



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 379 (N) OF 2009**  
**D. K. NJAGI MARETE .....CLAIMANT**  
**VERSUS**  
**TEACHERS SERVICE COMMISSION .....RESPONDENT**

**Mr. Orare for claimant/applicant**

**M/s Kaluai for respondent**

**RULING**

1. The claimant/applicant seeks a refund of Kshs.484,834/= deducted from a decretal sum of Kshs.1,913,293/= (both salaries and allowance) pursuant to a judgment of Judge Rika delivered on 28<sup>th</sup> June 2013.
2. It is not in dispute the deduction of Ksh.484,834/= from the award of the court was in respect of income tax and/or Pay As You Earn (PAYE) payable to the Commissioner of Domestic Taxes.
3. The respondent opposes the application stating that it was discharging its legal duty that arose from Article 210 of the constitution – imposition of tax, which provides;  

*“No tax or licensing fee may be imposed, waived or varied except as provided by legislation.”*
4. That failure to withhold and remit the said tax would have been unconstitutional and illegal.
5. The respondent prays that this application be dismissed with costs.

**Determination**

6. The issues for determination in this matter are: -

- (a) Whether an award of the court pursuant to Section 49 of the Employment Act, 2007 is amenable to income tax deduction.
- (b) If (a.) above is in the affirmative, whether a judgment debtor is obliged to withhold and remit the tax to the Commissioner of Domestic Taxes.

## Issue 1

7. It is not in dispute that the respondent, is the erstwhile employer of the claimant and that the award by Judge James Rika was as follows;

(a) Compensation for unfair termination at 12 months' gross salary, calculated at Kshs.1,847,820/=.

(b) Travel and accommodation allowance at Kshs.54,475/=.

(c) Two (2) days salary for the month of February 2009, at Kshs.10,998/=.

Total award was **Kshs.1,913,293/=**

8. The court did not award interest and costs.

9. Section 19 (7) (f) of the Employment Act, 2007 provides that an employer may deduct from the wages;

**“any amount the deduction of which is authorised by any written law for the time being in force, collective agreement, wage determination, court order or arbitration award”**

10. Section 49 of the Act provides;

**“(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) .....**

**(b) .....**

**(c) The equivalent of a number of months wages or salary not exceeding twelve month' based on the gross monthly wage or salary of the employee at the time of dismissal”**

11. Subsection 49 (2) provides;

**“Any payments made by the employer under this section shall be subject to statutory deductions.”**

12. It is to be remembered that the powers given to the Labour Officer under Section 49 are equally donated to the court by dint of Section 50 of the Act, as follows;

**“(50) in determining a complaint or suit under this Act, involving wrongful dismissal or unfair termination of the employment of an employee the Industrial Court shall be guided by the provisions of Section 49”**

13. A plain reading of Section 49 (1) (c) together with subsection 49 (2) leads to inescapable conclusion that an award made by the court in terms of Section 49 (1) (c) is subject to statutory deductions.

14. The legislature uses the word “*shall*” under subsection 49 (2) which is indicative of a mandatory directive to the employer who pays any money pursuant to a recommendation of a Labour Officer or order of the court to make statutory deductions from a gross monthly payment made pursuant to subsection 49 (1) (c).

15. Income tax including PAYE is one of the known statutory deduction made from wage or salary in favour of Commissioner of Taxes.

16. This court makes the finding without hesitation that the equivalent of twelve (12) months' salary awarded to the claimant by Judge Rika was subject to deduction of PAYE.

17. With regard to the award of two (2) days salary for days worked, Section 19 of the Employment Act, applies. Therefore, the employer was bound to deduct PAYE in respect thereof.

18. The parties did not provide the provisions under which travel and accommodation claim was made. The court notes that various allowances in the public service made to employees at the time the cause of action arose were made free of taxation.

19. In the absence of any specific information in this regard, the court gives the claimant the benefit of doubt and directs that the sum of **Kshs.54,475/=** granted to the claimant by the court in respect of travel and accommodation is not subject to taxation and it be paid in full without any statutory deduction.

**Dated and delivered at Nairobi this 21<sup>st</sup> Day of April 2017**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**