



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 370 (N) OF 2009**

(Before Hon. Lady Justice Maureen Onyango)

**UNION OF NATIONAL RESEARCH AND ALLIED INSTITUTE  
STAFF OF KENYA (UNRISK).....CLAIMANT/APPLICANT**

*VERSUS*

**KENYA INDUSTRIAL RESEARCH AND DEVELOPMENT  
INSTITUTE (KIRDI).....RESPONDENT**

**RULING**

The judgment in this case was delivered on 13<sup>th</sup> March 2015. In the judgment the court awarded the grievants the following –

1. 3 months basic salary as severance pay.
2. 3 months basic salary in lieu of notice.
3. In view of the length of service of the grievants, each of the grievants be paid compensation of 3 months basic salary.
4. The parties are directed to embark on calculation of the payments due to each employee which should include any pending leave not taken by each employee for the duration of employment.
5. The respondent shall pay the claimant Kshs 50,000/= as costs for the case.

By application dated 17<sup>th</sup> July 2017, the claimant avers that although it served counsel for the respondent with its calculations of the awarded remedies vide letter dated 16<sup>th</sup> April 2015, the respondent has failed and/or neglected to deliver to the claimant/applicant her calculations of the same. The claimant avers that the respondent lodged a notice of appeal on 19<sup>th</sup> March 2

015 which was served upon the claimant on 4<sup>th</sup> May 2015 but up to date has failed and/or neglected to stay the execution of the judgment hence the application herein in which the claimant/applicant seeks the following orders –

1. That the unrebutted revised quantum of the claimant/applicant's computation following the order in the judgment delivered on 13<sup>th</sup> day of March, 2015, served upon the respondent on 28<sup>th</sup> June 2017, be and is hereby adopted as a decree for execution purposes.
2. That the Honourable Registrar draw and issue the decree to the claimant/applicant for the *quantum meruit* total of Kshs.10,796.687.00 payable to the grievants as listed in the revised computation appearing as annex unrisk-04 hereto.
3. That, the respondent pay the total amount with compound interest at the rate of 26% as from 15<sup>th</sup> July 2009, the commencement date of this suit by notice of motion.
4. That, the respondent pay the claimant/applicant, Kshs.50,000.00 costs with compound interest at the rate of 26% as from the date of the judgment, that is from 13<sup>th</sup> March 2015, plus costs of this application.

In response to the application, the respondent filed a replying affidavit of MR. JAIRUS OMBUI, the respondent's Assistant Director, Human Resource Management and Administration sworn on 1<sup>st</sup> September 2017 in which he deposes that the claimant's revised computation is opposed as the decree is self-explanatory. It states that there is no basis of claiming compound interest at the rate of 26%, that the calculations have not been adopted by the court or agreed upon by the parties and further that the respondent is waiting for certified copies of the proceedings to enable it file a record of appeal. He deposes that the application is premature and should be dismissed.

On 24<sup>th</sup> October 2017 the respondent filed a supplementary affidavit of MR. JAIRUS OMBUI in which it enclosed its computation of the amount due.

When the parties appeared in court on 19<sup>th</sup> September 2017 for the hearing of the application and after hearing submissions by both parties, the court directed with the consent of the parties, that the Deputy Registrar will compute the amount due under item 4 of the judgment and draw a decree. The matter was fixed for mention before the Deputy Registrar on 16<sup>th</sup> October 2017. The parties thereafter appeared before the Deputy Registrar on 16<sup>th</sup> 23<sup>rd</sup>, 24<sup>th</sup> October and on 2<sup>nd</sup>, 13<sup>th</sup> and 27<sup>th</sup> November 2017 when they agreed on all issues except leave.

The parties appeared before me on 13<sup>th</sup> December 2017 when I directed that each party file submissions on the issue of leave.

### **Claimant's Submissions**

In the submission filed by the claimant on 22<sup>nd</sup> February 2013 the claimant proposes calculation using the following sample formula –

Last salary (30,000.00)/30 days average month x the total (35) leave days entitlement to = the entitled leave quantum (Kshs.35,000).

In other words, the claimant proposes that when calculating payment in lieu of outstanding leave days the non-working days should be included as part of the leave days due to an employee in addition to Saturdays, Sundays and public holidays so that the actual days taken by an employee who has 30 days leave is a minimum of 38 consecutive days. The claimant therefore submits that an employee with 30 days should be paid for 38 days, which is the actual number of consecutive days that the employee would be away from work when on a 30 working days annual leave.

