



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1443 OF 2010

BERNARD MOCHAMA ONDUMA1ST CLAIMANT

GEORGE MANGERA NYASIMI2ND CLAIMANT

VERSUS

AMOS KIMWOMI NYARIBO

DIRECTOR, BORA AND BONO DRY CLEANERS.....RESPONDENT

Mr. Mosei for Respondent (Applicant)

Mrs Kamau for Claimant (Respondent)

RULING

1. The Applicant filed an Application dated 30th January 2013 seeking to review the judgment and award of **Hon. Lady Justice Hellen Wasilwa**. The Application is supported by a Memorandum of Review in terms of **Rule 32** of the **Industrial Court Rules 2010**.
2. There are two grounds for review raised to wit;
 - i. The Award of Kshs.23,524.50 to the 1st Claimant and Kshs.11,475/= in respect of house allowance was made in error on the face of the record since the Claimant in paragraph 3 of the statement of claim states that the 1st Claimant was paid a consolidated salary of Kshs.6,000/= and 2nd Claimant was paid a consolidated salary of Kshs.4,500 per month.
 - ii. The Award in lieu of leave to the Claimant in the sum of Kshs.87,808/= for 8 years and Kshs.53,550/= in respect of 10 years for the 2nd Claimant was granted contrary to available evidence since the Respondent intended to show that the Claimants were only entitled to leave for 3 years.

The Applicant prays for the judgment to be reviewed accordingly.

Analysis of the judgment

3. The Judge found that he earned a salary of Kshs.15,680/= per month while the 2nd Claimant earned Kshs.7,650/= per month at the time of the dismissal.

4. In paragraph 3 of the statement of claim, it is pleaded that the 1st Claimant Mochama Onduma at the time of employment on 15th January 1998, earned a consolidated salary of Kshs.6,000/= per month whereas the 2nd Claimant Mr. George Mangera Nyasimi was employed in August 1998 at a consolidated monthly salary of Kshs.4,500/=. Neither of the Claimants sought to be paid house allowance in their pleadings.

Leave pay

5. Both the 1st and 2nd Claimant sought to be paid in lieu of 3 years leave in paragraph 6 of the Statement of Claim in the sum of Kshs.30,819.60 for the 1st Claimant and Kshs.9,180/= for the 2nd Claimant.

6. The judge specifically found that the 1st Claimant went on leave in the year 2007 and 2008 and went ahead to grant him payment in lieu of leave for 8 years. The 2nd Claimant was granted ten (10) years leave.

The law

7. **Rule 32** of **The Industrial Court (PROCEDURE) Rules, 2010** provides inter-alia that a judgment may be reviewed;

(b) on account of some mistake or error apparent on the face of the record; or

(c) on account of the Award, Judgment or Ruling being in breach of any written law or;

(e) for any other sufficient reasons.

Application for review in terms of **Rule 32(2)** is made to the Judge who passed the decree or made the order sought to be reviewed.

An exception to this rule in terms of the **Civil Procedure Rules, 2010** in order **45 2(2)** is that;

“if the Judge who passed the decree or made the order is no longer attached to the Court, the application may be heard by any other judge who is attached to that Court at the time the application comes for hearing.”

At the time this Application was filed, the trial judge had been transferred to Kisumu Industrial Court and therefore it was expedient for me to hear the Application.

Determination

8. The Court is satisfied of the following:

- i. that there is an error on the face of record with respect to the Award of house allowance in respect of both Claimants in that there was no pleading for house allowance and as a matter of fact it is conceded that the two Claimants earned consolidated salaries.

Accordingly, the Award of:

- (a) Kshs.23,524.50 for house allowance to the 1st Claimant is set aside; and

(b) Kshs.11,475/= for house allowance with respect to the 2nd Claimant is also set aside.

(ii) with regard to the Award for the two Claimants in lieu of leave days not taken there is an apparent error on the face of the record in that;

- a. with respect to both Claimants, they had pleaded to be awarded in lieu of leave days not taken for three (3) years. The Court awarded the 1st Claimant Leave pay for eight (8) years and ten (10) years for the 2nd Claimant. These awards are set aside and substituted as follows:

1st Claimant

payment of three (3) years Leave in the sum of Kshs.32,928/=; and

2nd Claimant

payment of three (3) years Leave in the sum of Kshs.16,065/=.

The rest of the Judgment remains as before.

Dated and Delivered at Nairobi this 20th day of June, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE