REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT NAIROBI

CAUSE NUMBER 1806 OF 2015

[formerly Industrial Court at Kisumu, Cause Number 166 of 2014]

BETWEEEN

1. PHILLIP ANYIEGO GAYA

2. WYCLIFFE OKOTH

3. PAUL NYAKACH & 79 OTHERS....................CLAIMANTS

VERSUS

H. YOUNG CO. E.A. LIMITED........................RESPONDENT

Rika J

Court Assistant: Emmanuel Kiprono

Amondi & Company Advocates for the Claimants

Orego & Odhiambo Advocates for the Respondent

JUDGMENT

1. This Claim was filed as Industrial Court Cause No. 166 of 2014. It was filed at Kisumu, on 21st July 2014. It was subsequently transferred to Nairobi, and registered as E&LRC Cause No. 1806 of 2015.

2. The 3 Claimants named above state, the Claim is filed on behalf of the 3 Claimants and 79 others, named in a contested letter of authority on record.

3. The Claimants aver that they were employed by the Respondent Company at different times, in the year 2013.

4. They were deployed to work at Ol-Karia Geothermal Power Plant, in the Rift Valley Region.

5. Letters of appointment and letter of authority to act, indicate the Claimants worked in different capacities. They were Erectors, Fitters, Pipe-Fitters, Grinder-men, Painters, Time-Keepers, and Assistants, among others.

6. They were issued individual letters of appointment, all incorporating terms and conditions of employment, contained in a CBA concluded between Kenya Association of Building and Civil Engineering Contractors [KABCEC], Roads and Civil Engineering Contractors Association of Kenya [RACECA], Kenya Federation of Master Builders [KFMB] of the one part, and Kenya Building, Construction, Timber and Furniture Industries Employees Union, of the other part.

7. They complain that the Respondent subjected them to tasks which caused risks, discomfort and inconvenience, without paying them appropriate allowances; they were made to work at height, without allowances; they worked in confined spaces without allowances; they

worked in high-level noise environment, without allowances; they handled hazardous chemicals, without allowances; they travelled long hours without allowances; they worked in an environment with radioactive matters and fumes, without allowances; they were denied accommodation or house allowances; and they were not given uniforms and protective clothing.

8. Numerous Employees lost their lives as a result of these breaches. The existing Employees went on strike to correct the situation, on 19th June 2014. The Claimants seek Judgment in the nature of allowances, against the Respondent for: -

a. Long-travelling hours at Kshs. 10,462,600.

b. Working at height at Kshs. 1, 146,300.

c. Working in confined spaces at Kshs. 1,146,300.

d. Handling hazardous chemicals at Kshs. 1,146,300.

e. Handling tools and machines at Kshs. 1,146,300.

f. Working in an environment with fumes and radioactive matters at Kshs. 1,146,300.

g. Working in an environment with high levels of dust at Kshs. 1,146,300.

h. Working in an environment of high levels of noise at Kshs. 1,146,300.

i. Food allowance at Kshs. 7, 928,415.

j. Accommodation allowance at Kshs. 8,716,950.

Total…Kshs. 34,758,810.

k. General damages.

l. Costs.

m. Interest.

9. The Respondent filed its Statement of Response on 20th August 2014. Its position is that the 3 Claimants have no mandate in law, to instigate the Claim on behalf of 79 others. The mandate belongs to the relevant Trade Union.

10. It is admitted that the Claimants were alongside many others, Employees of the Respondent, working at Ol-Karia Geothermal Power Plant. Their contracts incorporated the CBA mentioned at paragraph 6 of this Judgment.

11. The allowances they claim, fell under Clause 28 of the CBA, indicated to be ‘*site allowances*.’ They were payable for discomfort, risk and inconvenience. Under the Clause, payment of these allowances was subject to discussion and determination, involving the Parties and the Health and Safety Committee, nominated pursuant to the Occupational Safety and Health Act No. 15 of 2007. No such agreement concerning the Claimants was made. Not all Employees in any event would be entitled to these allowances, as not all were exposed to discomfort, risk and inconvenience.

12. The Claimants were hired in accordance with their qualifications, and were well aware of the nature of work they were contracted to perform.

13. Working at height consisted work at between 6 and 25 metres. In all cases, the Employees were provided safety equipment, and hand rails and kickboards were installed on all work platforms, to reduce risk of falling, and enhance safety.

