



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1410 OF 2010

SAMUEL ITEBA ONSARECLAIMANT/RESPONDENT

-VERSUS-

TRAVELLERS BEACH HOTELRESPONDENT/APPLICANT

Mr. Ambege for Respondent/Applicant.

Mr. Wachira for Claimant/Respondent.

RULING

The Applicant/Respondent was aggrieved by the decision of Honourable Justice Byram Ongaya made on 26th October, 2012 and lodged an application for review of the decision on 18th December, 2012.

The honourable Judge made the following findings of fact;

- i. *From the evidence before court, the court was satisfied that the Claimant was not a union member as alleged by the Respondent who did not produce the Collective Bargaining Agreement (CBA) to apply to the Claimant;*
- ii. *The Respondent failed to produce evidence to show that the Claimant was paid salary for September, October and half of November, 2009. The Judge found that the signatures the Respondent purported to rely on as evidence of acknowledgement of receipt of the payment were not authenticated and could not be said to belong to the Claimant. No payslips were produced by the Respondent to prove payment. He awarded Kshs.73,800/= consequently as arrear salary.*
- iii. *The Judge also found that the Respondent failed to dispute service pay due and owing to the Claimant in the sum of Kshs.177,120/= for 12 years service in terms of **Section 35 (5)** of the Employment Act. No new evidence has been produced to the contrary.*
- iv. *The Claimant admitted since he resigned and did not serve notice, he was ready and willing to pay one month's salary in lieu of notice in the sum of Kshs.29,520/= which the court found should be deducted from the award of the court.*

The Respondent claims in the review application that since the Claimant was a member of the Union and

had served 12 years the applicable notice period is four (4) months or payment in lieu and thus the court erred in awarding the Respondent one (1) month in lieu of notice. The Respondent argues that the court ignored explicit evidence in the payslip of the Claimant which shows that he paid union dues and therefore the finding was against the weight of evidence adduced hence a breach of the written law as provided under **rule 32 (1) (c)** of the Industrial Court Rules.

The court made a specific finding that there was no evidence that the Claimant was a member of the Union. No evidence even during the hearing of this application was presented to the contrary. The payslip alluded to is not on record. No grounds therefore in terms of **Rule 32 (1) (a) – (e)** have been disclosed by the Applicant/Respondent to fault this finding by the judge. The court had after all impugned the discharge dated 18th August, 2009 which date was long after the resignation of the Claimant.

The application to review the judgment of the court dated 26th October, 2012 lacks merit and same is dismissed with costs to the Claimant/Respondent.

Dated and delivered at Nairobi this 6th day of November, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE