



**REPUBLIC OF KENYA**

**IN THE IN THE EMPLOYMENT & LABOUR RELATION COURT OF KENYA**

**AT MOMBASA**

**CAUSE 110 OF 2014**

**KENYA UNION OF DOMESTIC, HOTELS,  
EDUCATIONAL INSTITUTIONS  
AND HOSPITAL WORK .....CLAIMANT**

**VERSUS**

**PWANI UNIVERSITY .....1ST RESPONDENT**

**STANDARD TECHNICAL SERVICES  
AND GENERAL SUPPLIES.....2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction**

1. The Notice of Motion before the court is dated 12.2.2016 and it is brought by the Claimant in the main suit, hereinafter called the “applicant”. The motion which basically seeks for review of this court’s judgment/ decree entered on 13.11.2015 by adding the name of Dorcas Salama Randu who was omitted from the award made and further by awarding severance pay to each grievant as provided by the CBA. The motion is supported by a Memorandum for Review and the Affidavits sworn by the applicant’s Branch Secretary Mr. Zacchaeus Osore. The motion is however opposed by the 1<sup>st</sup> respondent vide the Replying affidavit sworn on 16.3.2016 by Prof. Muhammed S. Rajab.

**Background**

2. On 13.11.2015, this court entered judgment in favour of the claimant declaring the termination of the grievants’ employment unlawful and awarding them kshs.4,195,319 plus costs and interests. However the sixth grievant’s name was excluded from the award made and the claimant brought the present application for the review and correction of the judgment. The parties agreed to dispose of the motion by filing written submissions.

**Applicant’s case**

3. The application is brought under section 12(1) and 16 of Industrial Court Act and is founded on the ground that there is an error apparent on the face the record which warrants review and setting aside of

the impugned judgment. According to the applicant the name of Dorcas Salama Randu was erroneously left out when the court was entering judgment for the other grievant's and as such the court should enter judgement for her. That the court also made another error by declining to award the grievant's severance pay as provided for in the CBA and as such the applicant prays for the award of severance pay to each grievant at the rate of 30 days pay for each completed year of service. The gist of the applicant's application is therefore to urge the court to award damages to Dorcas Salama Randu like the other grievants and in addition award severance pay to each grievant as prayed in the suit.

### **Respondent's case**

4. The respondent does not oppose the review of the judgment for purposes of making an award in favour of Dorcas Salama Randu. She admits that there is an error apparent on the face of the record. She is in agreement with the applicant that the said grievant should get reliefs in similar terms as the other 22 grievants being three months salary in lieu of notice, six months' salary as compensation for unlawful termination, 45 leave days and salary underpayment totaling to kshs.198,607. She however prays that the judgement be reviewed or corrected in her favour by reducing the award made to Kenga Katana from kshs. 198,607 to kshs. 172,203, Johnson Naunga from kshs.156,598 to Kshs.156,754 and Paul Karisa Kahindi from kshs.156598 to kshs 156754. According to her the correct award to all the grievants should be kshs.4,174,167.

5. The respondent has however opposed the request for the award of severance pay because that prayer was considered by the court and was dismissed vide the impugned judgment. That allowing it at this point would mean that the court is sitting on appeal of its own judgment.

### **Analysis and determination**

6. After careful consideration of the Application, affidavits and submissions, it is clear that the applicant has brought the review application on the ground that there is an error apparent on the face of the record. It is also clear that the review of the judgement in order to make an award to Dorcas Salama Randu is not opposed. The issues for determination herein:

**a. Whether the judgment should be reviewed and corrected by awarding severance pay to each grievant as prayed by the applicant.**

**b. Whether the judgment should be reviewed and corrected by reducing the awards made to Kenga Katana, Jonson Naunga and Paul Karisa kahindi.**

### **Review to award severance pay**

7. The right to apply for review of this court's decisions is donated under rule 32 (1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 (ELRCRs). Among other reasons, an aggrieved party may apply for review of a judgment on the ground that there is an error apparent on the face of the record. The burden of burden of proof is therefore upon the applicant to demonstrate that there is indeed an error apparent on the face of the record. The question that begs for answer is whether dismissal of the prayer for severance pay constitutes an error apparent on the face of the record for purposes of review. In my view, the answer is, no. As correctly submitted by the respondent, the said prayer was dismissed by the court after considering it on merits. Consequently, if the court made an error of judgment, the correct thing to do for the claimant was to appeal and not to seek review order. I therefore dismiss the request for review of the judgment for purposes of reconsidering the claim for severance pay.

### **Review to reduce the award made three grievants**

8. The respondent never appealed or formally applied for review of the impugned judgment. All what she has done is to allege by affidavit that the award made to Kenga Katana, Jonson Naunga and Paul Karisa kahindi was erroneous and excessive. That attempt by the respondent is neither here nor there because the court has not been properly moved. Even if the court was to excuse the failure to follow the known

procedure for seeking review, the calculations made by the respondent in paragraphs 6,7,&8 of her written submissions and paragraphs 3,4,&5 of Replying affidavit by prof. Muhamed S. Rajab is incorrect. I therefore decline to review the award as informally requested by the respondent.

9. Be that as it may, the court has on its own motion exercised the powers donated under rule 33 correct clerical errors apparent on page 14, 21 and 22 of the impugned judgment by rectifying a mistake or arithmetical error regarding the quantum of damages awarded to Kenga Katana, Johnson Naunga and Paul Karisa Kahindi and the aggregate sum awarded. The court erroneously summed up the specific awards made to the three said grievants and also in calculating the aggregate award to all the 22 grievants. I therefore rectify the mistake by reducing the award made to Kenga Katana from kshs. 198,607 to kshs. 172,203, Johnson Naunga from kshs.156,598 to Kshs.156,754 and Paul Karisa Kahindi from kshs.156,598 to kshs 156,754. I also rectify the aggregate award for the 22 grievants from kshs.4,195,319 to ksh.3,960,111.

10. In view of the admission by the respondent that Dorca Salama Randu should be awarded her dues just like the said 22 grievants, the judgment of this court dated 13.11.2015 is reviewed and corrected by adding an award in favour of Dorcas Salama Randu, based on her gross pay of kshs. 13,202, as follows:

Notice	kshs. 39,606
Leave	kshs. 11,127
Underpayment	kshs. 68,662
Compensation	<u>kshs. 79,212</u>
Total	<b><u>kshs.198,607</u></b>

11. The effect of the foregoing award is to make the aggregate award for the 23 grievants total to kshs.4,158,718, plus costs and interest as earlier ordered in the judgment delivered on 13.11.2015.

### **Disposition**

12. For the reasons stated above, the applicant's application dated 12.2.2016 is allowed only to the extent that the judgment of this court dated 13.11.2015 is reviewed and corrected in manner stated above and the aggregate award for the 23 grievant erroneously indicated on page 22 the said judgment as Kshs.4,195,319 is corrected and rectified by substituting it with **the sum of kshs 4,158,718 as clarified above.**

**Signed, dated and delivered at Mombasa on 18<sup>th</sup> day of November 2016.**

**ONESMUS N.MAKAU**

**JUDGE**