



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 29 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF ARTICLES 41, OF THE CONSTITUTION OF KENYA 2010,

AND

IN THE MATTER OF ENFORCEMENT OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTION 27 OF THE EMPLOYMENT 2007

AND

IN THE MATTER OF PRIVATE SECURITY REGULATIONS, 2016

AND

IN THE MATTER OF THE REGULATION OF WAGES (PROTECTIVE SECURITY SERVICES ORDER 1998)

BETWEEN

KENYA NATIONAL PRIVATE SECURITY WORKERS UNION.....PETITIONER

AND

G4S KENYA LIMITED.....1ST RESPONDENT

COMMISSIONER OF LABOUR..... 2ND RESPONDENT

PROTECTIVE SECURITY INDUSTRY ASSOCIATION3RD RESPONDENT

AND

CENTRAL ORGANISATION OF TRADE UNIONS COTU (K).....1ST INTERESTED PARTY

PRIVATE SECURITY REGULATORY AUTHORITY..... 2ND INTERESTED PARTY

THE HON ATTORNEY GENERAL..... 3RD INTERESTED PARTY

FEDERATION OF KENYA EMPLOYERS..... 4TH INTERESTED PARTY

KENYA SECURITY INDUSTRY ASSOCIATION5TH INTERESTED PARTY

JUDGMENT

1. The Petitioner is a trade union registered under the Labour Relations Act. It has a recognition agreement with the 1st Respondent signed on 2nd February 2021.
2. The Petitioner and the 1st Respondent negotiated their first CBA signed on 24th September 2018 which covers a period of two years from 1st September 2018 to 30th August 2020.
3. It is the Petitioner's averment that before the implementation of the CBA, the 1st Respondent paid overtime based on hours worked beyond the normal hours on a daily basis so that any hours worked beyond normal working hours on any day would earn overtime.
4. That upon implementing the CBA, the 1st Respondent started paying overtime on hours worked beyond 52 hours a week. That this has greatly reduced the overtime earnings of its members some of whom have threatened to down their tools.
5. The 2nd Respondent, the Labour Commissioner has been sued, according to the Petitioner, for its failure to uphold the Constitution, statutory and administrative responsibilities leading to the infringement of workers' rights.
6. The 3rd Respondent has been sued in its capacity as the home of many of country's registered private security companies and registered by the Registrar of societies with close to 100 members drawn from the Private Security Industry in Kenya.
7. The 1st Interested Party central Organisation of Trade Unions Kenya, COTU (K) has been joined to this suit as an Interested Party in its capacity as the federation of trade unions.
8. The 2nd Interested Party is established by an Act of Parliament to provide regulation to the Private Security Industry.
9. The 3rd Interested Party is the Attorney General is the designated Principal Legal Adviser of the Government of Kenya and in that capacity, vested with legal authority to defend any suit against the government.
10. The 4th Interested Party is an association that supplies good quality security services and ensures good employment and business practices to benefit the workers within the industry, government and the general public.
11. The Petition is expressed to be brought under Article 23 of the Constitution, the Employment and Labour Relations Court Rules. The Petitioner states that the petition questions the violation of Article 241 and the right to fair administrative actions within the workplace.
12. The Petitioner states that the legal foundation of the petition is Articles 2, 3, 28, 29, 41(1) and 41(2) and 232; and Section 2 of the Fair Administrative Actions Act, 2015.
13. The petition dated 19th February 2020 and filed on the same date is supported by the affidavit of Isaac G. M. Andabura, the National General Secretary of the petition.
14. The Petitioner prays for the following reliefs:
 - a. *That this Court do interpret and direct the parties on the right formula for overtime calculation.*
 - b. *An order of injunction restraining the 1st and 3rd Respondent either by themselves, employees, servants or agents from further deprivation of payment of overtime for the extra hours worked.*
 - c. *This Court be pleased to declare that the Respondents violated the applicant's members rights to fair labour practices namely the deprivation of overtime for the extra hours worked.*
 - d. *This Court do direct the 1st Respondent to pay the overtime in arrears to the employees from the month of September 2018, to all the affected employees.*
 - e. *This Court do direct the 1st and 3rd Respondent members to pay workers for extra hours in accordance with Section 27 of the Employment Act or any other relevant law that is favourable to the workers.*
 - f. *General Damages for violation of the Petitioner's fundamental rights*
 - g. *The Court do issue any other orders and directions as it may deem fit to meet the ends of justice.*
 - h. *Costs of the Petition*

15. The 1st Respondent opposed the petition and filed a replying affidavit sworn by Elijah Sitima, the Human Resource Director of the 1st Respondent on the 17th of June 2020. The 2nd and 3rd Respondents as well as all the interested parties did not file responses to the Petition but relied on the Report by the Labour Commissioner.

The Petitioner's Case

16. The Petitioner's case is that on 19th December 2018, the Petitioner wrote to the 2nd Respondent to intervene on the overtime calculation citing that it had brought acrimony among the workers to the extent that some workers had downed their tools.

17. It is the Petitioner's case that it is now seeking interpretation of the proper formula to be adopted by the parties and Private Security Sector in payment of overtime.

18. The 3rd Respondent upon receipt of the letter recommended on the 20th December 2018 that overtime is payable as follows;

- a. *For time worked in excess of the normal number of hours per week at one and half times the normal rate.*
- b. *For time worked on the employee's normal rest day or public holidays at twice the normal hourly rate*
- c. *That in situations where there exists more than one order, the practice is that the favourable one is used over the less favourable one.*

19. The 1st Respondent through its' letter dated the 17th December 2018 insisted on the formula as set out in clause 8.2 of the CBA which provides for calculating payment of overtime based on weekly worked hours as set out in **Regulation of wages (Protective Security Services) Order, 1998**, that only hours worked above 52 hours per week will be considered as overtime and will be used to compute the overtime allowance. That the hourly rate shall, where the employee is not employed by the hour, be deemed to be one-two hundred and twenty-fifth () of the employee's basic monthly wage.

20. The Petitioner avers that from 24th September 2018, when the collective bargaining agreement was implemented, the 1st Respondent stopped paying the workers overtime as it used to pay on a daily basis.

21. The Petitioner reported a Trade Dispute on the 15th April 2019, the issue in dispute being calculation of overtime. A Conciliator was appointed to reconcile the parties.

22. It is the Petitioner's case that the 3rd Respondent upon receipt of the respective written submissions by the Petitioner and 1st Respondent, gave contradicting findings and recommendations.

23. That Section 27 of the Employment Act provides that an employer shall regulate the working hours of each employee in accordance with the provisions of the Act and any other written law. That the bare minimum working hours at the moment is 8 hours a day for normal office hours.

24. The Petitioner believes that its member's rights right to equality and freedom from discrimination under Article 27, Article 29, right to fair labour practices under Article 41, right to fair administrative action under Article 47 of the Constitution have been violated

The Respondent's Case

25. The 1st Respondent filed a response in which it denied the averments by the Petitioner. It stated that prior to the collective bargaining agreement it had experienced financial difficulties which necessitated a restructuring of its wage bill which affected, inter alia, the overtime calculation for its employees.

26. That in May 2017, the Government of Kenya gazetted a minimum wage increase effective 1st May 2017 across all cadres as specified in the order. The 1st Respondent in compliance with the gazette notice increased the wages for its employees which substantially affected the wage bill.

27. That the 1st Respondent could not absorb the wage increase and suffered loss of business with big clients such as the National Bank of Kenya, Kenya Airways, Mater Hospital, Landmark and Jacaranda Hotels terminating their contracts with the 1st Respondent due to increased cost of business and poor economic conditions.

28. The cost of the wage bill had to be footed by the 1st Respondent amid reduced business and tough economic conditions adversely affecting the business profitability.

29. That the 1st Respondent was at risk of losing 151 client accounts which were serviced by about 2000 employees. That this portended a crisis as it would affect the 1st Respondent's business adversely.

30. That as a consequence, the 1st Respondent realised that about 2,500 employees were at risk of losing their jobs and there was need to manage the situation.

