



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 1910 OF 2013**

**DAVID MUTIE ..... 1<sup>ST</sup> CLAIMANT**

**KEVIN NYAUNGA GISAIRO..... 2<sup>ND</sup> CLAIMANT**

**JOSEPHAT MUTETI SAVA .....3<sup>RD</sup> CLAIMANT**

**VERSUS**

**DAVID SHELDRIK FOUNDATION ..... RESPONDENT**

**RULING**

1. By application dated 16<sup>th</sup> March 2015, the claimant seek the review of the court judgement delivered on 16<sup>th</sup> December 2014 on the grounds that in the court judgement, the court directed that the claimants be paid their salaries, out of station allowances, compensation for unfair termination, payment in lieu of notice, notice pay and be issued with certificates of service. That the court noted that the claimants had received Kshs.166, 670.00, Kshs.60, 446.00 and Kshs.148, 970.00 respectively but such amounts were not outlined as to their purpose save that it included severance pay. The court then directed that in computing the judgment amounts, such paid amounts be deducted from the final award. The court erred in that such amounts that were paid had not been added to the final award and to subtract the same would disadvantage the claimants, such amounts had been paid for overtime that was due and owing as noted in the august and September pay slips. Such monies were paid after the claimants came to court and only fair to have such deducted amounts be paid to the claimants. The claimants should also be awarded costs as the respondent was found to be at fault.

2. In reply the respondents filed the Replying Affidavit sworn by Charles Kariuki. That the application by the claimants is not for review but an indication that the claimants are aggrieved by the decision of the court and should file an appeal. The threshold under rule 32 of the Industrial Court Rules has not been met, the facts, the law and analysis of the court is clear and does not require any clarification. Paragraph 7 of the memoranda in support to the application is ambiguous as overtime is paid as and when it arises and the award herein was made based on the basic pay paid to the claimants. The amounts paid to the claimants were deposited with the labour Officer way before the claimants filed their claims in court. The application for review should be dismissed with costs.

3. In submissions, the claimants stated that the review sought herein relate to two items; one being that in the court award, there are amounts to be deducted from the final judgement amount which was erroneous as such amounts had not been added to the amounts in the final award so as to warrant a deduction of the same. secondly the claimants were not awarded costs yet such costs follow the event and should be awarded.

4. The claimants submitted that the claims by the claimants included that of unpaid salaries; compensation; notice pay; unpaid leave; unpaid house allowances; severance pay; unpaid days off; and unpaid overtime. The court granted most of the prayers save for the unpaid salaries, severance pay and unpaid overtime. Overtime was undisputed and was paid to the claimants vide their August and September pay slips and when the claimants argued their interlocutory application, the claimants were paid Kshs.166,670.00; Kshs.60,446.00 and Kshs.148,970.00 respectively being dues for severance pay and outstanding salaries for August and September, save that the amounts that were computed by the court as allowances and overtime were not factored and the court directed that the paid amounts be deducted from the final award. There was an error as the paid amounts were for;

- a) Severance pay;
- b) Outstanding salaries; and
- c) Undisputed overtime.

5. By directing that the paid amounts be deducted from the award amounts, the claimants were denied such payments.

6. The court rejected the claim for unpaid overtime. The paid amounts included the undisputed overtime payment that the respondent was willing to pay and were thus improper for the court to have such amounts deducted from the award amount. To deduct such amounts is to refund the respondents the paid amounts. This has prejudiced the claimants.

7. The claimants also submitted that the court having found the respondents at fault, costs should have been awarded. There was a demand notice issued way before the claimants came to court and the matter was not settled. Costs should have followed the event.

8. In response, the respondent submitted that the court judgement is clear with regard to what was awarded. The claimants had collected their terminal dues which dues were subject of the filed claim and by receiving part payment after the interlocutory application; they cannot now seek to have the same amount again. There is nothing new for review, there is no error or mistake or clarification that ought to be made. The application is an abuse of the court process and should be dismissed.

9. Costs to parties before this court are discretionary. This was not awarded. To claim the same as in the application is to challenge the court decision which should be in an appeal and not review application.

### **Determination**

10. The gist of the application is that the court in its judgment on 16<sup>th</sup> December 2014 made orders that all the dues awarded to the claimants should be subtracted o the paid amounts of Kshs.166, 670.00; Kshs.60, 446.00 and Kshs.148, 970.00 already paid to the claimants during the pendency of the suit. The basis of such a finding is that such amounts when paid, the claimants failed to outline as to what items had been paid save that this included payment of severance pay. It is worth noting that when the claimants came to court on 28<sup>th</sup> November 2013, their claims included that of;

- a) Unpaid salaries for august and September 2013;
- b) 12 months compensation for unlawful termination;
- c) One month salary in lieu of notice;
- d) Unpaid leave;
- e) Unpaid house allowance;

- f) Severance pay;
- g) Unpaid off days; and
- h) Unpaid overtime.

11. The interlocutory application filed together with the claim on the same date was seeking for urgent orders that sought to have the immediate payment of salaries and allowances due to the claimants for august and September 2012. It was thus acknowledged during the pendency of the hearing that the respondent paid Kshs.166, 670.00; Kshs.60, 446.00 and Kshs.148, 970.00 to the claimants. Such amounts were not outlined during the hearing as to what items were covered.

12. I have gone through the entire judgement of the court, each claimed item has been singled out and analysed and a finding made upon good reasons. Where the claimants were seized of the evidence now sought to be submitted as tot eh analysis of what was contained in the paid amounts of Kshs.166, 670.00; Kshs.60, 446.00 and Kshs.148, 970.00, this was in their possession during the hearing and when parties made their final submissions. to recall such evidence now, the court having analysed the evidence and material at hand when making the award is to defeat the very purpose of Rule 32 of the Industrial Court Rules. Such a review as outlined in the Rule is not meant to introduce new matters that were in the possession of the claimants and failed to produce it at the opportune time. To move the court in that direction would mean that there is no end to litigation and every time a claimant recalls or remembers that they did not say something when they had the chance in court, they would rush back and escalate their claims. this is not what due process entails. At the hearing of the case, each party had the time to state their case and allow the court to arbitrate. That has been done. The current application is not a good basis to reopen the case.

13. Costs warded to parties in this court are governed in law. Section 12 (4) of the Industrial Court Act is important to restate here;

*In proceedings under this Act, the Court may, subject to the rules, make such orders as to costs as the Court considers just.*

14. That being the law, the award of costs is thus discretionary. The court must assess each case on its merits, and where considered just, award costs. The court thus addressed itself in this regard in the judgement delivered on 16<sup>th</sup> December 2014.

**The application dated 16<sup>th</sup> March 2015 must therefore fail. Costs being discretionary, each party shall bear their own costs herein.**

**Delivered in open Court dated and signed at Nairobi on this 30<sup>th</sup> day of June 2015.**

**M. MBARU**

**JUDGE**

**In the presence of**

**Lilian Njenga: Court Assistant**

.....

.....