



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO.2046 OF 2013

BENJAMIN LANGWENCLAIMANT

VERSUS

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....RESPONDENT

RULING

1. By application dated 27th October 2016, the respondent's case is that in the ruling of the judgement of the court on 30th May, 2016 orders in the alternative are that (a) 3 years net salary should be paid to the Claimant and not 3 years gross salary. That order (b) was clear as it specifically relates to gross salary unlike order (a) that refers to net salary.
2. That the applicable net salary for the Claimant is kshs.225,155.00 for 3 years all amounting to Kshs.8,105,580.00 as his net salary.
3. In reply, the claimant's case is that the natural and ordinary meaning of the orders and judgement of 30th May, 2016 is that order (a) relates to gross salaries due to the Claimant for 3 years and not the net salary. The gross salary due as of 30th November, 2013 is the one to apply in the computation of terminal dues payable to the claimant.
4. That such gross salary was kshs.321, 650.00 per month which rate should apply and not the net pay.
5. In the judgement of the court delivered on 30th May, 2016 in the alternative, it was ordered and directed thus;

In the alternative to the above;
 - a) *The Respondent shall pay the Claimant salaries due for 3 years;*
 - b) *Compensation amounting to 12 months' salary at the last gross salary due on 30th November 2013;*
 - c) *The Claimant is awarded costs.*
6. The contest by the Respondent with regard to the interpretation and application on the computation of the above dues is that the 3 years salaries should be paid at *net pay* and not *gross pay* on prayer (a) as unlike order (b) which is specific and relates to *gross pay*.
7. The provisions applicable with regard to computation all terminal dues owing and or directed by the

court to an employee is section 49 of the Employment Act. Section 49(1)9

49. (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—

...

(c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal. [Emphasis added].

8. On the finding of the court that the claimant was unfairly terminated from his employment with the respondent, that basis alone give him remedies available under section 49 of the Employment Act. Upon such termination, all terminal dues payable are to be based upon the last *gross monthly wage or salary of the employee at the time of dismissal/termination.*

9. There is no rationale as to why the terminal dues should apply with regard to *net pay* as all benefits, allowances, emoluments and all work related entitlement are due to the employee had the termination not been effected. To thus base the terminal dues on the *net pay* would be to effectively deny the employee the chance to earn the rightful pay and apply a computation that is to the disadvantage of the employee.

10. However, even where the computation of terminal dues relate to the *gross monthly wage of the employee* section 49(2) of the Employment Act apply automatically. This is not at the option of the employer and where the court specifically prescribes or is silent, section 49(2) of the Employment Act is mandatory as the statutory deduction payable by the employer to the relevant body must be deducted based on the *gross wage*.

(2) Any payments made by the employer under this section shall be subject to statutory deductions.

11. In a ruling of the court in **Wilson Sibiyia versus Kenya National Examination Council, Cause No.1659 of 2014**; the court held that;

On the principal sum, the court award of kshs.947, 575.00, section 49(2) of the Employment Act apply. Such provisions of section 49(2) are not discretionary and are mandatory.

(2) Any payments made by the employer under this section shall be subject to statutory deductions.

...

Reference to various court case where statutory deductions were not ordered is not relevant herein. The law does not change simply because there is a lapse in compliance with mandatory provisions of the law. Section 49(2) of the Employment Act is stated in mandatory terms and not subject for court discretion.

12. In **John Kinyanjui Gateru versus The Family Bank Ltd, Cause No.743 of 2013**; on the issue of the payment of terminal dues owing to an employee upon dismissal, the court held that;

...Equally section 49(2) of the Employment Act requires an employer to deduct all statutory dues and deductions such as the taxes due before paying an employee. Such deduction apply to terminal dues as well

13. There is therefore good basis to pay an employee terminal dues based on the gross salary as from such gross pay, statutory deductions are required. Such would not put an employee at a disadvantage.

14. In any event where the employer fails to effect the statutory dues under section 49(2) of the Act, such is payable to the Kenya Revenue Authority (KRA) and to apply the *net pay* to compute the dues owing to

the Claimant is to force him into double taxation as his P9 form must be issued by the employer for his KRA annual returns. Where the Claimant is found to have failed to pay his statutory dues, there is a penalty applicable.

15. Therefore for the due compliance with the law, the Respondent shall compute the terminal dues owing to the Claimant by the use of his *gross monthly salary at the time of termination of employment*. Such dues shall also be subject to statutory deductions. This then translates to the gross pay of the Claimant as at 30th November, 2013 all at Kshs.321,650.00 per month and for the 3 years as per the order (a) of the judgement of 30th May, 2016 all being Kshs.11,579,400.00.

In this case therefore, the 3 years dues payable to the Claimant in terms of order (a) shall be based on the *gross salary* all at Kshs.11,579,400.00 and be subject to statutory deductions in accordance with section 49(2) of the Employment Act.

Orders accordingly.

Delivered in open Court at Nairobi this 15th day of December, 2016.

M. MBARU

JUDGE

In the presence of:

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