31. That the management of the 1st Respondent came up with remedial measures in a bid to keep the business afloat and retain the employees' jobs. One of the remedial measures proposed was a review of the policy on payment of overtime hitherto done on a daily basis to that prescribed under the Private Security Services (Wage) Order (the Order) where a security officer is entitled to overtime after completing 52 hours spread over a period of 6 days.
32. Throughout 2017, the 1st Respondent engaged the Petitioner, the 1st and 2nd Respondents as well as all the interested parties and its' employees on the remedial measures to be adopted including the matter of overtime.
33. That during this time the Petitioner filed three suits in Court against the 1st Respondent seeking to prevent it from declaring employees redundant and to restrain the 1st Respondent from changing the terms of employment. These matters were ELRC Cause 2326 of 2017, ELRC Cause No. 887 of 2018 and ELRC Cause No. 36 of 2018. These matters were eventually stayed pending consultations and negotiations between the parties.
34. After rigorous consultations with all the stakeholders and employees, the 1st Respondent on the 15th January 2018 took a decision to implement the new wage model. Letters with this information were issued to employees between 15th and 16th January 2018 for their signature and consent. That by 19th January 2018 about 77 percent of the 1st Respondent's employees had received and accepted the new changes in their salaries and overtime computation of their own volition.
35. The Petitioner and the 1st Respondent recorded consents in the matters marking them as settled. That the new wage model was therefore implemented.
36. That following the consents with the stakeholders and employees, the overtime computations were implemented in accordance with paragraphs 6 and 7 of the Order.
37. That under paragraph 6 of the Order, the normal working week of the employees including day and night guards shall be 52 hours a week spread over 6 days of the week.
38. That Paragraph 7 provides that an employee is entitled to overtime if they exceed hours of work specified in paragraph 6 of the order and the applicable formula is one and half times the normal rate of wages per hour with respect of excess hours worked on normal working days and double the normal rate in respect of overtime hours worked on a rest day or public holiday. The hourly rate where the employee is not employed by the hour is deemed to be one two hundred and twenty fifth of the employee's basic wage.
39. The 1st Respondent adjusted to paying overtime for hours worked beyond 52 hours of every week in accordance with the law. This was implemented from early 2018.
40. The Petitioner and the 1st Respondent thereafter began negotiating the CBA which was signed by the parties and relevant stakeholders on 24th September 2018 to cover a period of two years. The CBA was effective from 1st September 2018.
41. That under the CBA, it was agreed by the parties that overtime would be computed based on the prevailing formula provided under the Order and this was incorporated in clause 8.2 of the CBA.
42. That it is not correct that the 1st Respondent has been applying this computation formula since the CBA became effective, the change in the formula for calculating overtime from daily to weekly having been agreed to by the employees and the stakeholders following the restructuring of the wage bill.
43. That the conciliator had determined that the applicable computation formula was that found in clause 8.2 of the CBA.
44. That it is not correct that the minimum working hours is 8 hours for security service employees as alleged by the Petitioner and it is unclear which written law the Petitioner is relying upon. The working hours for guards as set out in the Order are 52 hours per week spread over the week. Employees have one rest day per week.
45. That it is not true the 1st Respondent has forced some of the unionized employees to withdraw from membership of the Petitioner. All the unionisable employees of the 1st Respondent are at liberty to subscribe to the Union.
46. That both the Petitioner and the 1st Respondent agreed to the incorporation of clause 8.2 into the CBA and it is disingenuous for the Petitioner to raise the issue now when the CBA has been in force for almost one and half years.
47. The 1st Respondent averred that it is not in breach of the CBA and that the Petition before Court does not meet the requisite legal test for a constitutional Petition.

Petitioner's Submissions

48. Ms Onyancha for the Petitioner submits that the 1st Respondent deprived the grievants overtime from September 2018. That the Petitioner feeling aggrieved filed the instant Petition under Article 41 of the Constitution to guarantee workers' rights and minimum wages. That one of the fundamental human rights is just remuneration. That the preamble of ILO recognises minimum wages.

49. That upon registration of the CBA the 1st Respondent changed the method it used to work overtime to weekly basis above 52 hours contrary to the Employment Act and Protective Securities Order 2008. That Section 27 of Employment Act provides that the employer shall regulate working hours of the employee. That the Commissioner of Labour also mentioned the issue of Section 27 of the Employment Act in the Report.

