



Banking Insurance & Finance Union [Kenya] v M Oriental Bank Limited (Cause 1644 of 2018) [2024] KEELRC 13426 (KLR) (13 December 2024) (Judgment)

Neutral citation: [2024] KEELRC 13426 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1644 OF 2018
K OCHARO, J
DECEMBER 13, 2024**

**BETWEEN
BANKING INSURANCE & FINANCE UNION [KENYA] CLAIMANT
AND
M ORIENTAL BANK LIMITED RESPONDENT**

JUDGMENT

Introduction

1. Through its statement of claim filed herein dated 31st December 2018, the Claimant sued the Respondent seeking the following reliefs and orders: -
 - I. The Respondent do tabulate and pay all the unionisable employee overtime worked as from 1st February 2016 to date as outlined in the parties CBA.
 - II. That the Respondent do adjust working hours per week to conform to the CBA in order to avoid further accumulation of overtime to all unionisable employees.
 - III. Ibrahim Omony Wesonga also be paid overtime worked amounting to KSHS. 583,448.
 - IV. Costs of the suit.
 - V. Any other relief court deems fit to grant.
2. In Response to the Statement of Claim, the Respondent filed a Memorandum of Defence dated 3rd September 2019 wherein it denied the Claimant's claim and entitlement to the reliefs sought.

The Claimant's case.

3. The Claimant presented one witness, Mr Ibrahim Omony Wesonga, to testify on its behalf. The witness adopted his witness statement dated 2nd June 2023 as his evidence in chief. The witness stated



that he was employed by the Respondent as a driver from January 1984 to December 2018, when he retired upon attaining sixty years.

4. The Claimant and the Respondent, through Kenya Bankers Association [KBA] have a valid Recognition Agreement signed on 4th October 2000 which allows the parties to negotiate terms and conditions of service for unionisable employees in the banking industry.
5. It was further stated that the unionisable employees in the Banking Industry include; Section Heads/ Supervisors/ Officers; Checkers [Standard Chartered Bank], clerks and copy typists, Technical staff and subordinate staff.
6. The Kenya Bankers Association is the Umbrella body representing all the forty-three [43] banks in the Republic of Kenya on matters of collective bargaining. The Respondent is a member of the Association.
7. The union and the Association have negotiated several Collective Bargaining Agreements [CBAs] containing terms and conditions of employment including rates of pay, hours of work, and overtime rates, among others. Clause A20 and A21 of the Collective Bargaining Agreement dated 16th August 2017, provides for hours of work and overtime rates to be applied and complied with by the Respondent.
8. Under Clause AB 20 of the Collective Bargaining Agreement, the hours of work per week were provided as follows: -
 - I. Section Head, Check Clerks, Clerical Staff, and Copy typists- 41 hours thus, a total of 164 hours in a four [4] week cycle.
 - II. Technical staff and Subordinate staff – 44 hours, a total of 176 hours in a four [4] weeks cycle.
 - III. Subordinate Staff [Watchmen] – 52 hours making a total of 208 hours in a four-week cycle.
9. By a circular dated 27th January 2016, the Respondent enhanced working hours for all staff, effective 1st February 2016. Under the circular, thus, Monday to Friday -8.30 Am to 6.30 Pm and Saturdays- 8.30 AM to 2.30 PM. This ran afoul of the stipulations of the CBA.
10. The extended hours were discontinued on 14th August 2017. However, this was in respect of technical and subordinate staff only. The Section Heads, clerks and copy typists continued to work two [2] hours overtime in a four-week cycle, therefore, working 41.5 hours per week instead of 41 hours per week.
11. The Claimant further stated that with the changes, all employees automatically without exception worked overtime per week in line with Clause AB21 of the CBA, thus;
 - I. Section Head, Check Clerks, Clerical Staff and Copy Typist- [56-44= 12] hours.
 - II. Technical Staff and Subordinate Staff: [56 -44=12] hours.
 - III. Subordinate Staff [Watchmen]: [56-52=4] hours.
12. The attendance register for the Respondent's Nakuru branch Exhibit BF/4, is a testament that the circular enhancing the working hours was duly implemented, and complied with by all staff.
13. The Claimant received a complaint from its members that, the Respondent had changed hours of work, they were being underpaid, and they were not entitled to 28 working days as annual leave. Resultantly, it wrote a letter dated 5th October 2016 to the Respondent, raising the issues. The Respondent replied through its letter dated 5th October 2016 the Respondent refuting the allegations.



14. On 22nd November 2017, the Claimant reported a labour dispute to the Minister in line with the provisions of Section 62 of the *Labour Relations Act*. The issues in dispute were overtime and non-implementation of the General Wages 6%. The dispute was accepted by a letter dated 5th December 2017 and a Conciliator Ms. Hellen Apiyo was appointed to conciliate the matter.
15. On 19th March 2018, the Conciliator invited the parties to a meeting. The parties attended but failed to reach an agreement. The conciliator recommended referral of the matter to court as it remained unresolved.
16. This conciliation process that bore no agreement was over a dispute that was radically different from the one that had been subjected to conciliation and resolved before Mrs. M.M. Kezzah. The earlier dispute revolved around, hours of work, leave days, and underpayment of salary. The agreement was reached on 9th May, 2017. Overtime was not an issue in the resolved dispute. There wasn't any agreement as regards overtime.
17. In support of his specific claim herein, the Claimant's witness stated that following the changed hours of work upon the premise of the email dated 27 January 2016, he worked 56 hours per week translating, thus, 224 hours in a four-week cycle.
18. As such, he should be compensated in the following manner;
 - I. February 2016= 4 weeks x 58, 047/164 x 1.5 x 12=25, 484
 - II. March 2016- February 2017=62 weeks x 62,110/164 x 1.5 x 12=422,651.
 - III. May 2017- 14th August 2017=14 weeks x 88,061/164 x 1.5 x 12=135,313Therefore, total overtime entitlement of KSHS. 583,448.
19. Cross examined by Counsel for the Respondent, the witness confirmed that he left the Respondent Bank through retirement in December 2017. The Claim herein was filed a year after his retirement. Upon retirement he was paid all his dues save overtime benefits.
20. In the first conciliation process, the issue of overtime wasn't a subject of discussion. It wasn't handled in the conciliation process. However, on page one of the Conciliator's report, it was indicated that overtime was one of the items that were in issue.
21. Though the letter dated 9th May 2017 indicates that there was consent by the parties over the dispute, there wasn't any. The letter wasn't brought to his attention at any time. The letter [which is part of the Claimant's exhibits] is a false document.
22. The witness further stated that at all material times, he was he represented the grievants as their steward. Some grievants are still in the employment of the Respondent. Others existed.
23. Lastly, the witness stated that at all material times, he could report to work at 8.30 am and leave at 5.00 pm. There is no single time he reported to work earlier than 8.30 a.m. or work beyond 5.00 P.m.
24. In his evidence in re-examination, the witness stated that through its letter dated 22nd November 2017, the Claimant Union informed the Minister of the existence of a dispute over overtime and non-implementation of General Wages and requested the Minister to commence the process contemplated under the *Labour Relations Act*.
25. Through its letter dated 7th December 2016, the Union had written to the Minister concerning a dispute on, hours of work, leave days, and underpayments. The issue of overtime wasn't a subject of the letter.



The Respondent's case

26. The Respondent's case was placed fourth through the evidence of Jimmy Mwalume, its Head of Human Resources.
27. It was the Respondent's case the issue of overtime was a subject of a dispute which was mutually discussed between the parties and settled by consent. The letter dated 9th May 2017, speaks to this.
28. Its employees work as per the agreed working hours as outlined in the Collective Bargaining Agreement, any allegations to the contrary by the Claimant are vexatious, scandalous and ill intended. Any employee who worked beyond the hours agreed under the CBA was adequately compensated.
29. The official time for checking in and clocking out was 8.30 am and 5.00pm, respectively. So that if an employee decided to come in earlier than the reporting time, he or she cannot be heard to assert that she worked overtime. The alleged register for its Nakuru Branch was fraudulently, and illegally obtained without prior authority or permission of the Respondent. Further, it only shows what time employees got to the station and left, not the hours worked throughout the week.
30. Ibrahim Omonyo Wesonga is an employee who reached his retirement age, issued with the requisite notice and paid all his dues per the terms of the CBA. His claim that he worked overtime are callous and unreasonable, only intended for unjust enrichment.
31. Cross examined, the witness testified that after 27th February 2017, the Respondent changed the working hours.
32. From the letter dated 9th May 2017, it appears the trade dispute was on hours of work, leave days, and underpayments. Apparently, the issue of overtime wasn't an issue in controversy then.

Analysis and Determination

33. I have carefully considered the pleadings, evidence, and submissions filed herein, and the following issues emerge for determination thus:
 - I. Whether the issue of overtime was mutually resolved on or about the 9th of May 2017.
 - II. Whether the Respondent breached the terms of the Collective Bargaining Agreement dated 16th August 2017.
 - III. Whether the Claimant / Grievants are entitled to the reliefs sought.

Whether the issue of overtime was mutually resolved on or about the 9th of May 2017.

34. There isn't a doubt that the Claimant Union at all material times was and is recognized by the Respondent Association, and therefore its [the Association's] individual members for purposes of collective bargaining. As such, the Claimant has access to a variety of statutory rights. A careful consideration of the Collective Bargaining Agreement hereinabove mentioned shows that overtime was one of those specific bargainable issues that the parties -the Association and the Claimant, agreed to negotiate on, and indeed agreed on, as expressed through the Collective Bargaining agreement.
35. Further, this Court notes that the two matters, working hours and overtime, were distinctly negotiated and provided for in the collective bargaining agreement. In my view, therefore, where any of the parties to the agreement held that there was a dispute on any of those distinct issues, the dispute could be raised expressly on the same. There cannot be a ground to conclude that an issue was raised in the dispute if it wasn't done so expressly, unless reasonable ground obtains, to imply.



