



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 669 OF 2012

MAKAU MBONDO.....CLAIMANT

VS

CROWN INDUSTRIES LIMITED.....RESPONDENT

RULING

1. On 5th June 2013, I delivered an award in favour of the Claimant in the sum of Kshs. 83,741. The Respondent subsequently came back to Court by Notice of Motion dated 12th September 2013 seeking review of the award on the following grounds:

- a. That whereas the Court at paragraph 19 of the Award granted the Claimant four (4) months salary in compensation and one (1) month's salary in lieu of notice, the Court made an error at page 21 in computing the final compensation at five (5) months' salary;
- b. That the Court at paragraph 20 of the Award erroneously awarded the Claimant leave pay when the Claimant had admitted having received final pay as per Appendix 4 of the Defence and the Respondent's submissions at paragraph 21.

2. In reply, the Claimant maintained that the Court had made a just award on the basis of the evidence on record. He deponed that he had not received any leave pay apart from Kshs. 2,732 which was paid to him as part of his final pay in June 2011.

3. The power of the Industrial Court to review its own decisions is donated by Section 16 of the Industrial Court Act, 2011 and Rule 32 of the Industrial Court (Procedure) Rules, 2010.

4. Rule 32 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—

(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;

5.The first point of review has to do with the number of months salary awarded to the Claimant in compensation for unfair termination of employment. Although at paragraph 19 of the Award, the compensation is reflected as the equivalent 4 months' salary, the final award is shown as 5 months' salary. In this regard, I invoke Rule 32(1)(b) of the Industrial Court (Procedure) Rules, 2010 and correct the error on paragraph 19 to reflect an award equivalent to 5 months' salary.

6.The second point of review is on leave pay. In his testimony rendered during the trial, the Claimant told the Court that he never went on leave. He further testified that he was paid Kshs. 2,732 as leave pay. In his Replying Affidavit sworn in opposition to the application for review, the Claimant deponed that apart from Kshs. 2,732 paid to him in June 2011, he had not received any other pay in lieu of leave.

7. In its written submissions, the Respondent attached payslips for the months of December 2008, December 2009, December 2010 and June 2011 reflecting some figures for leave pay. In his Replying Affidavit, the Claimant denied having seen these payslips.

8.A review is neither an appeal nor is it a retrial. The Respondent has not demonstrated to the Court what had prevented them from producing the new documents attached to its submissions filed on 9th October 2013. Parties are responsible for presenting their entire case to the Court and since the Respondent, without any explained reason, failed to produce leave records as required under Sections 10 and 74 of the Employment Act, 2007 during the hearing of the case, this Court has no power to admit any such records at the review stage. The only evidence that is admissible is that which is contained in the Claimant's payslip for June 2011 reflecting leave pay in the sum of Kshs. 2,732 which figure is hereby deducted from the award for leave pay.

9. The Respondent's submission that the Claimant was erroneously paid service pay which should be off set against notice pay amounts to a counterclaim, which should have been presented during the trial.

10. Ultimately, the Award delivered by this Court on 5th June 2013 is reviewed as follows:

- a) 5 months' salary in compensation for unfair termination.....Kshs. 50,600
 - b) One month's salary in lieu of notice.....10,120
 - c) Leave pay (Kshs. 23,021- 2,732).....20,289
- Total.....Kshs.81,009**

Each party will bear their own costs.

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

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JUDGE

In the Presence of:

.....*Claimant*

.....*Respondent*