50. On CBA clause 8.2, the Petitioner argues that it provides the payment on weekly basis above 52 hours which would make employees lose out. That there was a dispute reported to the Labour Commissioner. That in the CBA, the words 'above' and 'weekly' have been inserted to deny the workers overtime. That the Court cannot rewrite the contracts between parties. That there was insertion of the words above at paragraph 4 of the report.

1st Respondent's Submissions

51. Mr Makori for the 1st Respondent submitted that the Petitioner and the 1st Respondent entered into a recognition agreement and thereafter negotiated a CBA. A review of the CBA between the Petitioner and Wells Fargo as well as the Kazi Kenya and the present CBA shows that clause 8 is the same in all the CBAs. That the assertion that some words have been inserted is incorrect.

52. That the Petitioner has a similar dispute with other employers which are not disclosed to court. That the working hours of an employee are 52 spread over 6 days in a week. That there is an economic impact when an employee absconds duty but works overtime on other days. That Regulation 6 of the **Private Security Services Workers Order** does not state how many hours can be worked in a day. That Regulation 7 of the Order provides for overtime and the formula for calculation thereof.

53. That it is therefore not true that the 1st Respondent has changed the working of overtime to the detriment of employees or breached of the regulations. That the CBA is signed and registered in court following negotiations. The 1st Respondent contended that the instant Petition does not meet the threshold for a constitutional Petition as laid in **Anarita Karimi Njeru v Republic 1979 eKLR, Mumo Matemu v Trusted Society of Human Rights Alliance and 5 Others (2013 eKLR, Judicial Service Commission v Gladys Boss Shollei and Another 2014 eKLR**. The 1st Respondent averred that the Petitioner has not pleaded with precision the constitutional violations and how the violations have infringed on the members rights.

Response to the 1st Respondent's Submissions.

54. Ms Onyancha in a rejoinder submitted that there is an illegality in clause 8 of the CBA. That in the regulations the overtime is spread over 6 days. That the clause being contested calculates overtime on a weekly basis thus disadvantageous to workers who have worked throughout the week. That Clause 8 does not conform to Section 27 of the Employment Act and Security Wages Order where there is no word "above" overtime should be calculated daily. The Respondent has violated Article 4 of the Constitution. That the overtime sought on the Wells Fargo dispute is different. There is a judgment attached. Ms. Onyancha submitted that Wells Fargo is paying overtime on daily basis. That the point of emphasis is the word above which is not in the wages order.

Issues for Determination

- a. What is the proper construction of the CBA between the Petitioner and the 1st Respondent as regards the calculation of overtime dues?
- b. Whether overtime dues should be calculated based on hours worked on a day or in excess of the normal number of hours per week.
- c. Whether there has been Constitutional violation of the grievants rights

Determination

55. Clause 8 of the Collective Bargaining Agreement signed between the Petitioner and 1st Respondent dated the 24th September 2018 provides as follows –

8.0 WORKING HOURS, PUBLIC HOLIDAYS AND OVERTIME

8.1 Normal working hours for all employees shall be a maximum of fifty two (52) hours a week spread over six (6) days. Every employee shall be entitled to one rest day in every period of seven (7) days worked. Employees shall normally be granted paid leave of absence on all gazetted holidays, however the Employer reserves the right to require employees to work on these days, where deemed necessary. Any work done beyond this limit shall be treated as overtime and compensated at:

8.1.1 One and a half (1.5) times the normal rate in case an employee works on a 'normal day;

8.1.2 Two (2) times the normal rate of wages per hour in case an employee works on a gazetted public holiday; and

8.1.3 Two (2) times the normal rate of wages per hour in case an employee works on a rest day.

8.2 For the purpose of calculating payment for overtime, the overtime hours will be computed and paid based on weekly worked hours as set out in the Regulation of Wages (Protective Security Services) Order, 1998. Any hours above 52 hours per week as is stipulated in 8.1 above will be considered as overtime hours and will be used to compute the overtime allowance. The hourly rate shall, where the employee is not employed by the hour, be deemed to be one-two hundred and twenty-fifth () of the employee's basic monthly wage.

