



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**INDUSTRIAL CAUSE NO. 304 OF 2014**

***(Before Hon. Justice Mathews N. Nduma)***

**WYCLIFFE OKOTH.....1<sup>ST</sup> CLAIMANT**

**PAUL NYAKACH.....2<sup>ND</sup> CLAIMANT**

**VERSUS**

**H. YOUNG & COMPANY LIMITED.....RESPONDENT**

**JUDGMENT**

1. The claim was filed on 10<sup>th</sup> November 2014 by the 1<sup>st</sup> and 2<sup>nd</sup> claimants seeking payment of overtime allowances in the sum of Kshs. 942,000 based on a Collective Bargaining Agreement signed between the respondent and the union serving the sector on 10<sup>th</sup> September 2013, costs and interest.
2. The suit is opposed by a memorandum of reply filed on 29<sup>th</sup> January 2015.
3. CW1, Paul Nyakach the 2<sup>nd</sup> claimant testified on behalf of both claimants under oath. That he was presently a teacher employed by TSC. That he has a consent filed on 28<sup>th</sup> August 2017 to testify on behalf of other claimants. That he relied on a witness statement filed on 2<sup>nd</sup> April 2017 as his evidence in chief. That he produced the annexes to the statement of claim as exhibits in the suit and list of documents filed on 28<sup>th</sup> August 2017. That they claim terminal benefits as per the CBA aforesaid in the sum of Kshs. 942,000 as set out in paragraph 11 of the statement of claim and computation filed on 28<sup>th</sup> August 2012. The claim is for the period 2013-2014.
4. CW1 testified that he was employed by the respondent from 8<sup>th</sup> May 2013 up to 12<sup>th</sup> July 2014. That the CBA was signed on 10<sup>th</sup> September 2013. CW1 worked as a time clerk. The employees had clocking cards. CW1 manned the clocking machine. CW1 reported to work before 7 am. The work station was inside Hells gate National Park. CW1 and the 1<sup>st</sup> claimant with co-workers were taken to the site by a motor vehicle which picked them by the roadside around 5 a.m in the morning. The time to leave work in the evening was not specified. It depended on the work available. CW1 was the last to leave after everyone had clocked out. The 1<sup>st</sup> claimant worked in the stores department. The claimant produced staff movement summary report as exhibit '2'. It showed the time the claimants clocked in and out. CW1 demonstrated how he clocked in at 7 a.m and left around 5.47 p.m at one given day. The time was usually more than 8 hours. Overtime claimed is time above the 8 hours normal working hours. At times they reported earlier than 7 a.m. CW1 was paid overtime only for May 2013. The payment was done together with the salary. Overtime was paid 1.5 times normal rate per hour and double rate on Sundays worked.
5. The two claimants were picked together and left together daily. They were carried by one motor vehicle.
6. CW1 prayed the court to rely on the computation provided to find the claim for unpaid overtime proved and award accordingly.
7. RW1 Eunice Waithera testified for the respondent. She told the court that she was the human resource manager of the respondent from November 2017.
8. That she was not there when the two claimants worked for the respondent. That handing over was done to her and she relied on the claimants' records handed over to her.
9. RW1 testified that normal working hours were 8 hours between 8.00 a.m. and 5 p.m. This was provided under *clause 4 of the CBA*. RW1 testified that the claimants did not work overtime. RW1 admitted that workers were transported in and out of the site at the same time. She

confirmed the records of clocking in and out produced by the claimants. RW1 confirmed that on 31<sup>st</sup> March 2014, the claimants clocked in at 7.11 a.m and clocked out at 5.47 p.m. RW1 explained that even though the employees clocked in earlier than 8. a.m, they would start working at 8 a.m similarly that they would stop working at 5 pm but clocked out later when transport was ready to take them home. That the claimants awaited transport but were not necessarily working.

10. RW1 stated that the claimant went on strike with eight (8) others. Notice to come back was given to them but they never returned. RW1 admitted all the clocking times show that the claimants reported earlier than 8 a.m and left after 5 p.m. RW1 however insisted under cross examination that the claimants did not work the extra hours but only waited to be ferried home.

11. RW1 prayed that the claims be dismissed with costs.

### **Determination**

12. The only issue for determination is whether the claimants worked overtime that was not paid for on the dates showed in the work records produced by CW1 and confirmed to be genuine clocking in and out times by RW1. RW1 admitted that the times shown in the record reflected when the claimants were transported to the site of work and the time the claimants were transported out of the site. RW1 however denied that the claimants would be working during the extra hours they were at site explaining that they would be only waiting for transport but not working. CW1 stated that they worked until the time they clocked out and they started working immediately they clocked in upon arrival at the site. CW1 explained that the record reflected working hours for purposes of showing number of hours worked by employees. That according to the CBA in place normal working hours were 8 hours and hours worked over and above the 8 hours were overtime to be paid at the rate of 1.5 salary rate and at double rate if done on a Sunday. RW1 confirmed that clause 4 of the CBA provided for overtime as testified by CW1.

13. From the oral and documentary evidence before court, the court is satisfied that the claimants worked overtime on most of the days between 8<sup>th</sup> May 2013 to 12<sup>th</sup> July 2014. The CBA covered this period. The claimants were paid overtime only for the month of May 2013 and no other month. The claimants have proved on a balance of probabilities that they had worked overtime that was not paid for by the respondent. The sum of Kshs. 942,000 quantified to be due and owing to the claimants has not been challenged by RW1. RW1 only testified that the claimants did not work during the period the work records show that they were at work for more than 8 hours. The testimony by RW1 is not credible. The record clearly shows the number of hours worked by the claimants and other workers on a daily basis.

14. Accordingly, the claimants have proved their case on a balance of probabilities and the court awards the claimants as against the respondent as follows:

- (a) Unpaid overtime in the sum of Kshs. 942,000.
- (b) Interest at court rates from date of filing suit till payment in full.
- (c) Costs of the suit.

**Judgment Dated, Signed and delivered this 18<sup>th</sup> day of July, 2019**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Achura for claimants

M/S Olendo for Respondent

Chrispo – Court Clerk