



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. 746 OF 2012**

(Before Hon. Lady Justice Hellen S. Wasilwa on 13<sup>th</sup> July, 2017)

**PAUL JUMA OKINA.....CLAIMANT**

**VERSUS**

**FIRST ASSURANCE COMPANY LIMITED.....RESPONDENT**

**RULING**

1. Before the Court is an Application for Review of Award of the Court dated 10<sup>th</sup> November 2015 where the Respondent states that the award was done without offsetting of severance pay and salary in lieu of notice already paid to the Claimant.
2. The Applicant has submitted that the Respondent had paid terminal dues which included severance and salary in lieu of notice. Severance had been computed at the sum of Kshs.2,425,750.00 (15 days salary for 30 years worked) and 1 months’ salary in lieu of notice computed at the sum of Kshs.156,500.00. The Claimant would be unjustly enriched if payment made to him before the claim was filed is not offset.
3. They state that the Judge acknowledges in page one of the Award and it is also in record and evidence that the Respondent paid to the Claimant the following amount:-

***Kshs 2,689,929.00 as pension and made up as follows:***

***Respondent’s Contribution*** ***Kshs. 1,487,496.00***

***Claimant’s Contribution*** ***Kshs 1,202,433.00***

***Kshs 2,689,929.00***

***Kshs 1,786,764.00 as terminal dues, made up as follows:***

***Service/Severance Pay*** ***Kshs 1,960,750.00***

***2 months’ salary in lieu of notice*** ***Kshs 313,000.00***

***Leave Pay*** ***Kshs 216,433.00***

**KShs 2,535,183.00**

**Less Tax**

**Kshs 748,420.00**

**Kshs 1,786,764.00**

4. As was established during trial the Claimant received the same payment on 3<sup>rd</sup> March 2011 and signed discharges confirming receipt thereof.

5. They pray that the Court reviews, varies or clarifies the Award dated 22<sup>nd</sup> October 2015 and or substitutes it to the following extent.

6. They further submit that the following payment made to the Claimant by the Respondent prior to the filing of this suit as part terminal dues be offset and or be deducted from the Award made herein:-

**Service/Severance Pay.....Kshs 1,960,750.00**

**2 Month's Salary in lieu of notice ..... Kshs 313,000.00**

7. The Claimants have filed a Replying Affidavit dated 3<sup>rd</sup> February 2016 where he makes response to the Application for Review calling this Honourable Court to dismiss the Application for Review on interalia the following grounds:-

***1. The Respondent has filed a Notice of Appeal against the Award;***

***2. The Presiding Court had reached a proper conclusion of law and fact;***

***3. There is a difference between Service Pay and Severance Pay;***

***4. The two months' notice pay was contractual whereas the one month's payment in lieu of notice awarded by the Court was on the ground of failure to follow the procedure in termination by redundancy;***

***5. The Application is a disguised Appeal which is an abuse of the Court process.***

8. The Respondents have filed written submission dated 19<sup>th</sup> May 2017 where they state that the total amount awarded to the Respondent under the Award was a sum of Kshs 4,460,250.00 made up as:-

***Severance pay for Redundancy ..... Kshs 2,425,750.00***

***One months' salary in***

***lieu of notice of Redundancy.....KShs.156,500.00***

***12 months' salary as compensation for***

***unfair termination ..... Kshs 1,878,000.00***

9. They submit that the severance pay and salary in lieu of notice was done without offsetting the same from payments already made to the Claimant and was an error on the part of the Court since it is not in dispute and is in fact on record that some amounts under these heads had already been paid to the Claimant.

10. They submit that it was established during trial that the Claimant received such payment on the 3<sup>rd</sup> of March 2011 and signed discharges to the Memorandum of Defense seen at page 1 and 2 and computation

of the terminal dues seen in a further list of document at page 1.

11. They submit that as the Judge referred to those prior payments in page 1 of the Award it was most likely an honest oversight. They submit that on page 16 of the Award, the Judge goes on to state:-

***“The Claimant is not entitled to “service pay” having been a member of the NSSF and also the Respondent’s Pension Scheme. They submit that it would be a breach of the same findings for the Claimant to retain amounts paid as service pay and severance pay at the same time and would be unjust enrichment of the Claimant”.***

12. They submit that they have already filed a Notice of Appeal but are yet to file an Appeal and the ‘Notice’ was simply filed to enable a party to manifest its desire to appeal which desire may not eventually be actualized. To this end they rely on the Court of Appeal decision in **Yani Harvanto vs. ED & F Man (Sugar) Limited Civil Appeal No. 122 of 1992**; where a similar argument was overruled by the Court. It was stated that:-

***“the Appeal has been fought on to main issues, the first is whether the Respondent having filed a Notice of Appeal, which had not been withdrawn had a right to apply for review.....***

***An appeal is not instituted in the Court of Appeal until the Record of Appeal is lodged in its registry, fees paid and security lodged..... Rule 81 of the Court of Appeal Rules, in addition requires the inclusion of a memorandum of Appeal..... So quite clearly, the Judge had jurisdiction to entertain the Application for Review and the Submission by Sampson that he had no jurisdiction to do so, must be rejected.”***

13. They submit that they have filed a Notice of Appeal at this stage and not having reached the stage of formally filing an Appeal and the Application for Review is therefore perfectly within the jurisdiction of the Court.