Overtime Formula

$\times 1.5 \times \text{Overtime hours above 52 per week}$

56. The Regulation of Wages (Protective Security Services) Order, 1998 provides for overtime as follows –

7. Overtime

(1) An employee who works for any time in excess of the normal hours of work specified in paragraph 6 shall be entitled to be paid for the overtime thereby worked at the following rates –

(a) one-and-a half times his normal rate of wages per hour in respect of any time worked in excess of the normal hours of work; and

(b) twice the normal rate of wages per hour in respect of any time worked on a rest day.

(2) For the purpose of calculating payment for overtime in accordance with subparagraph (1), the basic hourly rate shall, where the employee is not employed by the hour, be deemed to be one-two hundred and twenty-fifth of the employee's basic monthly wage.

8. Weekly rest

An employee shall be entitled to one whole rest day each week.

57. Section 27 of the Employment Act enacts that –

27. Hours of work

(1) An employer shall regulate the working hours of each employee in accordance with the provisions of this Act and any other written law.

(2) Notwithstanding subsection (1), an employee shall be entitled to at least one rest day in every period of seven.

58. I do not see any contradiction in the CBA and the Order. Both provide for payment of overtime for work done in excess of 52 hours per week.

59. The CBA is signed by both parties. It has been registered in Court with the participation and approval of both parties. It is thus a binding agreement between the parties and can only be vitiated on the known grounds of vitiation of contracts which are mistake, fraud, misrepresentation, undue influence or duress. None of these are alleged by the Petitioner. It is clear from the correspondence between the Petitioner and the 1st Respondent on record, especially the letter dated 17th December 2018 from the 1st Respondent's Managing Director, Mr. Stephen Barry addressed to Mr. Isaac Andabwa, the Secretary General of the Petitioner and which facts are pleaded by the 1st Respondent, that the complaint by the Petitioner is that the 1st Respondent has changed the manner in which it used to calculate overtime previously. As stated by the 1st Respondent, this was necessitated by the Respondent's poor financial situation and was effected before the CBA was negotiated.

60. This issue was discussed by the parties at length before the 1st Respondent implemented the same in January 2018. It is therefore not true that it is the implementation of the CBA that caused the new mode of calculation of overtime as pleaded by the Petitioner herein.

61. The Petitioner at Paragraph 10 of the Petition avers that the 1st 2nd and 3rd Petitioners have violated the provision on overtime calculation, as contained in the Collective Bargaining. It is unclear whether this refers to the departure by the Respondents from the contractual terms or this is simply a reference to the broader violation of the grievants rights as understood by the Petitioner. This is because Ms Onyancha in her submissions in Court appeared to be of the view that the CBA stipulates that calculation of overtime is on weekly basis but that the same is illegal in light of Section 27 of the Employment Act as read with the Order.

62. The Petitioner has not stated in the pleadings that there are vitiating factors that is mistake, misrepresentation, undue influence and duress rendering the contract between it and the 1st Respondent that is, the CBA invalid. Neither is there any complaint in the pleadings that there was an illegality committed leading to the provision on the overtime. The claim on illegality appears for the first time on the submissions. In **Josephat Kihia Muthoka v Kalu Works Limited and Another (2016) eKLR**, the Court observed that the –

“The foregoing term of the CBA is not ambiguous in any way. It is a valid term of contract mutually agreed between the parties. It

is binding on the claimant as it is on all unionisable employees of the Respondent. It is well settled principle of law that the Court has no jurisdiction to invalidate a contract unless there exists any or all of the vitiating factors known in law including mistake, misrepresentation, undue influence and duress. In this case, the Claimant neither pleaded nor adduced any evidence to prove that the CBA was vitiated by any of the factors.”

63. The dispute before court is purely contractual. The 1st Respondent cannot be held to have constitutionally violated rights of the grievants by simply seeking to enforce that which they believed rightly, to be an entitlement emanating from private contractual arrangement between it and the Petitioner.

64. The foregoing notwithstanding, the Court wishes to clarify that when tabulating hours worked per week, any hours worked overtime must be converted using the formula in the Protective Security Services (Order) 1998 so that any hours worked beyond working hours on a normal working day are deemed to be 1.5 hours, while any hours worked on a public holiday or rest day are converted at 2 hours for every hour worked.

65. **The Petition before Court lacks merit and is accordingly dismissed with no orders as to costs.**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF AUGUST 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE