



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 373 OF 2013**

(Before Hon. Lady Justice Maureen Onyango)

- JOSEPH K. MULI.....1<sup>ST</sup> CLAIMANT
- CHARLES M. MIANO.....2<sup>ND</sup> CLAIMANT
- JULIUS M. KAMAU.....3<sup>RD</sup> CLAIMANT
- JOSEPH M. KAMAU.....4<sup>TH</sup> CLAIMANT
- ISAYA O. BARAZA.....5<sup>TH</sup> CLAIMANT
- ELAKU M. KANGELU.....6<sup>TH</sup> CLAIMANT
- CHARLES K.KAHIGA.....7<sup>TH</sup> CLAIMANT
- OBADIAH K. WAWERU.....8<sup>TH</sup> CLAIMANT
- RICHARD KYALO MULI.....9<sup>TH</sup> CLAIMANT
- HASSAN O. AKIBAYA.....10<sup>TH</sup> CLAIMANT

*VERSUS*

**DEUTSCHE GESELLSCHAFT FUR TECHNISCHE ZUSAMMENARBEIT GMBH,  
 GTZ-INTERNATIONAL SERVICES (GTZ-IS).....RESPONDENT**

**JUDGMENT**

The Claimants in their Plaint dated 22<sup>nd</sup> June 2007 and filed in Court on 30<sup>th</sup> July 2007, and the Amended Plaint filed in Court on 18<sup>th</sup> December 2007 seek the following remedies:

- i. Overtime
- ii. Hardship/remote duty allowance
- iii. One Month salary in lieu of notice
- iv. Salary for October 2006

The Defendant/Respondent filed a Defence dated 28<sup>th</sup> August 2007 and filed in Court on 29<sup>th</sup> August 2007 in which it is admitted that the Plaintiffs/Claimants were employed by the Defendant/Respondent in various capacities under separate fixed term contracts of employment.

The Respondent avers that the regular working hours comprised of 61 hours per week. That whenever the need arose some of its employees were compelled to work additional hours to complete assigned tasks without additional remuneration as the same had already been factored in while setting the salaries.

The Respondent further avers that the Plaintiffs/Claimants' did not work for seven days without rest. They they had one rest day each week.

It is further contended that the Claimants' Plaint has no basis and that the Claimants are not entitled to the reliefs sought therein. The respondent urges the Court to dismiss the Claims with Costs to the Respondent.

On 22<sup>nd</sup> September 2015, the 2<sup>nd</sup> Claimant, CW1 testified on his behalf. It was his evidence that he was employed by the Respondent Company in the year 2004 as a foreman supervisor earning a monthly salary of Kshs.75,000/=.

It was his further evidence that over time his salary was increased to Kshs.110,000/- per month and finally to Kshs.115,500/= per month. Further that his place of work was South Sudan but the contract was entered into in Kenya under Project Southern Sudan Roads and Dyke Rehabilitation Program, which project the Defendant/Respondent was contracted to undertake by the World Food Program.

CW1 further testified that he was employed from the year 2004 to the year 2006 when his contract was terminated. Further, that the applicable law for the contract was the law of the Republic of Kenya.

CW1 stated that their salaries were paid in Kenya Shillings although they were based in South Sudan during the subsistence of the Contract of employment.

CW1 testified that they worked for 8 hours a day and would work overtime. It was his evidence that he did not receive any payment for overtime as they worked more hours to conclude the work in time. The extra hours were computed with an expectation that the Defendant/Respondent would pay the overtime as tabulated.

It was CW1's evidence that the Contract of employment provided for a notice period of three months prior to termination. Further that he worked until October 2006 when he took leave from the Defendant's/Respondent's Nairobi Office and was terminated.

CW1 testified that he was issued with a cheque of Kshs.55,000/= but declined as the amount was less than his monthly salary which was Kshs.115,000/=.

CW1 stated that there were no rest days and that after a period of 3 months of service they would proceed on 1 week off. There was no provision for annual leave. He further stated that they also worked on gazetted public holidays in Kenya which was never paid by the Respondent/Defendant.

CW1 further stated that while working in South Sudan they did not live with their families due to insecurity and thus their claim to be paid hardship allowance which they were entitled to but was not paid by the Defendant/Respondent. He further stated that there were colleagues of the Respondent Company who were duly paid their hardship allowance which was discriminating against them.

On cross examination CW1 stated that he was employed by the Defendant/Respondent on 3 months renewable contracts continuously. Further that his salary was deposited in his Kenyan account.

On further cross examination CW1 stated that at termination he was issued with a cheque of Kshs.55,000/= and that the cheque was not deposited into his Kenyan account as was the case at the time of payment of his salary during the subsistence of the employment contract.

