



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 155 OF 2013

(Originally Nairobi Cause No. 315 of 2011)

MICHAEL KIMANI MWANIKI

1ST CLAIMANT

CECILIA WANGUI WAITHAKA

2ND CLAIMANT

v

NGOTHO COMMERCIAL AGENCIES LTD

RESPONDENT

RULING

1. On 17 October 2014, Ongaya J delivered judgment in which judgment was entered in favour of the Claimants in the following terms

1. A declaration that the respondent's termination of the claimants' employment was unfair.

2. The respondent to pay each claimant 12 months' gross salaries at the rate of their respective last gross monthly pay; one month pay in lieu of termination notice and pay in lieu of annual leave as prayed for in the memorandum of claim; and the respondent to pay by 1.12.2014 failing interest to be payable at court rates till full payment.

3. The claimants to file and serve the computation of the dues in order (2) above, within 7 days, and to record the quantum on a convenient mention date.

4. The respondent to pay costs of the suit.

2. On 22 October 2014, the Respondent filed a Notice of Appeal.

3. On 24 October 2014, the Claimants filed the computations as ordered by the Court.

4. The 1st Claimants computations were

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|------------------------------------|-----------------|
| a. One month pay in lieu of notice | Kshs 8,162/- |
| b. Annual leave | Kshs 36,129/- |
| c. 12 months' gross salary | Kshs 112,635/60 |

TOTAL **Kshs 156,927/-**

and for the 2nd Claimant, the computations were as follows

a. One month pay in lieu of notice	Kshs 11,031/-
b. Annual leave	Kshs 36,129.30
c. 12 months gross salary	Kshs 152,227.80

TOTAL **Kshs 199,388/-**

5. The Respondent filed its computations on 29 October 2014, as follows:

1st Claimant

One month pay in lieu of notice	Kshs 6,500/-
Annual leave	Kshs 35,244/-
12 months gross wages	Kshs 78,000/-

TOTAL **Kshs 119,744/30**

and 2nd Claimant

One month pay in lieu of notice	Kshs 7,500/-
Annual leave	Kshs 36,129.30
12 months gross wages	Kshs 90,000/-

TOTAL **Kshs 133,629/30**

6. On 31 October 2014, the Claimants filed submissions to support the computations.

7. On 16 December 2014, the Claimants filed a Notice of Motion seeking review of the judgment delivered on 17 October 2014. This review is the subject of this ruling.

Claimants' case on the review

8. The Claimants case is that the Court's findings that the Claimants were employed on commission basis and therefore claims for underpayment, overtime, public holidays and Saturdays failed were not supported by the evidence.

9. The Claimants further contended that the finding that they were entitled to 12 months gross wages compensation at the rate of last gross salaries was not correct.

10. According to the Claimants, the 2nd Claimant's last basic pay was Kshs 7,500/- .

11. The Claimants submitted therefore that there were errors in the judgment which merited review.

Respondent's case

12. The Respondent opposed the motion and relied on an affidavit sworn by one Thomas Ngotho.

The Respondent asserted that the application did not meet the threshold for review under rule 32 of the Industrial Court (Procedure) Rules, 2010, because the Claimants had not disclosed the discovery of new and important evidence which was not available at time of hearing, and that the grounds put forward were grounds of appeal.

13. The Respondent also contended that there was no error apparent on the face of the record; the judgment was not in breach of a written law and that no sufficient reasons had been shown to review the judgment.

14. The record bears that the Respondent has filed a Notice of Appeal against the judgment.

Evaluation

15. The Court had ordered the Claimants to compute, file and serve their entitlements according to the terms of the judgment. The Claimants and the Respondents each filed their computations. The computations did not agree on the entitlements.

16. If I understand the Claimants correctly, they are asserting that the Court should have awarded the head of claim on underpayments based on the basic minimum wages as prescribed in Legal Notice No. 38 of 2006 and Legal Notice No. 98 of 2010.

17. For the 1st Claimant it is contended that the basic minimum wage was Kshs 8,162/- and house allowance of Kshs 1,224.30 while for the 2nd Claimant, the basic minimum wage was Kshs 11,031/- and house allowance was Kshs 1,654/65 while she was earning Kshs 7,500/- per month.

18. I have looked at the Memorandum of Claim filed in Court on 9 March 2011. The issue of underpayments was stated as one of the issues in dispute and was traversed at length in the Respondent's Response.

19. In testimony, the 1st Claimant testified that his salary was Kshs 6,500/- at time of termination. He made reference to salary vouchers (Exh. VI(a)). He stated under cross examination that from 2009 during a month he could not recall, he was paid on a commission basis and he was no longer on a monthly salary. He categorically stated that at termination, he was paid by commission and that his work determined the commission.

20. The 2nd Claimant on her part testified that at time of termination, she was earning Kshs 7,500/- but did not give any oral evidence as to whether she was on commission or monthly pay.

21. The Respondent's witness on his part stated that the 1st Claimant was on commission, while the 2nd Claimant was on a salary.

22. The Court has considered all the surrounding circumstances of the instant Cause, the fact that an appeal has been preferred and the policy of economical and judicious use of judicial time and has formed the following opinions.

23. One, proceeding to determine the application for review may fundamentally alter the findings of the trial Court such that the substratum of any appeal by the Respondent may be removed. That would not be wise or prudent and would amount to short circuiting the judicial process.

24. Two, a review application pursuant to rule 32 of this Court's Rules should not be an avenue to disturb or relook at the factual findings made by a Court.

25. Three, although the Claimants pleaded underpayments in the Memorandum of Claim, they did not lead any evidence as to lead the Court to reach a finding that they were underpaid.

Conclusion and Orders

26. Arising from the above discussion, the Court declines to review the judgment of Ongaya J, save to settle the awards payable to each of the Claimant's on the basis of the salaries proved in Court.

27. The Court therefore computes the awards and orders the Respondent to pay the Claimants as follows

1st Claimant

a) One month pay in lieu of Notice	Kshs 6,500/-
b) Accrued Leave	Kshs 35,244/30
c) 12 months wages compensation	Kshs 78,000/-
TOTAL	Kshs 119,744/30

2nd Claimant

a) One month pay in lieu of Notice	Kshs 7,500/-
b) Accrued leave	Kshs 36,129/30
c) 12 months wages compensation	Kshs 90,000/-
TOTAL	Kshs 133,629/-

28. Each party to bear costs of the review application.

Delivered, dated and signed in Nakuru in Court on 20th day of February 2015.

Radido Stephen

Judge

Appearances

For Claimants Mrs. Ndeda instructed by Ndeda & Co. Advocates

For Respondent Ms. Muthoni instructed by