



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

**CAUSE NO 1044 OF 2014**

**PRESQUELLA ADHIAMBO.....CLAIMANT**

**VERSUS**

**GOLDEN BISCUIT LIMITED.....RESPONDENT**

**RULING**

1. On 13<sup>th</sup> May 2016 I delivered an award in favour of the Claimant in the following terms:

- a) 12 months' salary in compensation.....Kshs. 247,032
- b) 1 month's salary in lieu of notice.....20,586
- c) Service pay for 10 years.....102,930

2. The Respondent subsequently filed an application seeking review of the award. In the memorandum in support of the application, the Respondent cites the following grounds:

a) Service pay vis a vis severance pay: the Respondent states that the pleadings and submissions filed in Court included a prayer for severance pay but not service pay, yet the Court went ahead to award service pay.

The Respondent submits that by doing so the Court framed an un-pleaded issue to which the Respondent had no opportunity to respond.

b) Service pay under the old employment law and practice: the Respondent states that the repealed Employment Act (Cap 226) did not envisage payment of service pay. The Court therefore erred in applying a principle of the Employment Act, 2007 in an arrangement obtaining before the law came into force.

c) Daily rate: the Respondent submits that the daily wage applicable to the Claimant was Kshs. 476 and not 686. The rate of Kshs. 686 was inclusive of overtime which would fluctuate depending on the number of hours worked. The Court therefore erred in adopting the figure of Kshs. 20,586 as the Claimant's monthly salary.

3. In its written submissions filed on 10<sup>th</sup> November 2016, the Respondent also faults the framing of the issue of desertion which was not in contention.

4. The Claimant filed an answer to review and her own cross review on 22<sup>nd</sup> August 2016. While

challenging the Respondent's grounds for review, the Claimant asks the Court to review its finding on the employment period from 10 to 22 years. The Claimant further asks for reconsideration of the finding on overtime compensation, leave allowance and maternity leave.

5. In a response filed on 23<sup>rd</sup> September 2016, the Respondent opposes the Claimant's cross review on the ground that it is not based on an error apparent on the face of the record.

6. The power of the Court to review its own decisions is donated by Section 16 of the Employment and Labour Relations Court Act and Rule 33 of the Procedure Rules. Rule 33(1) provides as follows:

***(1) A person who is aggrieved by a decree or an order of the Court may apply for a review of the award, judgment or ruling-***

***(a) if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made; or***

***(b) on account of some mistake or error apparent on the face of the record; or***

***(c) on account of the award, judgment or ruling being in breach of any written law; or***

***(d) if the award, judgment or ruling requires clarification; or***

***(e) for any other sufficient reasons.***

7. In dealing with an application for review such as the one before me, the Court must guard itself against sitting on appeal over its own decision. As held by **Mativo J** in **Michael Muriuki Ngubuini v East African Building Society Limited [2015] eKLR** if a court misapprehends the law or facts, the remedy for the aggrieved party does not lie in review. The option available to such a party is to go on appeal.

8. Counsels for the parties mounted persuasive arguments on several findings made by the Court. It seems to me however that while the issues raised might form good grounds of appeal they cannot pass through the narrow gate of review.

9. In light of this, both the Respondent's review application and the Claimant's cross review fail and are dismissed.

10. Each party will bear their own costs

11. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 31<sup>ST</sup> DAY OF MAY 2017**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Wakiaga for the Claimant

Mr. Masese for the Respondent