



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 1845 OF 2011

MATHEW LUCY CHERUSA.....CLAIMANT

VS

POVERELLE SISTERS OF BELGAMO T/A

BLESSED LOUIS PALAZZALO HEALTH CENTRE.....RESPONDENT

RULING

Background

1. On 4th April 2013, the Court delivered an Award in favour of the Claimant for the sum of Kshs. 171,000 being salary arrears. The Respondent was agreeable to settling the Award amount but contested the tabulation of the salary arrears as presented by the Claimant and adopted by the Court.
2. The Respondent's Advocate therefore wrote to the Claimant's Advocate on 22nd April 2013 raising the issue of tabulation which according to the Respondent was erroneous. The Claimant did not respond to the Respondent's letter but sent auctioneers to the Respondent's premises to proclaim the Respondent's goods.

The Respondent's Application

3. By consent of the parties, the application for stay of execution pending determination of the application for review was allowed on 8th July 2013. The Court then directed the parties to file their respective tabulation of the dues payable to the Claimant as well as submissions on payment of Auctioneer's fees.
4. The Respondent's case is that the figure presented by the Claimant as tabulation of salary arrears for period between 2009-2011 was incorrect and there was therefore an error on the face of the court record which the Court ought to rectify. According to the Respondent, the Claimant's monthly basic salary during the period in question was as follows:
 - a. January 2009-October 2009-Kshs. 12,160
 - b. November 2009-December 2010-Kshs. 14,050
 - c. January 2011-September 2011-Kshs. 14,550

The Claimant's Reply

5. In her Replying Affidavit filed on 5th July 2013, the Claimant deponed that in the tabulation

submitted by the Respondent as 'MG1' the Respondent was mixing and interchanging the annual increment with gratuity in a bid to defeat the Claimant's claim.

6. The Claimant further deponed that the Respondent's application amounted to asking the Court to sit on appeal over its own decision. Further, since the Respondent had not challenged the Claimant's tabulation at the trial, it was precluded from applying to the Court for the case to be reopened.

Ruling by the Court

7. The Claimant has taken the view that for the Court to entertain the Respondent's application, it would be sitting on appeal of its own decision. I disagree.

8. Section 16 of the Industrial Court Act provides that:

16. The Court shall have power to review its judgments, awards orders or decrees in accordance with the Rules.

9. Pursuant to this provision, Rule 32(1) of the Industrial Court (Procedure) Rules, 2010 provides as follows:

32. (1) A person who is aggrieved by a decree or an order of the Court may apply for a review of the award, judgment or ruling—

(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; or

(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;

(d) if the award, judgment or ruling requires clarification;

(e) for any other sufficient reasons.

10. It is therefore incorrect to state that for the Court to review this matter, it would be sitting on appeal over its own decision. Consequently, I will proceed to determine the application for review on its own merit.

11. It seems to me that the bone of contention in the tabulation of what is payable to the Claimant has to do with the basic salary paid to her from January 2009. According to the Claimant, she was paid a basic salary of Kshs. 8,900 in the year 2009. The Respondent on the other hand submitted that the Claimant was in fact paid a basic salary of Kshs. 12,160 during this period.

12. During the trial, the Claimant produced her pay slips for November 2010, August 2011 and September 2011. On its part, the Respondent produced a Muster Roll showing the Claimant's basic salary for period between June 2008 and June 2009 as Kshs. 12,160. The Claimant did not controvert the evidence produced by the Respondent in this regard. The Court therefore adopts the figure of Kshs. 12,160 as the basic salary paid to the Claimant in 2009 and reviews the Award as follows

Year	Basic Salary	Basic salary payable (with	Difference per	Cumulative
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	paid (Kshs.)	25% increment)	month	difference
2009 (12 moths)	12,160	14,063	1,903	22,836
2010 (12 moths)	14,050	17,578	3,528	42,336
2011 (9 moths)	14,550	21,973	7,423	66,807
Total		Kshs. <u>131,979</u>		

This amount is subject to statutory tax. The Claimant and the Respondent will pay the Auctioneer's charges on a 50-50 basis and each party will meet their own costs.

Orders accordingly.

DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 7TH DAY OF AUGUST 2013

LINNET NDOLO

JUDGE

In the Presence of:

.....*Claimant*

.....*Respondent*