



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 125 OF 2013

(Before Hon. Lady Justice Maureen Onyango)

PAUL OOKO OKOTH.....CLAIMANT

-Versus-

CHEMELIL SUGAR COMPANY LIMITED.....RESPONDENT

R U L I N G

Judgment in this suit was delivered on 29th January, 2016 wherein the Claimant was awarded the following -

- (i) 3 months salary in lieu of noticeShs.60,726
- (ii) 63 days annual leaveShs.42,508.20
- (iii) Service Gratuity (25 days per year for 15 YearsShs.253,025
- (iv) 6 months salary compensation.....Shs.121,452

Total **Shs.477,711.20**

On 25th May 2016 the Claimant filed an application for review under Rule 32 of Industrial Court (Procedure) Rules, 2010 in which he prays for the following orders -

- 1) **THAT** this Honourable Court be pleased to review, vary and/or clarify the Judgement given on 29th January, 2016.
- 2) **THAT** in the alternative the court should Review and vary the said judgment to show that the total award is as follows;
 - a. Notice pay - 3 months (Clause 10(d) - C.B.A)

Kshs.47,472 x 3Kshs.142,416.00
 - b. Unpaid Salary (8 days - October 2009)

offered by Respondent -----Kshs. 12,659.20

c. Accrued leave 76 days Clause 16 - C.B.A
(offered by Respondent).....Kshs.121,844.80

d. Leave travelling allowances
Clause 17 - C.B.A)Kshs.1930* 15 yearsKshs. 28,950.00

e. Service gratuity-Clause 31 (a) - C.B.A 25
days x 15 years.....Kshs.593,400.00

f. The Claimant should have been suspended on 6/10/2009
and paid half salary during the pendency of the
criminal case, but if acquitted full salary from
8/10/2009 - 26/7/2011
22 months x 47,472Kshs.1,044,384.00

g. Compensation - 6 months salary x 47,472.Kshs.284,832.00

Total.....Kshs.2,228,486.00

3) **THAT** this Honourable Court be pleased to grant such offer to further orders or relief as it may deem fair and just in the circumstances.

The grounds for review are that -

- a) There is mistake or error apparent on the face of the record.
- b) The judgment requires clarification.
- c) There are sufficient reasons to review the said award.

It is the claimants case that he is entitled to -

a. Notice pay - 3 months (Clause 10(d) - C.B.A)
Kshs.20,242 x 3=.....kshs.60,726.00

b. Unpaid salary (8 days - October 2009) offered
by Respondent =.....Kshs. 5,397.66

c. Accrued leave 76 days Clause 16 - C.B.A
(offered by Respondent).....Kshs.51,279.33

d. Leave travelling allowances Clause 17 - C.B.A)
Kshs.1930* 15 yearsKshs.28,950.00

e. Service gratuity-Clause 31(a) - C.B.A 25 days

x 15 yearsKshs.253,024.99

f. The Claimant should have been suspended on

6/10/2009 and paid half salary during the

pendency of the criminal case, but if acquitted

full salary from 9/10/2009 - 26/7/2011.

22 months x 20,242Kshs.445,324.00

g. Compensation - 12 months salaryKshs.242,904.00

TotalKshs.1,087,605.90

The claimant submits that it appears that in both the submissions and the judgment the monthly salary used for the claimant was the basic pay of Kshs.20,242/- instead of the gross pay of Kshs.47,472/- as pleaded in the amended claim aforesaid and as stated in court. He further submits that it also appears that the court did not address the reasons why salary during suspension of Kshs.445,324/- was disallowed yet the C.B.A was very clear on the same.

The Claimant prays that the award of the court be reviewed based on his last salary of Shs.47,472 as follows -

a. Notice pay - 3 months (Clause 10 (d) - C.B.A)

Kshs.47,472 x 3=Kshs.142,416.00

b. Unpaid salary (8 days - October 2009)

offered by Respondent = Kshs. 12,659.20

c. Accrued leave 76 days Clause 16 - C.B.A

(offered by Respondent).....Kshs.121,844.80

d. Leave travelling allowances

Clause 17 - C.B.A) Kshs.1930* 15 yearsKshs. 28,950.00

e. Service gratuity-Clause 31(a) - C.B.A

25 days x 15 yearsKshs.593,400.00

f. The Claimant should have been suspended

on 6/10/2009 and paid half salary during the

pendency of the criminal case, but if acquitted

full salary from 8/10/2009 - 26/7/2011.

22 months x 47,472.....Kshs.1,044,384.00

g. Compensation - 6 months salary x 47,472..Kshs. 284,832.00

TotalKshs.2,228,486.00

The Respondent opposed the application for review and filed an undated affidavit in Reply sworn by EMUKULE JOHN MARK ESQ counsel for the Respondent. It is the Respondent's position that the application for review of award offends the provisions of Rule 32 of the Industrial Court (Procedure) Rules, 2010 as the same was prepared in the names of the Advocate on Record who is not a party to the proceeding and/or the aggrieved party to the Judgment delivered on 10th December, 2015. The Respondent further states that the judgment dated 10th December, 2015 was very categorical on its award and/or dismissal of the prayers by the claimant and the same does not have any error apparent on the face of the record and does not need clarifications but it is just a difference in opinions held by the claimants. The Respondent submits that the application for review of award by the claimant is based on a decision of the court to use Kshs.20,242 from the Collective Bargaining Agreement and the basic pay and not Kshs.47,472, the gross pay as pleaded in the amended Memorandum of Claim which in essence makes this an issue of opinion and not an error apparent on the face of the record and the same does not need clarification, that the question whether the Claimant is entitled to basic pay or gross pay upon termination is a matter of fact subject to different opinion which is not an error apparent on the face of the record and the same can only be canvassed through an appeal and not review.

The Respondent submitted that the question whether the claimant should be paid for the period during suspension is an issue of clarification of the Judgment which cannot be addressed at the review stage.

The Respondent submits that the leave days as granted by the Honourable Court is based on what was pleaded by the claimant in the amended claim and the same was granted as prayed, that parties are bound by their pleadings and any further compensation should be a matter of the opinion of the claimant and the same cannot be subject to a review. The Respondent further submitted that the basis of the whole application for Review of Award is therefore misguided and the same should be dismissed with costs to the respondent.

During the hearing of the application both Mr. Rakoro who appeared for the Claimant/applicant and Mr. Emukule who appeared for the Respondent reiterated the contents of the application and affidavit in reply respectively. In addition Mr. Emukule referred the court to the case of **JMKVMWM & Another [2015] eKLR**, the case of **Board of Trustees National Social Security Fund v Michael Mwalo [2015] eKLR** and the case of **Bakery Confectionery, Food Manufacturing and Allied Workers (K) v Milly Fruit Processors Limited [2014] eKLR**.

Determination

I have considered the pleadings and the submissions of counsel in favour of and in opposition to the application for review of award. The issues that arise therefrom are whether the application is defective for having been filed by counsel instead of the claimant/applicant. The other issue is whether the court used the correct salary in determining the awards to the Claimant/Applicant and finally, whether the court inadvertently failed to consider the prayers for 8 days worked in October 2009 and, leave travelling allowance and salary during suspension.

On the first issue, the Respondent avers that the application for review is defective as both the application and the affidavit in support thereof are signed by counsel for the applicant. The Respondent's counsel has not stated how this has caused prejudice to the Respondent. In my opinion this is a matter of procedural technicality that does not go to the root of the application as to warrant the same being struck out for being defective. In the case of **The Co-operative Merchant Bank Ltd v George Frederick Wekesa Civil Appeal No.54 of 1999** the Court of Appeal stated that -

"... striking out a pleading is a draconian act, which may only be resorted to in plain cases... whether or not a case is plain is a matter of fact ..."

In **Elijah Sikona & George Pariken Narok on Behalf of Trusted Society of Human Rights v Mara Conservancy & 5 others [2014] eKLR**, Emukule J, (as he then was) when dealing with an application

seeking to strike out a plaint observed that -

'Striking out is a jurisdiction which must be exercised sparingly and in clear and obvious cases. Unless the matter is plain, and obvious, a party to civil litigation is not to be deprived of his right to have his suit determined in a full trial.'

Both the Employment and Labour Relations Court Act and the Constitution require this court to determine cases without undue regard to procedural technicalities. The Respondent has not stated that it has been prejudiced in any manner by the application being signed by counsel or the affidavit in support thereof being sworn by counsel.

I therefore find no merit in this objection by the Respondent.

The second issue is whether the salary of the Claimant to be issued should be Shs.20,242 which was used in the Judgement, or Shs.47,472 stated as the gross pay of the Claimant in the Claimant's payslip of the month of August 2009. The payslip has the following breakdown -

BASIC PAY		20,242.00
UNIONISABLE O/T	1.50	10,669.35
UNIONISABLE O/T	2.00	16,561.35
GROSS PAY		47,472.70

The Claimant's position is that the court ought to have used the gross pay inclusive of overtime.

It is important to get the correct wording of section 49 and the meaning thereof. In section 49(4) the words used is gross monthly wage or salary. The word gross pay is not the same as gross monthly wage or salary. When considering gross pay only payments of a permanent nature are considered. These include payments of gross basic salary and standing allowances such as house allowance, medical allowance, responsibility allowance, overtime allowance etc which are paid as part of the monthly entitlement of an employee. Payments made only in cases when an employee works overtime hours and which is not payable during periods when no overtime work is done, as for instance where an employee is on leave, do not count for purposes of calculating gross wage or salary. Only the constant as opposed to transient payments are considered to be part of gross wage or salary. For this reason the court considered the payslip of the Claimant and ignored overtime payments which were not part of the Claimant's normal pay.

There was therefore no error in the use of the rate of Shs.20,242 in the judgment as the wage of the claimant since overtime payments do not constitute part of the wage but is a compensation for extra work done in that month only. The prayers based on gross pay of Shs.47,472 are therefore without basis. These include notice pay, service gratuity and compensation.

I however agree with the applicant that the prayer for 8 days worked in October 2009 was made and admitted by the Respondent but was not included in the Judgement. I also agree with the applicant that although the Respondent admitted and offered to pay the applicant 76 leave days the court awarded only 63 days as prayed for.

The applicant has admitted that the prayer for leave travelling allowance was considered in the judgment and dismissed.

On the prayer for salary during suspension, the court held that no salary is payable after the date of termination which was 8th October 2009. The applicant was never suspended and cannot become entitled to payment during a non-existent suspension.

For the foregoing reasons, I review and amend the judgement dated 29th January to the extent stated above and award the following -

(i)	3 months salary in lieu of notice	Shs.60,726
(ii)	76 days annual leave	Shs.51,280
(iii)	Service gratuity (25 days per year for 15 years)	Shs.253.025
(iv)	6 months salary compensation	Shs.121,452
(v)	4 days worked in October, 2009	Shs. 12.659.20
	Total	Shs.499,142.20

Orders accordingly.

Dated and signed and delivered this 9th day of February, 2017

MAUREEN ONYANGO

JUDGE