14. Alleged confined spaces had been certified as safe by the relevant Safety Officers.

15. Long hours travelled were necessitated by the Employees’ choice to reside far from the workplace. The Respondent provided buses, which transported the Employees to and from their workplace.

16. Equipment to secure the Employees from noise pollution was issued.

17. There was no evidence of radioactivity at the workplace. Only a few Employees handled chemicals, and had specific training for the role.

18. House allowance was paid to all Employees, in accordance with the Employment Act and the CBA.

19. The Respondent prays the Court to dismiss the Claim with costs.

20. The 3rd Claimant gave evidence for the Claimants on 10th December 2020. Safety Manager Nzioki Luka, and Meshack Owira, an Employee of the Respondent, gave evidence for the Respondent on 25th February 2021, when proceedings closed. The Cause was last mentioned virtually before the Court on 3rd June 2021, when Parties confirmed the filing of their Submissions, and the Cause reserved for Judgment on 23rd September 2021. Judgment however, has been prepared and is ready for delivery earlier than the date given, and the Court has instructed that its Registry issues notices to the Parties, for delivery of Judgment on the date indicated below.

21. Nyakach told the Court that he is a Teacher by profession, and authorized to testify for the 82 Claimants. He was employed as a Time-Clerk. His contract was terminated by the Respondent on 14th June 2014. Other Claimants' contracts were terminated on different dates.

22. The Union prepared the computation of allowances claimed. This was based on the CBA. The Claimants were, Members of the Union. Computation was forwarded to the Respondent. It was not implemented. The CBA and individual contracts of employment are not contested.

23. Some other Employees such as Wesley Koskei and Simon Muturi, were availed some of the allowances claimed by the Claimants.

24. The CBA provided under Clause 28, that the Respondent and the Union would discuss and agree on the allowances. The Human Resource Department indicated there would be discussions, but none took place.

25. Ol-Karia Geothermal emitted toxic gases. The Employees were affected. Working there warranted risk allowance. There were no measures to minimize risk. The Employees were traumatized. They were denied house allowance.

26. Nyakach asked the Court to uphold the Claim.

27. Upon cross-examination, he told the Court that he did not have a written authority to give evidence on behalf of the other Claimants. Clause 28 of the CBA mentions discussions between the Respondent and the Union. Discussions would involve Occupational Safety and Health Committee. Discussion did not take place. The Shop Steward prepared the computations. Nyakach was a Time-Clerk, entitled to risk allowance of Kshs. 18,000 monthly. He worked in confined spaces. Koskei was paid accommodation allowance. Simon Muturi also received this allowance. The CBA referred to house allowance. The Claimants seek accommodation allowance as a discomfort allowance. They paid rent for their families and had to pay rent for themselves separately, in their separate residences. They were paid house allowance. They seek food allowance. It is not in the CBA. Not all Employees handled hazardous chemicals. All were affected by dust and noise pollution. Nyakach conceded that he is not an expert on any of the occupational hazards, the Claimants allege, they were exposed to.

28. Safety Manager Nzioki Luka told the Court that, the Respondent was a contractor, engaged on a World Bank Project at Ol-Karia.

29. Anyone working above 4 metres was deemed to be involved in hazardous work. There were protective measures in place. There were harnesses to avoid falls. There were permits issued to persons working at height. All Employees working at height, had to sign a document indicating they understood the hazards. Permits issued daily.

30. Confined spaces are areas with limited access. These included tanks. Fabricators and Welders worked in confined spaces. There had to be a permit issued, to work there. There was air-monitoring, before the Employees were granted access.

31. There were no hazardous chemicals. All chemicals were level 3, and acceptable under the relevant classification. There was provision for Personal Protective Equipment, where there could be hazardous materials. Employees worked in short cycles to avoid adverse effects of long-term exposure. These were mainly Laminators.

32. Fumes came from welding. Welders were provided welding masks. X-rays were regulated strictly in accordance with advice from the Nuclear Board. All regulations were observed with regard to Radioactive Technicians.

33. Nzioki agreed with the Claimants that the site was dusty. There were measures to mitigate the effect of dust on the Employees. Vehicular movement was limited. There was a water tanker, regularly pouring water on the road network to reduce dust. Steel blowing created noise. Majority of Employees were off-duty when this work was ongoing. Those present were provided earplugs. The Employees were provided transport and house allowances. There was no provision for food allowance.

