



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI

Cause Number 691 (N) of 2009

BETWEEN

DANIEL MUTISYA

MASESI.....CLAIMANT
NT

VERSUS

ROMY

MADAN.....1ST
RESPONDENT

GENERAL FOODS (KENYA LIMITED)

.....2ND RESPONDENT

Rika J

CC. Leah Muthaka

Mr. Kandere instructed by S. K. Opiyo & Company Advocates for the Claimant

Mr. Wanada Instructed by Shapley Barret & Company Advocates for the Respondents

RULING

The Award was delivered on 12th April 2013, granting the Claimant the sum of Kshs.369,495 in accumulated house rent allowance.

The Respondents filed an Application for Review of the Award dated 3rd May 2013. The respective parties' Advocates canvassed the Application on 12th June 2013.

There are two grounds upon which the application rests:-

1. The Court made an error in finding that that the Respondents did not produce evidence to show that the salary paid to the Claimant was consolidated, including the housing element.
2. The Claimant's salary in 1986 was not Kshs.8,300.

The Claimant filed Grounds of Opposition stating that the Court is *Functus Officio*, the Respondents having preferred an Appeal against the Award.

The Court Finds and Orders:-

1. It is true the Respondents produced a copy of the contract of employment dated 1st November 2007, concluded with the Claimant. The contract states:-

“You will be paid a consolidated gross salary i.e. including house allowance of Kshs.8,600. This salary will be paid in arrears at the end of each month.”

2. It was not a correct finding of fact, that the Respondents did not produce anything to show a clause on the housing element. The record is hereby corrected to show that the contract of employment contained a clause stating the Claimant would be paid a consolidated salary.

3. The Clause however, is not supported by the actual Pay Statements issued to the Claimant. The Payslip for April and May 2009 - Claimant's appendix 2 - show a Basic Pay of Kshs.8,600. Basic Pay means the amount paid to the employee, without any other allowances. The Pay Statements are clear Kshs.8,600 was paid less any other allowances.

4. The conclusion of the Court would be that the initial contract of employment was either varied subsequent to 2007, or the Respondents gave the Claimant a contract containing ambiguities. Such ambiguities must be resolved in favour of the employee. In light of the variance between the contract of employment and the statutory pay statement, the Court does not see any practical effect, of the wrong finding that the Respondents had not given any evidence to support their claim that salary was consolidated.

5. As to the rate payable in 1986, the Claimant testified he was paid Kshs.8,300. Mr. Wanada did not cross-examine him on this rate. Mr. Romy Madan did not say anything to contradict the Claimant on this rate throughout his evidence. It is not enough for the Respondent to come on review, and allege that the amount is too high for a General labourer in 1986. The General Wage Order provides for the wage floor, and parties are free to negotiate above that floor. It was for the Respondent, who keeps custody of employment records, to contradict the Claimant, either through the records or evidence of its witness. Romy Madan unfortunately lost his records in a fire, and gave no oral evidence to contradict Masesi, or even assist the Court in arriving at any other starting salary. The figure of Kshs.8,300 was pleaded in the Statement of Claim, and given in the testimony of the Claimant. The Respondents did not at any stage challenge this figure.

For these reasons, the application for review dated 3rd May 2013 is dismissed with no order on the costs.

Dated and delivered at Nairobi this 19th day of June 2013

James Rika

Judge