36. Through its letter dated 4th October 2016, addressed to the Respondent’s Chief Executive Officer, the Claimant wrote:

“Re: Complaints by Unionisable Members of Staff of Your Bank

We have received complaints from unionisable members of staff of your Bank on the following issues;

[i]. Hours of Work

Monday to Friday- 9.00 a.m. to 6.00 p.m.

Saturdays 9. 00a.m to 2.00 pm

[ii]. That the change in hours of work has changed from the hours in the CBA from February 2016.

2. Leave Days. - Employees are allowed 28 leave days which includes Saturdays and Public Holidays contrary to the terms in the CBA which started in February 2016.

3. Underpayments: - the unionisable members of staff have been paid monthly rates below the CBA entry levels since January 2007 and we have been reliably informed that the unionsable staff have been paid KShs. 15,000 gross monthly salary on engagement.

4.”

37. The letter elicited a response from the Respondent through its letter dated 5th October 2016, contending that the allegations that the Claimant did put forth in its stated letter were, not true, and unfounded. Further, it had not breached the Collective Bargaining Agreement at all.

38. It was common cause that the forgoing morphed into a trade dispute. I take a clear view that from the Claimant’s letter dated 7th December 2016, the issues in dispute were set out specifically and expressly, Hours of Work, leave days, and underpayments, and that by its letter dated 21st February 2017, the Ministry referred the matter for conciliation, unambiguously with these subject issues for resolution.

39. In the settlement letter dated 9th May 2017 addressed to the Claimant’s General Secretary and the Respondents Chief Executive Officer, the Conciliator Mrs M.M. Kezzah wrote:

“Re: Trade Dispute.

Issues in dispute

I. Hours of Work

II. Leave days

III. Underpayment of salaries

Previous correspondences and meetings on the above subject matter refer.

The parties met under my Chairmanship and agreed to resolve all issues in dispute.

Attached is a settlement brief consent letter on the resolution of the trade dispute

The dispute is therefore settled. “



40. By reason of the foregoing premises, I am convinced that the dispute that was resolved as expressed in the conciliator's report was in respect of those three matters. The matter of 'overtime' wasn't in dispute in the process. I see no circumstance that can prompt this Court to imply that it was.

Whether the Respondent breached the terms of the Collective Bargaining Agreement entered into by the Parties on 16th August 2017.

41. By its letter dated 5th December 2017, the Claimant reported a trade dispute to the Minister of Labour and Social Protection Department of Labour on violation of CBA in regard to two matters, overtime and non – non-implementation of General wages 6%. A conciliator was appointed. She convened and had a meeting with the parties but no agreement was reached, hence this suit.
42. It is imperative to state that as the person asserting the breach, a duty fell upon the Claimant to prove that, the Respondent breached a term of the Collective Bargaining Agreement, [i.e. on overtime], and it had failed to implement the General wage of 6%. I have carefully considered the material placed before me by the Claimant and hold that it didn't bother to direct any towards proving the Respondent's failure to implement.
43. By an email dated 14th August 2017, the Respondent's Human Resource Manager [RW1] wrote to its employees indicating the business hours of the Respondent Bank- Monday to Friday – 09.00 am -04.30 pm and Saturdays- 09.00 am to 12.00 pm, and reporting and leaving hours; - Monday to Friday 8.30 am to 05.00 and Saturday- 08.30 am to 12.30 pm. The Claimant contended that this email discontinued the extended working time that was brought onboard via the email dated, 27th January 2016, but only in respect of technical staff and subordinate staff. I note the email applied to all employees. It didn't segregate. The Claimant just asserted that other members of staff besides those under the two categories continued to work under the directions of the email of 27th January 2016, without presenting any or sufficient evidence to support the assertion.
44. This Court hasn't lost sight of the fact that in his evidence under cross examination, the Claimant's witness stated that throughout his employment he never reported for earlier than 8.30 am and after 5.00 pm. One then fails to see what the basis for the Claimant's claim and his that the Respondent obligated employees to work overtime but without paying them, is.
45. Further, this Court notes that the Collective Bargaining Agreement hereinabove mentioned took effect on 1st March 2017. The alleged incidents of breach of Collective Bargaining related largely to a period before this effective date. To prove its case, the Claimant needed to tender as evidence the Collective Bargaining Agreement, the predecessor of that of 16th August 2017. This, the Respondent didn't do.
46. By reason of the foregoing premises, I come to an inescapable conclusion that the Claimant didn't prove that the Respondent was in breach of any Collective Bargaining Agreement.

Whether the Claimant is entitled to the reliefs sought.

47. Having found as I have hereinabove, I hold that the Claimant/ Grievants aren't entitled to the reliefs sought.
48. In the upshot, the Claimant's case is hereby dismissed. Each party is to bear its own costs.

READ, SIGNED AND DELIVERED THIS 13TH DAY OF DECEMBER 2014.

OCHARO KEBIRA

JUDGE.



In the presence of

.....for Claimant

.....for Respondent