34. On cross-examination Nzioki told the Court that, there were mitigation measures in place for the various risk factors. The project was funded by the World Bank, and was preceded by environmental assessment.

35. There were no hazardous gases in the short term. Illness would depend on long-term exposure. Any new Employee had to be inducted about hydrogen sulphide. Areas where this gas was found to exist were shut down, based on regular environmental assessments. Hydrogen sulphide was a common gas at the site. Nzioki agreed the gas is toxic. Employees would be susceptible. Nzioki however opined that even the water we drink is toxic. Adverse effects depend on the levels of exposure. There were agencies closely monitoring the levels of toxicity.

36. Having an exposure did not entitle Employees to risk allowance. Employees demonstrated, demanding for risk allowance. The Respondent did not accede. Silicates are like sand. Resins have dust. There is no chemical exposure in this. There were safety shifts, providing for precautions for those Employees interacting with hazardous materials. Nzioki did not have records of these shifts. He did not know if an Employee named Ouma Ogesa, died from exposure to hazardous material at Ol-Karia. He was aware of an Employee, William Odhiambo, who fell from mezzanine floor. He was taking security checks. He was a contracted Employee. Nzioki did not know the root cause of his fall. Another Employee named Alito fell from a moving bus. It was outside the workplace. Nzioki was not aware of an incident involving Engineer Gachichu. Directorate of Occupational Safety and Health has all the records of these incidents.

37. The Respondent identified some of the hazards at the workplace to include flammable materials, welding sparks, falling from heights, and manual handling. These were likely to cause harm. Page 199 and 233 of the Respondent's documents, show Wesley received accommodation and welding allowances. 2 Employees received this. Accommodation was paid when an Employee worked a night out. One of the Employees, who was paid this allowance was a Plumber, who worked on extended basis. It was paid where an Employee would not reach his usual abode after extended duty. The Respondent did not pay accommodation allowance selectively.

38. Redirected, Nzioki explained that hydrogen sulphides have levels of toxicity. They were on the lower levels at Ol-Karia. Accommodation allowance was given in emergency cases.

39. Respondent's Employee Meshack Owira told the Court that he did not sign the letter of authority on record, enabling the 3 Claimants to pursue this Representative Claim. He was informed by the Respondent about the Claim. He said he knew nothing about it.

40. Cross-examined, he stated he was Claimant No. 4 on the list filed by the Claimants, which indicated authority was donated to the 3 Claimants to pursue the Claim. He denied that he was induced by the Respondent to recant authority. His contract was terminated alongside those of other Claimants, through redundancy. He denied that he came to Court back on a promise by the Respondent, for re-employment. He had written to the Court to be discharged from the proceedings. It is not true that he remained in the proceedings, to cunningly draw benefits alongside the other Claimants, in event the Court finds in their favour. Redirected, Owira told the Court he did not give authority, and he could not withdraw the Claim, because he did not know of its existence.

41. The issues in dispute, as understood by the Court, are: -

- Whether the 3 Claimants have authority to present the Claim on their own behalf and on behalf of 79 others.
- Whether the Claimants are entitled to site/ risk allowances computed at Kshs. 34,758,810.
- Whether they are entitled to general damages, costs, interest and any other suitable relief.

The Court Finds: -

Authority to act.

42. Rule 9 of the E&LRC [Procedure] Rules, 2016, regulates Claims filed by several Persons. A Claim may be instituted by one Party, on behalf of other Parties, with similar cause of action. Where a Claim is so filed, the instituting Party shall in addition to the Statement of Claim, file a letter of authority signed by all the other Parties.

43. The Claim herein is brought by 3 Claimants, allegedly on authority of 79 Claimants. 1 has come forward and denied that he signed the letter of authority on record.

44. In such a case, the effect would be that the Claim by the particular Claimant, is deemed to have been filed without authority. The effect of non-authorisation is confined to the particular Claimant. There is no legal effect on the claims by the other Claimants. ***The first duty of the Court is to order that the Claim against the Respondent, relating to Meshack Owira [Meshack Omundu, No. 10 in the letter of authority on record] is struck out.***

45. The other objection by the Respondent, is that the Claimants authorized the Law Firm of Amondi & Company to pursue the Claim on their behalf; authority was not for the 3 Claimants to pursue the Claim in a representative capacity.

