



REPUBLIC OF KENYA
INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 1780 OF 2013

MATHIAS AMATA MWALO.....CLAIMANT

VS

WILDLIFE CLUBS OF KENYA.....RESPONDENT

RULING

Mr Mbichire for Respondent/Applicant

Mr Kiprono for Claimant/Respondent

An application seeking to review the Award of Hon. Justice Mathews Nduma delivered on 3rd May, 2013 was filed on 7/6/2013. The application is opposed by the Claimant and has filed a replying affidavit.

The basis for the review sought is that the court granted the claimant gratuity calculated at 25% of the total gross pay for the period worked in the sum of Kshs 323,750.

The Applicant submits that the gratuity ought to have been calculated at 12.5% of the total gross pay giving a total of Kshs 161,875 instead of the awarded amount.

The 12.5% is alleged to be in terms of Clause 13.9 of the Respondent's policy and procedures manual which provides for a pension scheme which an employee contributes 7.5% whilst the organization contributes 12.5%.

In the statement of claim dated 17/10/2011 and filed by the claimant on 18/10/2011, it was specifically pleaded in paragraph 11 that service pay was to be calculated at the rate of 25% of the total gross pay of 323,750.

The Respondent responded to paragraph 11 aforesaid in its memorandum of defence dated 17/11/2011 and filed on 21/11/2011 by making a bare denial that service pay was not payable.

In court, the Claimant in his sworn testimony reiterated that he was entitled to service pay calculated at 25% of the total gross pay.

Two witnesses testified in support of the Respondent's case, namely Isabella Mbandi a former colleague of the Claimant and Mr David Ouma, the current Human Resource Manager of the Respondent.

None of the two witnesses refuted the testimony by the Claimant regarding the rate applicable in calculation of service pay. This evidence by the Claimant therefore was completely unchallenged.

An application for review of a judgment of court in terms of Rule 32 of the Industrial Court (Procedure) Rules, 2010 may be brought by a person aggrieved by a decree or an order of the court –

- a. *“If there is a discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;”*

There has been not the slightest attempt to justify the introduction of the policy and procedure manual sought to be relied upon by the Respondent/Applicant at this late hour. It is purported to be an official document of the Respondent which was at all material times in the knowledge and possession of the Human Resource Officer who testified before court.

For this reason alone, the Applicant has failed to meet the threshold for review of the judgment of court dated 3rd May, 2013 and delivered in open court on the same date.

Accordingly the application is dismissed with costs to the Claimant / Respondent.

It is so ordered

Dated and Delivered at Nairobi this 13th day of August, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE.