



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT LABOUR AND RELATIONS COURT**

**AT MOMBASA**

**CAUSE 324 OF 2015**

**BONIFACE MULANDI.....CLAIMANT**

**VERSUS**

**ALI BARBOURS CAVE RESTAURANT.....RESPONDENT**

**RULING**

**Introduction**

1) On 1.7.2016 I delivered judgment herein whereby, I awarded the claimant kshs. 184,749.40 inclusive of kshs. 104,270.40 as compensation for overtime worked. The respondent (herein after called the applicant) has brought the application dated 20.7.2016 seeking review of said judgment on ground that there is a mistake or error apparent on the face of the record.

2) The claimant has opposed the application by his Replying affidavit sworn on 9.8.2016. The gist of his affidavit is that he worked overtime everyday from 2008 and urged the court to increase the award in respect of overtime worked to kshs. 535165. In his view the error was apparent on the face of the record which should be corrected by increasing the said award.

**Applicant's Case**

3) Mrs. Ibrahim prosecuted the application on behalf of the applicant. She urged that paragraph 29 of the impugned judgment should be reviewed and set aside. That under such paragraph, the court awarded to the claimant pay in respect of overtime based on Regulation of Wages (Hotels and Catering Traders) order. That in calculating the award of the overtime pay, the court used 45 hours per week instead of the 52 hours per week provided for under the said regulation 5. That the use of 45 hours per week instead of the 52 hours provided by the law was a mistake or error apparent on the face of the record which should be corrected by the court through review.

**Claimant's Case**

4) The claimant admitted that his claim for overtime was based on 52 hours and not 45 hours per week. That based on the 52 hours normal working hours per week, his claim for overtime was merited because even Rw2 in her testimony admitted that he worked extra hours. He urged the court to review the award for overtime to kshs. 535165 because he had worked 4804 extra hours which when multiplied by kshs. 55.70 per hour works to that sum. He further urged the court to order the applicant to avail the work Attendance Register to verify his claim for overtime.

## **Applicant's Rejoinder**

5) Mrs. Ibrahim objected to the claimant's request for upward review of the award for overtime and urged the court to restrict itself to correcting the error or mistake stated in the application by the applicant and not to accept the new issues raised by the claimant. She further contends that the court lacks jurisdiction to take new evidence at this stage for purposes of enhancing the awards in the judgment.

## **Analysis and Determination**

6) The issues for determination are:-

*a) Whether the application has merits.*

*b) Whether the request to review the award overtime pay upwards should be entertained.*

## **Merits in the Application**

7) There is no dispute that the contract of employment between the parties herein provided for 52 working hours per week. There is further no dispute that regulation 5 of the Regulations of Wages (Hotels & Catering Trades) order, provides that employees in the said industry shall work for 52 hours per week. The said regulation provides:

***“5(1) The normal hours of work in respect of every work, except a gardener, shall consist of fifty two hours spread over six days of the week”:***

8) The Claimant was not a gardener but a waiter and as such his normal working hours per week was 52 hours. The court therefore made a mistake or error by using 45 hours per week instead of 52 in assessing and awarding overtime to the claimant. If the court did not make such a mistake or error, the finding that the claimant had worked for 1872 extra hours in 6 years would not have been made and as such the award of kshs. 104,270.40 for overtime would not have been made.

9) In view of the foregoing, I find that the application by the applicant has merits and should be allowed as prayed.

## **Claimant's Request**

10) The request for upward review of the award for overtime by the claimant has been made vide his replying affidavit. No law or judicial precedents have been cited by claimant upon which the court should entertain his request. Rule 32(1) of the Industrial Court Procedure (2010) Rules provides that:-

***“A person who is aggrieved by a decree or an order of court may apply for a review of the award, judgment or ruling...”***

11) In view of the foregoing, the request by claimant for upward review of the award by the claimant is incompetent. A replying affidavit is not an application for review within the meaning of Rule 32(1) supra. An application for review under sub rule (3) is supposed to be in form 6 set out in the first schedule. This court has also entertained application made by a notice of motion under the civil procedure rules by dint of rule 31(20) of the rules of this court. The said rule states that:

***“31(2) Rules of an execution of an order and decree applicable in the High Court shall be applicable to an order and a decree of the Court”.***

12) In view of the foregoing therefore, the request by the claimant for upward review of the award of overtime is declined for being incompetent.

## **Disposition**

13) The Application for review by the applicant is allowed and the mistake or errors on the judgment is corrected by setting aside the award of kshs. 104,270.40 in respect of overtime pay. The total award in the judgment after correction shall be **kshs. 80,479** plus costs and interest as earlier ordered. I will not award costs for the applications to any party because the error was by the court.

**Signed, Dated and Delivered at Mombasa this 9<sup>th</sup> day of September 2016.**

**ONESMUS MAKAU**

**JUDGE**