### **Respondent's Submission**

For the respondent it is submitted that leave days exclude Saturdays, Sundays and public holidays as per paragraph 6.1(b) of the Collective Bargaining Agreement 2008 which is applicable to this case. It is submitted that the applicant's arguments are baseless, that the computation as contained in the supplementary affidavit of Mr. Ombui is correct and has been paid to all affected employees with the exception of 12 employees who were reinstated and therefore do not qualify for the payments. It is further submitted that all the affected employees accepted payment as calculated by the respondent.

The respondent urges the court to adopt its calculation and reject the claimant's.

### **Determination**

Clause 6.1 of the relevant Collective Bargaining Agreement signed the parties and registered by court provides as follows –

#### **“6.1 ANNUAL LEAVE**

- a. An employee shall be eligible for annual leave at the commencement of a “leave year” except in the case of newly appointed employees who shall be required to complete a minimum period of 3 months before being granted annual leave. For this purpose, “Leave Year” shall mean a calendar year:
- b. Annual leave which excludes Saturdays, Sundays and Public Holidays shall be granted at 30 days for all employees per year.
- c. The grant of leave shall be subject to the exigencies of the service, which may require that employee take leave during the period designated by the Director. However, personal circumstances and preference at an individual employee shall, where possible, be taken into consideration.
- d. Annual leave is not accumulate but an employee may, if he so wishes, carry forward from one leave year to another not more than one-half of his annual entitlement. This arrangement is intended to enable an employee to reserve a portion of his leave to be taken in an emergency.
- e. Subject to paragraph (e) above, annual leave shall be taken within the leave year it falls due or forfeited. Deferment of annual leave from one year to another shall not be permitted save in very exceptional circumstances with the prior approval of the Director
- f. Each department prepare a full leave roaster annually showing months on which employees are to proceed on leave and the number of days for each employee, such a leave roaster shall be pinned on departmental notice boards.”
- g. An employee may apply or be asked to accumulate leave for not more than a maximum period of 2 years continuous service. If accumulated leave is approved, this shall be taken together with due *and appropriate payments made there.*

h. An employee proceeding on leave will be paid his basic pay and other allowances (leave allowance, overtime) at least 3 days early prior to departure, provided that a request to this effect is made on the leave application form and that such application form is received at least 14 days before the leave starts.

i. Employee resigning from the service of the Institute or have their services terminated by the Institute shall be granted a accrued leave at the rate of 3 days per complete month of service and be paid.

Section 28(1) of Employment Act provides for leave as follows –

## **28. Annual leave**

### **(1) An employee shall be entitled—**

**a. after every twelve consecutive months of service with his employer to not less than twenty-one working days of leave with full pay;**

**b. where employment is terminated after the completion of two or more consecutive months of service during any twelve months' leave-earning period, to not less than one and three-quarter days of leave with full pay, in respect of each completed month of service in that period, to be taken consecutively.**

The Regulation of Wages and Conditions of Employment (General) Order provides for working hours which are the only hours that an employee is paid a salary for. The Act is clear that when an employee works outside the working hours (overtime) or on any public holiday or rest day, the employee is paid overtime for the hours worked only. This means that the employer is not concerned with any hours when an employee is not supposed to be at work.

The same argument applies with leave. An employee is not on leave on a rest day or on a public holiday. He is only on leave during the period when he is supposed to be at work. That is the period the employer pays for when paying in lieu of leave. For these reasons, 30 days leave means just that. An employer paying an employee in lieu of 30 days leave pays the salary for 30 days, not for the period when the employee is not supposed to be at work. In the case herein, Saturdays, Sundays and public holidays are not part of leave and the respondent is under no obligation to pay for the same.

I find that the claimant's calculation is wrong as it includes days when an employee is not on leave from work. The respondent's calculation reflects the correct position.

I therefore order that the respondent's tabulation be adopted for purposes of payment in lieu of leave and pro-rata leave. The result is that the claimant's application dated 17<sup>th</sup> July 2017 is dismissed. There shall be no orders for costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31<sup>ST</sup> DAY OF AUGUST 2018**

**MAUREEN ONYANGO**

**JUDGE**