14. They also submit that the Claimant has alleged that they have failed to mention the specific sub rule of Rule 32 of the Act that they rely on for review, they however state that the Claimant has not shown how they would be prejudiced by failure to mention the specific sub-rule. They submit that it is now accepted by the Kenya legal profession that Courts and litigants ought not to dwell on substantive merits of a matter and not unnecessarily glorify technicalities that do not go on the root matter in issue.

15. The Claimants have also filed written submissions dated 22<sup>nd</sup> May 2017. They also submit that the Application for review is contrary to the law as the Respondent has filed a Notice of Appeal. They submit that it is trite law that Applications for Review are available to an Applicant who does not intend to appeal a decision of the Court. As the Respondents have filed a Notice of Appeal dated 12<sup>th</sup> November 2015 and filed in Court on the 16<sup>th</sup> of November 2016, the Respondent lost the right to apply for a review of the Award.

16. They submit that while the presiding Judge was aware of the fact that the Claimant had received Kshs.2,689,929.00 on account of pension and Kshs.1,786,764.00 on account of terminal dues, the first sum is not contentious but the second one is.

17. They submit that the second sum of Kshs.1,786,764 was paid as gratuity/service pay (after tax deductions) under the contract of service and Section 35(5) of the Employment Act 2007. The payment was for service and not severance pay.

18. They further submit that the calculations on the face of the Application is wrong as what the Claimant received is Kshs. 1,786,746.00 and not Kshs.2,273,750 as claimed and these are matters that were recognized by the presiding Judge.

19. They submit that severance pay is payable under the Employment Act 2007 on account of redundancy

and it is provided for in Section 40(g) thereof. They state that the Honourable Judge found it that the Claimant was terminated by way of redundancy and awarded the Claimant severance pay in the sum of Kshs.2,425,750.00. There is therefore no error on the Award necessitating review and pray that the Court finds thus.

20. As to costs, they submit that the Respondents have acted in bad faith by filing an application whose sole objective is to delay or deny the Claimant fruits of his judgement. In light of that, they ask the Court to condemn the Respondent to foot the costs of the Application.

21. In conclusion the Claimant submits that there is a factual and legal difference in the conception of 'Service Pay' and 'Severance Pay'. The Claimant is entitled to both service pay under the contract of service particularly the letter of termination dated 22<sup>nd</sup> February 2011, and severance pay on grounds of termination by redundancy which has been awarded by the Court.

22. They ask that the Honourable Court upholds the Award.

23. Having considered the submissions of both parties, it is this Court's position that the Court has a duty and jurisdiction to review its judgments or orders under Rule 33 of Industrial Court Procedure Rules 2016 under the following circumstances:

1) ***"A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the 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;***

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

***c) if the judgment or ruling requires clarification; or***

***d) for any other sufficient reason.***

2) ***An application for review of a decree or order of the Court under subparagraphs (b), (c) or (d), shall be made to the judge who passed the decree or made the order sought to be reviewed or to any other judge if that judge is not attached to the Court station..."***

24. The Applicants contend that they seek review on account of an "error on the face of the record", the apparent error being payment of dues already paid to the Claimant.

25. The Applicant contends that the Court awarded Claimant his pension dues and also service/severance pay and 2 months' salary. They contend that he should not have been paid both severance/service pay.

26. From the Respondent's Appendix 1, they paid Claimant 1,786,764 computed as follows:

<b><i>Service pay</i></b>	<b><i>= 1,960,750/=</i></b>
<b><i>2 months' notice</i></b>	<b><i>= 313,000/=</i></b>
<b><i>Leave pay</i></b>	<b><i>= 261,433/=</i></b>
<b><i>Total</i></b>	<b><i>= 2,535,183/=</i></b>
<b><i>Less tax</i></b>	<b><i>= <u>748,420/=</u></i></b>

**Balance** = 1,786,764/=

27. From the judgment, it is apparent that the Court had awarded 2,425,750/= as severance pay. This is because the Claimant had been declared redundant and under Section 40(1)(b) of Employment Act, this is payable in redundancy situations. The Claimant had been paid 2 months salary in lieu of notice and the Court did not award him anything under this limb. The Hon. Judge awarded 1 months' salary in lieu of notification of redundancy as provided for under Section 40(1)(b). This is different from the 2 months' salary provided in the termination notice provided in his letter of 25<sup>th</sup> January 2008.

28. That being the scenario, I do not find anything that was awarded to the Claimant which had already been paid. There is therefore no error on the record which this Court can correct by way of review.

29. This application for review is therefore without merit and I dismiss it. I order the Applicant to pay costs of this application.

Read in open Court this **13<sup>th</sup> day of July, 2017.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Muhonja holding brief Mwananda for the Claimant

Maingi holding brief for Munialo for Applicant – Present