



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO. 208 OF 2013**

**KENYA UNION OF DOMESTIC, HOTELS,  
EDUCATIONAL INSTITUTIONS, HOSPITALS &  
ALLIED WORKERS**

**CLAIMANT**

**v**

**EGERTON UNIVERSITY**

**RESPONDENT**

**RULING NO. 2**

1. On 25 July 2014 the Court delivered judgment in which it was ordered that

1. The respondent to pay each grievant baggage allowance Kshs 5,000; ***annual leave for every year served and thereafter prorate pay at the rate of the last monthly pay for each annual leave and for the period 1.08.2008 to 30.06.2013.***

2. The payment in 1 to be made by 1.09.2014, failing interest to be payable at court rates from the date of the suit being 5.05.2013 till full payment.

3. The respondent to deliver to each grievant a certificate of service by 1.09.2014.

4. The respondent to pay the claimant's half costs of the suit.

2. In compliance with the judgment, the Respondent made payment of Kshs 2,252,429/- to the Union, but the Union disputed the formula used by the Respondent in computing the amounts to be paid.

3. On 10 October 2014, the Union demanded for Kshs 2,653,196/-, which it stated was the balance due, but the attempt was unsuccessful.

4. The Union this moved Court on 22 July 2016 seeking orders

1. THAT the Respondent be ordered to pay the grievant the balance of Kenya Shillings 2,653,196.39 to comply with the court order

2. THAT the court be pleased to order any relief it may deem just and fit to give

3. THAT the cost of this application be paid by the respondent.

5. The Respondent filed a replying affidavit sworn by its Legal Officer, Janet C. Bii in opposition to the

application on 7 November 2016.

6. On 17 November 2016, the Court directed that the parties appear before the County Labour Officer for conciliation and/or to agree to the appropriate and correct legal formula to compute the outstanding leave pay.

7. The parties appeared before the County Labour Officer and he filed a report with the Court on 24 January 2017. The Respondent indicated that it agreed with the formula advised by the Labour Officer, while the Union disagreed with the formula.

8. The Court therefore directed that written submissions be filed and the same were highlighted on 16 March 2017.

9. The issue presented for the Court's determination is whether the Respondent should have used the Grievants consolidated as opposed to basic salaries in computing leave pay.

10. It is not in dispute that the Grievants were on consolidated salaries which the Respondent deconsolidated (by deducting the equivalent of 15% thereof as house allowance) in order to compute the commuted annual leave due to each Grievant.

### **Union's position**

11. The Union contended that the correct formula was

Last Pay X Number of Days

26

12. The last pay proposed by the Union was the last consolidated salary each grievant was earning at point of separation.

13. The Union, in asserting that its proposed formula was correct referred to clauses 17(a)(i) and (ii) of the collective bargaining agreement as read together with section 28(1)(a) and (b) of the Employment Act, 2007 and submitted that **full pay** could only mean a pay consisting of basic salary and house allowance .

14. The Union also cited *Revised Wage Guidelines* issued by the Minister for Finance in 2005, but the said Guidelines were not provided to the Court.

15. According to the Union, in deconsolidating the salary, at least 15% of the salary should be deemed as house allowance.

### **Respondent's contentions**

16. The Respondent on its part urged that the formula suggested by the Labour Officer was the correct one and that it had used the said formula in computing the leave payments due to the Grievants.

17. The formula proposed by the Labour Officer was

Basic salary X Number of Days X 1

365

18. The Respondent also urged that not all the Grievants were employed on 1 August 2008, and therefore it was an error for the Court to order that the annual leave pay be computed from that date.

19. In the view of the Respondent, the leave pay could only be paid from date of employment and not a blanket date of 1 August 2008.

### **County Labour Officers recommendation**

20. The County Labour Officer in his report filed with the Court noted that the collective bargaining agreement in place did not reflect payment for leave on a consolidated basis and that the correct formula was to use the **basic salary** instead of consolidated salary.

21. The report further noted that the Grievants pay slips did not indicate a consolidated salary but rather had elements of basic salary and house allowance.

### **Evaluation**

22. There is no express statutory framework in this country outlining the formula to be used when an employee decides or agrees with the employer to encash leave days.

23. By practice and custom in human resource function in this country, the correct and proper formula for computing commuted leave pay where an employee does not take annual leave has been to use the basic salary (without allowances).

24. In this regard, the recommendation by the Labour Officer was correct, and the submission by the Union could only be founded on contractual agreement and not practice or customs in human resource management.

25. The Court also notes that clause 17 of the collective bargaining agreement filed by the Union referred to paternity leave and not annual leave. It is clause 15 which had provision for 30 days annual leave with **full pay**.

26. The initial fixed term contracts issued to the Grievants had separated monthly salary and house allowance.

27. The Court has looked at the pay slips which were filed by the Union during the currency of these initial contracts and they had basic salary and house allowance, itemised separately.

28. However, despite the renewed contracts filed in Court indicating that the Grievants were placed on consolidated salaries, the accompanying pay slips (attached to the supporting affidavit of Albert Njeru to the motion dated 5 July 2013) show that there was a deconsolidation of pay in the pay slips.

29. In the Court's view therefore, the Respondent was well within the practices and customs to compute the leave pay on the basis of basic salary and not the consolidated salary.

30. And if the Court were wrong on that conclusion, it appears that the *Revised Wages Guidelines* of 2005 referred to by the Union but not shown to the Court contemplated a deconsolidation and even on that basis, the Respondent may not be faulted.

31. Before concluding, the Court wishes to note that although it was not dealing with a review application, the submission by the Respondent that the salary applicable at the respective time should be used as a factor in commuting leave and not the last pay at time of separation is sound in law. The last salary cannot be applied retrospectively when commuting leave when the salary was different.

32. Further it was erroneous for the Court to award leave pay for blanket period without putting into consideration the respective dates the Grievants were employed. However, the error must have arisen because of the way the Union pleaded its case.

33. The Court would in effect dismiss the application dated 14 June 2016 with no order as to costs

because of the ongoing relationship between the Union and the Respondent.

**Delivered, dated and signed in Nakuru on this 28<sup>th</sup> day of April 2017.**

**Radido Stephen**

**Judge**

**Appearances**

For Union Mr. Onwonga, Industrial Relations Officer

For Respondent Mr. Gekonga instructed by Gekonga & Co. Advocates

Court Assistant Nixon