46. The letter on record, gives authority or instructions at the outset, to Amondi & Company, to pursue the Claim. At the tail end of the list of Employees however, there is specific authority donated to the 3 Claimants to pursue the Claim. The Respondent appears to have missed this, which can be blamed on the Claimants' choice of print font. It is miniscule, almost illegible.

47. The last objection was that the Claim should have been presented by the Claimants' Trade Union. This objection carries no weight. Trade Unions and their Members are allowed legal representation through an Advocate under Section 22 of the E&LRC Act. There is no procedural flaw, in the Employees coming before the Court in their own names, rather than in the name of their Trade Union. Even if the Claim was initiated in the name of the Union, the Claimants would still be named as the Grievants. The Respondent has not shown any Rule or Statutory Provision, barring the Claimants from approaching the Court as they have done. The Union has not in any event, raised objection about its exclusion. It played a significant role in crafting this Claim, having done the computations upon which the Claim is brought.

48. The Court is satisfied that the 3 Claimants had proper authority in instituting the Claim on their own behalf and on behalf of 79 others. They satisfied the requirements of Rule 9 of the E&LRC [Procedure] Rules, 2016.

Allowances.

49. The allowances, where Kshs. 1,146,300 is uniformly sought, involving working at height; handling chemicals; confined spaces; handling tools and machines; exposure to fumes and radio-activity; dust; and noise pollution, are what the Respondent correctly submits, to be regulated under Clause 28 [ii] of the CBA.

50. They are compressed into discomfort, risk and inconvenience allowance. They are payable under the Clause, to Employees undertaking work causing risk, discomfort and inconvenience.

51. The Clause states that these allowances would only be payable, after discussion and determination involving the Union, the Employer,

and the Health and Safety Committee, nominated pursuant to Occupational and Safety Health Act [OSHA].

52. Section 9 of OSHA, requires that, every Employer shall establish a Safety and Health Committee, in accordance with Regulations prescribed by the relevant Cabinet Secretary, if the workplace comprises 20 or more Employees, or if the Director advises such a Committee is established at any other workplace.

53. The Parties agree in their evidence, that no discussion or agreement relating to allowances under Clause 28, took place.

54. This aside, the Claimants have not led expert evidence, showing the presence of the various hazards they have complained about.

55. The 3rd Claimant, Paul Nyakach was a Time- Clerk. He is not an expert to testify about hazardous gases, and radio-activity.

56. The Second Schedule of OSHA prescribes occupational diseases. If there is exposure, a Claimant must be able to point at a specific occupational disease he has been exposed to, and break it down in comprehensible language to the Court.

57. What the Claimants' Union did, was to lump Employees together, assume they were similarly placed, and faced with the risk of similar injuries and diseases.

58. There is no evidence establishing the presence of alleged hazards, and showing exposure, warranting Clause 28 allowances.

59. There were allegations of Employees having died at the workplace, but no evidence was provided, establishing that deaths were occasioned by any of the hazards the Claimants complain about.

60. The Second Schedule to OSHA, has very complex prescription of occupational diseases, that in the view of the Court, exposure to and risk of contracting these diseases, can only be established through expert evidence.

61. The prescription includes poison by carbon bisulphide, phosphorous, arsenic, tetrachloroethane, nitrous fumes, which entail handling of, or exposure to fumes, dust or vapour from these gases.

62. The Schedule includes other diseases, whose exposure to, would need to be established through expert evidence. These include inflammations, ulcerations or malignant skin conditions caused by exposure to electromagnetic radiations other than radiant heat or ionizing particles; pulmonary diseases occasioned by inhalation of dust; and various carcinoma brought about by exposure to various chemicals known to be carcinogenic.

63. The Second Schedule is expansive. It even includes infection by leptospira icterohaemorrhagiaeae, which in common parlance, entails exposure to places which are, or liable to be infested by rats.

64. There are complexities in the Schedule. To prove exposure to the risk of diseases shown in the Schedule, an Employee or other Person claiming exposure, must bring to Court an expert in the specific filed, to assist the Court unravel the attendant risk and exposure.