CW1 testified that they worked from Monday to Sunday, that in 2004 he worked from 1<sup>st</sup> March 2004 to 31<sup>st</sup> December 2004 continuously unless on 1 week leave. CW1 however stated that he cannot recall all the days he was away on leave which he is not claiming for.

CW2 (**Joseph Njoroge Kamau, 4<sup>th</sup> Claimant**) testified in his evidence that he was employed by the Respondent Company on 5<sup>th</sup> February 2005 as a Plant Mechanic earning a monthly salary of Kshs.42,000/= which was increased to Kshs.47,000/=.

CW2 further testified that he worked for the Defendant/Respondent until his services were terminated in 2006. Further that he was not paid any overtime despite having worked overtime and during public holidays.

It was CW2's evidence that despite his contract providing for \$100 as hardship allowance the same was not paid to him and that he was not given notice as per the Kenyan law.

CW2 stated that he was issued with a cheque of Kshs.20,000/= at the time of termination which cheque he testified that he returned to the Respondent as the Respondent failed to explain why he was paid less than his monthly salary of Kshs.47,000/=. He further stated that no amount was deposited into his account in terms of salary.

On cross examination CW2 stated that he worked continuously for the Respondent for a period of 20 months. It was his evidence that he was not paid salary for October 2006 when his services were terminated.

On further cross examination CW2 stated that he was paid for having worked on Sundays. It was his further evidence that hardship remote area allowance was not provided for in his contract.

CW2 stated that he was not aware if the October 2006 salary was paid into his account and needed to confirm with his Bank. He urged the Court to allow his Claim as prayed.

CW3 (**Isaya O Baraza, 5<sup>th</sup> Claimant**) testified that he was employed by the Respondent Company in February 2004 as a Clinical Officer to treat the respondent's employees and worked till October 2006. He further stated that his salary was Kshs.112,000/=.

It was CW3's evidence that he was based in South Sudan. He further averred that he was employed on 3 months' contracts that were renewed upon expiry.

CW3 stated that his working hours as per his contract was 52 hours but was forced to work extra hours as overtime and was not paid. He further averred that he worked on Sundays as well as on public holidays and was never paid.

It was his further testimony that he was terminated while he was on duty in South Sudan, that he was informed that the Respondent Company could not sustain staff. Further that he was informed verbally by the Respondent's Company manager that he was one of the staff affected.

CW3 testified that he was directed to report at the Respondent's Nairobi office where he was issued with a cheque of Kshs.50,000/= and a declaration form which he rejected.

CW3 further testified that he was not paid terminal dues at the time of termination and that he received verbal notice of termination.

It was his evidence that living in South Sudan involved a lot of risk and he was forced to live away from his family. He was therefore claiming risk allowance that was to be paid to him at \$100 per day as the WFP staff who were stationed at the same place were entitled to the hardship allowance.

On cross examination CW3 stated that his contract provided for working hours of 61 hours under clause 2.1 and that he could work extra hours without extra pay. He further stated that despite working on Sundays he did not document the number of Sundays he worked and that he worked on humanitarian grounds based on his type of work.

On further cross examination CW3 stated that he was issued with a cheque of Kshs.50,000/= at the time of termination but rejected the same as the amount was not explained and it was less than the amount he received as monthly salary.

On re-examination CW3 stated that he seeks hardship allowance from the Respondent as he worked in South Sudan which is very hostile and that other staff were paid hardship allowance and not Kenyan employees which amounted to discrimination.

CW4 (**Elaka M. Kingelu, 5<sup>th</sup> Claimant**) in his evidence stated that he was employed by the Respondent in 2004 as a driver earning a monthly salary of Kshs.30,000/=. He further stated that he was based in South Sudan and the Contract of Employment was signed at the Respondent's Kenya Office at Lenana Road.

CW4 testified that he was verbally terminated and was not offered any terminal dues. He further stated that his last salary was Kshs.40,000/=.

It was CW4's evidence that he worked overtime without any pay. He further claims hardship allowance under Kenyan law as the same was not provided for in his Contract of employment given that South Sudan is a harsh and risky place.

On cross examination CW4 stated that he has no claim over salary.

On further cross examination CW4 confirmed that his last salary at the Respondent Company was Kshs.47,000/=. He further stated that he was not aware how much drivers earned as salary in Kenya.

He further averred that he did not take leave but rest days and recuperation for 14 days based on WFP policy.

On further cross examination CW4 stated that he seeks payment of overtime over the entire work period from December 2004 to October 2006 less rest and recuperation days. He further stated that he was informed that he was to be paid Kshs.24,000/= as send-off which was to be deposited into his account which did not happen.

