



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 1065 OF 2010

JOHN KAMAU WANYOIKE.....CLAIMANT

VS

CODA CONSULTING GROUP LIMITED.....RESPONDENT

RULING

Introduction

1. On 15th December 2011, Kosgei J (as he then was) delivered an Award in favour of the Claimant made up of one month's salary in lieu of notice, days worked, accrued leave and 10 months' salary in compensation for unlawful loss of employment. The Respondent subsequently moved the Court for a review of the Award.
2. Upon hearing the Respondent's application for review, Wasilwa J found an error apparent on the face of the record, being a miscalculation of accrued leave days. Consequently, the Learned Judge reviewed the figure on leave from Kshs. 210,000 to 79,356 .

The Claimant's Application

3. On 25th June 2013, the Claimant filed an application for review of the Ruling by Wasilwa J on the ground that the Learned Judge, in reviewing the Award by Kosgei J erred in law and fact by using a factor of 30 days instead of 21 days in calculating the amount in respect of accrued leave. According to the Claimant, the error in calculation had prejudiced him by the sum of Kshs. 33,977.
4. This application first came before me *ex parte* on 26th June 2013 when I certified it urgent and directed the Claimant to serve the Respondent for an *inter partes* hearing on 16th July 2013 on which date there was no appearance for the Claimant prompting the Court to dismiss the application with no order for costs.
5. The Claimant then filed the current application on 22nd July 2013 under Certificate of Urgency seeking orders for reinstatement of the application for review dated 25th June 2013 on the ground that on 16th July 2013, when the application was dismissed for non attendance, Counsel had proceeded to the wrong court.

The Respondent's Opposition

6. The Respondent filed Grounds of Opposition on 31st July 2013 terming the Claimant's application as bad in law and an abuse of the court process. First, the reasons given for non attendance were insufficient. Second, the Court was *functus officio* since the Award delivered by Kosgei J on 15th

December 2011 was reviewed by Wasilwa J on 17th October 2012.

Ruling by the Court

7. From the court record, it is evident that Counsel for the Claimant failed to exercise due diligence in this matter. However, in the interest of justice, the Court has decided to allow reinstatement of the application for review which I will now proceed to determine on merit.

8. Counsel for the Respondent took the view that this Court is *functus officio* since the Award in question has already been subjected to review. I disagree.

9. Rule 32 (1) (c) of the Industrial Court (Procedure) Rules, 2010 provides that:

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—

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

10. Counsel for the Claimant submitted that, the Ruling by Wasilwa J itself carries an error which necessitates review. The application is not for review of the Award delivered by Kosgei J.

11. According to the Claimant the Learned Judge should have used a factor of 21 days and not 30 days to calculate the amount payable on accrued leave. It seems to me that the Claimant's argument in this regard stems from a confusion between the factor to be used in calculating leave days with the factor to be used in calculating the daily rate to be used in determining pay in lieu of leave.

12. In my view, the factor to be used in calculating daily rate for employees in regular continuous employment is 30 days since these employees are deemed to be in employment even on rest days and public holidays. In the case before me the number of accrued leave days was already determined at 68 days. The only figure for determination before Wasilwa J was the daily rate and I agree with the Learned Judge that the factor to be applied was 30 days and not 21 days as argued by the Claimant.

13. The application for review therefore fails and is dismissed with no order for costs.

DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18TH DAY OF SEPTEMBER 2013

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JUDGE

In the Presence of:

.....**Claimant**

.....**Respondent**