65. The Claimants have not supplied the Court with expert evidence, establishing the presence of the hazards, and the risks they were individually faced with. They instead brought a Time- Clerk, as their principal Witness.

66. The Claimants appear to acknowledge the inadequacy of this Witness, in their Closing Submissions. They submit: -

- Paul Nyakach erroneously referred to the wrong exhibits.
- Under cross-examination, he faltered, saying he did not have authority of his Colleagues.
- He stated that no meeting ever took place between the Claimants and the Union.
- Documents produced by the Claimants ought to supersede their oral evidence.
- The Witness was overwhelmed by the solemnity of the occasion while giving evidence.

67. The Claimants' Submissions place little faith in the evidence given by their representative. The Court would think that, the Claimants placed too much weight on the shoulders of Nyakach, a Time-Clerk, to give evidence on a subject best suited to be dealt with by an expert. With tremendous respect to the Claimants, how would Nyakach testify about radioactivity and presence of hazardous chemicals, and the occupational risks the Claimants faced at Ol-Karia?

68. The risks warranting allowances under Clause 28, have to be discussed and determined between the Respondent and the Union, with the assistance of Occupational Safety and Health Committee. The inclusion of this Committee suggests to the Court that it is intended to discharge a role of availing expert advice, on the subject matter. The Respondent and the Union on their own, would be hard-pressed to establish the presence and levels of risk.

69. The Claimants did not show that the Respondent failed to carry out initial and regular environmental, occupational safety and health audits. This was after all a World-Bank Project. The World Bank investigates complaints regarding its Projects worldwide. It does not fund Projects without initial environmental assessments. The Claimants' Union should have perhaps, brought its Members' complaints to the World Bank Country Office, at the time the Members opted to demonstrate.

70. OSHA also imposes sanctions on rogue Employers. Officers under this Act are allowed to issue Improvement Notices, if in their opinion, an Employer is contravening the Act. The Officers may also issue Prohibition Notices, where they are of the view that activities at the workplace involve, or will involve, a risk of serious personal injury or disease to the Employee.

71. The Claimants and their Union, have not told the Court whether they brought to the attention of the Director OSH, the issues they have complained about before this Court.

72. The Court does not have material upon which to declare that the allowances under Clause 28 of the CBA, were due to the Claimants.

73. Their pay slips show house allowance was paid. There was no obligation on the part of the Respondent to pay accommodation allowance as an invariable allowance. It was paid to Employees working outside their normal workstations, and who could not make it back to their residences in good time. It was in the understanding of the Court, what would be termed as night out allowance. It is an allowance captured under the Clause on Safari Allowance in the CBA. It was dependent on an Employee having working overnight stops, in defined areas. It should not be confused with house allowance, an invariable allowance under CBA Clause 9 and Section 31 of the Employment Act.

74. That some of these allowances were paid to 2 or 3 other Employees, would not justify payment to other Employees, or lead to a finding of discrimination. The Claimants did not show that they were involved in similar tasks as the Employees upon whom the allowances were paid. They did not show that the said allowances were invariably part of those other Employees' pay slips.

75. The Claimants' individual Contracts and the CBA, do not have provision for food allowance. Section 33 of the Employment Act, only requires an Employer to ensure that an Employee is properly fed, where there is a provision for food in the contract of employment. The Claimants have not shown that the Respondent had an obligation to feed them. The prayer for allowances pegged to long travelling hours was not shown to have been available in the CBA. The Claimants were provided with transport. There is no support for general damages.

76. It is the view of the Court that this Claim must fail, for reasons given above. The Court must however commend the Claimants for bringing their complaints forward for consideration of the Court. A different approach in their collection and presentation of evidence, may have yielded a different result. The Union ought to have sourced expert evidence. Occupational Safety and Health is a highly technical employment field. It was not the proper approach to place the evidential burden on the shoulders of Nyakach, a Time –Clerk. This is however, the outcome notwithstanding, an exceptional Claim, and the Claimants must be commended for highlighting the issues discussed in this Judgment. They should not be condemned to pay costs.

IT IS ORDERED: -

> ***a. The Claim as a whole is declined.***
>
> ***b. No order on the costs.***

DATED, SIGNED AND RELEASED TO THE PARTIES, AT CHAKA, NYERI COUNTY, UNDER MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 20TH DAY OF AUGUST 2021.

James Rika

Judge