CW5 (**Obadiah K. Waweru, 8<sup>th</sup> Claimant**) testified on 26<sup>th</sup> January 2016. It was his evidence that he was employed by the Respondent Company in 2004 as a Motor Grader Operator and was to be based in South Sudan and earn a monthly salary of Kshs.49,000/=. However, it was CW5's evidence that he was paid Kshs.51,000/= while in South Sudan based on the nature of the work.

CW5 further testified that the contract was per Kenyan law and working hours were to be 8 hours, he worked extra hours without any overtime payment. He further stated that he did not take leave only rest and recuperation for 14 days after 3 months. That he also worked on public holidays gazetted in Kenya.

He testified that he claims overtime and hardship allowance due to the fact that the Respondent paid other employees hardship allowance. It was his further testimony that he cannot recall if the Respondent ever paid hardship allowance.

CW5 testified that his salary for October, 2006 was also not paid and he was not issued with notice or payment in lieu thereof.

On cross examination CW5 stated that his contract was for 3 months but would be renewed upon expiry. He further confirmed that Clause 3(1) of his contract provided that his salary was Kshs.48,410/=.

On further cross examination CW5 stated that his salary for October 2006 was never paid and no money was deposited into his account as he did not see it.

CW6 (**Richard Kyalo Muli, 9<sup>th</sup> Claimant**) testified that he was employed by the Respondent from 8<sup>th</sup> March 2004 as a driver of heavy commercial vehicle but was given a machine. He further stated that he was based in South Sudan.

His salary was Kshs.30,000/= per month and he worked 48 hours a week and overtime with no pay.

He averred that as per the last contract prior to his termination in October 2006 he was earning monthly salary of Kshs.40,014.25/=.

CW6 stated that he claims for overtime, hardship allowance and notice as none was issued.

On cross examination CW6 stated that his October 2006 salary was paid. He further stated that overtime was for hours worked above 8 hours.

On further cross examination CW6 stated that he was issued with a cheque for Kshs.20,715/= however, the amount was never paid.

CW7 (**Hassan O. Akibaya, 10<sup>th</sup> Claimant**) testified that he was employed by the Respondent in the year 2004 as a driver of heavy commercial motor vehicle and was based in South Sudan. He further testified that his salary was Kshs.50,000/=.

CW7 further testified that his working hours were 8 hours based on Kenya law. He testified that he left the Respondent's employment in mid-2006 due to illness (high blood pressure). He further stated that he was issued with a termination letter that indicated that his termination was due to illness.

It was the evidence of CW1 that he seeks payment of overtime as he worked on Sundays and during Public holidays gazetted in Kenya and hardship allowance as he was based in South Sudan which was a high risk Country.

On cross examination CW7 confirmed that he worked until April 2006 when his contract expired. He further stated that in April 2006 he was paid Kshs.119,000/= and informed that the amount was payment of terminal dues which he disputed.

CW8 (**Florence Wanjiku Maina**) testified on behalf of Julius M Maina (deceased), 3<sup>rd</sup> Claimant who died and was subsequently substituted vide the Ruling dated 13<sup>th</sup> February 2017.

It was her evidence that the 3<sup>rd</sup> Claimant was employed by the Respondent from the year 2004 to the year 2006. It was her further testimony that the 3<sup>rd</sup> Claimant earned a monthly salary of Kshs.57,000/=.

CW8 urged the court to allow the Claim as prayed.

The Claim for the 1<sup>st</sup> and 7<sup>th</sup> Claimants abated as their applications for substitution were disallowed, the two Claimants having passed on and not having been substituted within the time provided in law.

The Respondent's case was heard on 24<sup>th</sup> September 2018, RW1 (**Robert Calistus Nyariki**) gave evidence on behalf of the Respondent.

He confirmed that the Claimants were employees of the Respondent Company and were all based in South Sudan as the Respondent had a contract for the construction of roads in South Sudan.

RW1 testified that the nature of engagement between the Claimants and the Respondent was a fixed term contract clearly stipulating start date and end date with the last contracts expiring on 31<sup>st</sup> October 2006.

He testified that the Claimants' contracts were extended frequently upon expiry. He further stated that the Claimants' were paid terminal dues including overtime through their Bank accounts.

It was his further evidence that the Claimants' worked regular hours with extended time and their pay was agreed on a monthly rate. That the Claimants were not paid field and remote allowances as the same were not provided for under their employment contracts.

RW1 confirmed that overtime payments for Sundays and public holidays were made based on the schedule attached at page 417 to page 461 of the Respondents bundle of documents.

