tabulate the amounts due to her.
- b) The court further gave the parties the option to tabulate the amounts due to the claimant and file a consent before this court in that regard.
- c) The applicant/claimant therefore files the present application in compliance with this court's orders and directions.

In the supporting affidavit the claimant has tabulated the final judgment as follows –

1. 12 months' gross salary as compensation –  $(148,753 \times 12 = 1,785,036/=)$
2. Salary for 15 days worked in September 2015 –  $(148,753/2 = 74,376/=)$
3. 3 months' salary in lieu of notice based on gross pay –  $(148,753 \times 3 = 446,259/=)$

4 45 pays' annual leave based on basic pay (Kshs.260,317.75/=)

5. Passage/baggage allowance Kshs.11,745/=

6. Release of pension (Kshs.384,645.20/=)

**TOTAL PAYABLE AMOUNT = Kshs.2,962,378.95/=**

7. Costs of the suit.

The claimant has further attached the following documents to the affidavit –

(1) Copy of online payslip for the months of March, April and August 2015 reflecting gross pay of Kshs. 148,753 made up of basic salary of Kshs. 81,586; house Allowance of Kshs. 53,167 and Commuter Allowance – own Car of Kshs. 14,000/=.

(2) A statement of account from Maseno University Bookshop reflecting an invoice for Kshs.57,506 dated 12<sup>th</sup> June 2015 and credit amounts of Kshs.6,000 paid on 31<sup>st</sup> July 2015, a further Kshs.6,000 paid on 31<sup>st</sup> August 2013, payment of Kshs.10,000 made on 27<sup>th</sup> October 2015 and a final payment of Kshs.35,500 made on 25<sup>th</sup> July 2017. The invoice reflects a NIL balance.

(3) A printed receipt from Maseno University Bookshop for the sum of Kshs. 35,500 dated 25<sup>th</sup> July 2017.

(4) A statement from Maseno University Retirement Benefits Scheme as at 30<sup>th</sup> September 2015 with a closing balance of Kshs.384,645.20.

The respondent filed a replying affidavit of DR. MIDIDA P. KETA, the Deputy Director Human Resources at Maseno University sworn on 22<sup>nd</sup> November 2017 in which he deposes that although in the judgment delivered on 19<sup>th</sup> October 2017 the claimant was required to file a copy of her payslip within 7 days she only filed copies on 30<sup>th</sup> October 2017 and served the respondent on 1<sup>st</sup> November 2017. He deposes that the benefits under Maseno University Retirement Benefits Scheme cannot be raised at this point as averred at paragraph 5 of the claimant's affidavit, that the pension is managed by an independent body and has clear procedures through which the claimant may make her claim. It is further deposed that the claimant pleaded 35 days' annual leave which should be based on her basic salary and that payment in lieu of notice is also based on basic pay as provided at paragraph 21.2.1 (a) of the terms of service for non-teaching staff annexed as annexure YOA – 2 of the statement of claim. He has computed the amount payable pursuant to the award as follows –

	<b>Kshs.</b>	<b>Kshs.</b>
112 months' gross pay	= 148,753 x 12	1,785,036
215 days salary for September 2015	= <u>15 x 148,753</u> 30	74,377
33 months' salary in lieu of notice based on gross pay	= 81,586 x 3	244,758
435 pays' annual leave based on basic pay.	= <u>(81,586 x 1.5 x 35)</u> 205	20,894
5Passage and baggage		11,745
<b>Total Amount Payable</b>		<b>2,136,810</b>
Less: Tax		(558,367)
		<b><u>1,578,443</u></b>
<b>Tax Workings</b>	<b>Year of Income</b>	

1.	12 months' gross pay	2016	476,644
2.	15 days salary for September 2015	2015	17,407
3.	3 months' salary in lieu of notice based on gross pay	2015	58,711
4.	35 pays' annual leave based on basic pay.	2015	3,878
5.	Passage and baggage	2015	1,727

### **Determination**

I have considered the application, the supporting affidavit and documents attached thereto. I have also considered the averments in the replying affidavit and the tabulations by each party.

As is stated in the judgment the only issue for determination is the tabulation of the items set out in the judgment.

From the affidavits and tabulations by the parties, they are not in agreement on whether pay in lieu of notice and terminal leave should be based on basic or gross pay. They are also not in agreement whether the amount should be subject to income tax. These are issue provided for in law at section 49 of the Employment Act as follows-

#### **49. Remedies for wrongful dismissal and unfair termination.**

**(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee 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 to which he was entitled under this Act or his contract of service;**

**(b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or**

**(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.**

**(2) Any payments made by the employer under this section shall be subject to statutory deductions.**

The provisions are clear that pay in lieu of notice is based on gross pay and payments awarded attract statutory deductions. Income tax is part of statutory deductions. On annual leave the award expressly provides for the same to be based on basic pay.

On the issue of pension, the award is also explicit that the claim should be made to the administrators of the pension scheme, and if there is any dispute the same is to be resolved in the manner provided under the Retirement Benefits Act.

The correct tabulation of the award is therefore as follows-

1. 12 months' gross salary as compensation –  $(148,753 \times 12) = 1,785,036/=$
2. Salary for 15 days worked in September 2015 –  $(148,753/2) = 74,376.50/=$
3. 3 months' salary in lieu of notice based on gross pay –  $(148,753 \times 3) = 446,259/=$
4. 45 days' annual leave based on basic pay  $(81,586/30 \times 45) = \text{Kshs. } 122,379/=$
5. Passage/baggage allowance Kshs. 11,745/=

**TOTAL PAYABLE AMOUNT = Kshs.2,439,795.50/=**

I therefore enter FINAL JUDGMENT in favour of the claimant against the respondent in the total sum of **Kshs.2,439,795.50/=**.

The respondent shall also pay costs.

The decretal amount is subject to taxation.

The respondent will only be discharged upon payment of decretal sum, costs as taxed and production of a certificate of payment of Income Tax from Kenya Revenue Authority for any tax that may be deducted.

**DATED AND SIGNED AT NAIROBI ON THIS 27<sup>TH</sup> DAY OF APRIL 2018**

**MAUREEN ONYANGO**

**JUDGE**

**DATED AND DELIVERED AT KISUMU ON THIS 10<sup>TH</sup> DAY OF MAY 2018**

**MATHEWS NDERI NDUMA**

**JUDGE**