On cross examination RW1 confirmed that the Contracts of employment provided for working hours of 51 hours in a week (normal schedule) and that there was fixed overtime of 9 hours excluding breaks. He further stated that some employees worked on Sundays on a needs basis and if they worked they were paid overtime as per the schedule attached to the Response.

On further cross examination RW1 stated that the Respondent did not provide for hardship allowance, what was provided for in the staff manual was a duty station allowance.

RW1 stated that at the expiry of the Contracts of employment on 31<sup>st</sup> October 2006 all Claimants were paid all their terminal dues as provided for under their individual contracts.

On re-examination RW1 clarified that the provision in the project handbook for 40 working hours per week applied to staff stationed at the Respondent's Nairobi office

The parties then filed and exchanged written submissions.

### **Claimant's Submissions**

In the written submissions the Claimant reiterated the contents of the Memorandum of Claim and oral evidence in Court.

It was submitted that the initial contracts entered into between the Claimants and the respondent provided for 52 working hours per week, six days a week and that if need arises the employee would work additional hours but such overtime would be without pay because provision for overtime had been made in the consolidated salary.

The Claimants further submitted the said contracts had modifications made on them in the year 2005 which included change in working hours that was from 6.00 am to 6.00 pm Monday to Friday and 6.00 am to 12.00 noon Saturdays and the applicable law was the law of the Republic of Kenya.

It was submitted on behalf of Charles Miano (2<sup>nd</sup> Claimant) that his claim for overtime was Kshs.2,687,928 and not the initial amount of Kshs.3,178,826 as days he was on rest and recuperation days were excluded from the total tally. That he was abandoning his claim for overtime for Sundays and Public holidays as he did not work on the given days. Further, that he was duly paid his October 2006 salary meaning that the claim was similarly abandoned.

It was submitted on behalf of Joseph Kamau (4<sup>th</sup> Claimant) that he is entitled to Kshs.1,254,780/= as overtime reduced from Kshs.1,659,181/= after exclusion of rest and recuperation (R & R) days as he admitted having been away on rest and recuperation. He further admitted that he did not work on Sundays and as such the claim is abandoned.

It was submitted on behalf of Isaya O. Baraza (5<sup>th</sup> Claimant) that he worked overtime on humanitarian grounds as his nature of work was that of a clinical officer. He further admitted that he was paid his salary for October, 2006 at the time his contract came to an end.

For Elaku Kangelu (6<sup>th</sup> Claimant) it was submitted that he is entitled to Kshs.1,798,091/= as overtime payment less rest and recuperation days that he was off duty.

It is submitted on behalf of Obadiah Karanja (8<sup>th</sup> Claimant) that he is entitled to 1,276,757/= exclusive of rest and recuperation days that he was away from work.

It is submitted on behalf of Richard Kyalo Muli (9<sup>th</sup> Claimant) that he is entitled to Kshs.1,192,467/= as overtime which amount is exclusive of rest and recuperation days that the 9<sup>th</sup> Claimant admitted that he was not working.

### **Respondent's Submissions**

It is submitted that the Claimants worked on fixed term contracts commencing and ending on specified dates. Further the contracts expressly provided that the Respondent had discretion to enter into new contracts with any of the Claimants upon expiry of the contract period and that the Contracts expired by effluxion of time.

The Respondent further submitted that the Claimants are not entitled to overtime as pleaded and submitted. It was submitted that the Claimants were paid a negotiated salary which was for the agreed 61 hours a week as was agreed between the Claimants and Respondent at the point of signing of the employment contract.

It is further submitted that the Claimants are estopped from claiming what was not within their terms of agreement as they had agreed to the said terms at negotiation and are thus bound by the said terms.

For emphasis the Respondent relied on the authority of *Timothy K. Odindo Versus Bakers Delight Holdings Limited (2018) eKLR* where it was held that:

“The Claimant testified that the agreed salary covered all hours worked and there was no agreement on overtime. The Court returns that the parties are bound by the agreement on the monthly pay of Kshs.14,000 for all the work done. The prayer for unpaid overtime 1.5 per hours for 1318 hours by Kshs.58 per hour Kshs.114,666.00 will therefore fail as unjustified- the Claimant confirmed that there had been no grievance about overtime and he never demanded the same throughout the service and that he knew, and the agreement was, that he works from 6.00 am to 6.00 pm.”

It is further submitted that the Claimants never raised the issue of the overtime when they were in employment. This only arose after their contracts came to an end.

The Respondent further relied on the case of *John Mokaya Maiko Versus Security Group (Msa) Limited (2018) eKLR* where the Court stated as follows:

“The claim for overtime is dismissed because it appears from the material presented to the court that the parties had agreed on a fixed overtime pay of Kshs.5,275 per month whether the Claimant worked or not. It is therefore an afterthought for the Claimant to claim overtime after 16 years and more based on the latest salary.”

It is submitted on behalf of the Respondent that the Court considers the fact that all the Claimants were paid more than what is provided for under the wages order.

The Respondent submitted that the instant claim be dismissed with costs.

### **Findings and Determination**

Having considered the pleadings, evidence, submissions and authorities cited by the parties the following are the issues for determination:

1. Whether the Claimants are entitled to the reliefs sought
2. Who is entitled to costs of the suit?

### **Whether the claimants are entitled to the reliefs sought**

The Claimants in their Amended Complaint claim for the following:

- i. Overtime
- ii. Hardship/remote duty allowance
- iii. One Month salary in lieu of notice
- iv. Salary for October 2006

#### **i. Overtime.**

The Contract of employment provides for fixed overtime pay for all Claimants. For instance the Contract of employment for Joseph Kiseve Muli provided under clause 3.1 on Remuneration a fixed overtime payment of Kshs.12,750.00.

The Claimants never complained about this position before the expiry of their contracts. The claim for overtime is thus not warranted.

Clause 2.1 of their employment contracts provide:

**“The regular working hours shall comprise 61 hours per week, composing 50 hours normal schedule and fixed overtime of 9 hours excluding breaks.**

**In case the need arises, the employee will have to work additional hours to complete assigned tasks. Such work shall be without additional remuneration as this has already been considered in setting the basic salary, fixed overtime pay and other allowances.”**

Under Clause 3.1 on remuneration the monthly salary is itemised as follows –

Basic salary.....	Kshs.21,000
Fixed overtime pay.....	Kshs.5,250
Housing and Benefits.....	Kshs.9,450
Duty Station Allowance.....	<u>Kshs.6,300</u>

**Total Remuneration    Kshs.42,000**

It is clear from the contracts that the claimants’ contracts all provided for fixed overtime of 9 hours payable whether or not any overtime was done during the month. The contract further provided that no additional pay would be made for overtime work as the remuneration had a

provision for fixed overtime.

Further, it is clear that the intention of the parties was expressly outlined in the employment contract. In the case of **Timothy K. Odindo Versus Bakers Delight Holdings Limited (2018) eKLR** it was held that:

“The Claimant testified that the agreed salary covered all hours worked and there was no agreement on overtime. The Court returns that the parties are bound by the agreement on the monthly pay of Kshs.14,000.00 for all the work done. The prayer for unpaid overtime 1.5 per hours for 1318 hours by Kshs.58 per hour Kshs.114,666.00 will therefore fail as unjustified- the Claimant confirmed that there had been no grievance about overtime and he never demanded the same throughout the service and that he knew, and the agreement was, that he works from 6.00 am to 6.00 pm.”

The Claim for overtime therefore fails and is dismissed.

#### **ii. Hardship/remote duty allowance**

The Claimants in their Amended Pleadings as well as in evidence demand payment of hardship/remote duty allowance on grounds that they were all based in South Sudan during the subsistence of their Contracts of employment.

The Claimants in evidence admitted that the said Hardship/remote duty allowance was payable to staff of WFP. No evidence was adduced to confirm this. The claimants on the other hand admitted that hardship/remote duty allowance was not provided for in their contracts. The same is a matter of contractual terms as it is not provided for in the law.

RW1 in his evidence stated that the Claimants were not paid hardship allowance as it was not provided in their employment contracts.

The foregoing being the case, the claim fails and is accordingly dismissed.

#### **iii. One Month salary in lieu of notice**

From the evidence on record the Claimants were employed under fixed term contract with a clear start date and end date.

Paragraph 8.2.1 of the contracts provide as follows –

**“This fixed-term contract ends without further notice being required on the date stipulated in paragraph 1.3 of the contract.”**

Paragraph 1.3 of the contracts provide for the start and end dates of the contracts and further states – “*without any further notice being required.*”

RW1 testified that the contracts terminated by effluxion of time and all the Claimants were duly paid their salaries for October 2016.

To that end, the claim for one month salary in lieu of notice must fail. The same is accordingly dismissed.

#### **iv. Salary for October 2006**

It is clear from documentary evidence that the Claimants were paid their salaries for October 2006 and therefore this claim must also fail.

The upshot of the above is the entire claim fails and is dismissed. Each party shall bear its own costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29<sup>TH</sup> DAY OF JANUARY 2019**

**MAUREEN ONYANGO**

**JUDGE**