



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KISUMU**  
**CAUSE NO. 145 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**SAMUEL KIPNGETICH KORIR**

**GULETH BULE HASSAN**

**VICTOR GITHIOMI**

**EDWIN KIPROTICH CHUMO.....CLAIMANTS**

**DAVID K. BURUSEI**

**ELIUD GALENYWA MWANZI**

**JOSHUA BARASA KARANI**

*VERSUS*

**JIANGIXI ZHOGNMEI ENGINEERING**

**CONSTRUCTION COMPANY LIMITED.....RESPONDENT**

**JUDGEMENT**

The claimants are all male adults who worked for the respondents during the construction of Webuye – Kitale Road. They were all not issued with any letters of appointment.

By the claim dated 27<sup>th</sup> May 2015 they allege that they were engaged by the respondent for periods ranging from 13 to 29 months as set out below.

1. Samuel Kipngetch Korir – 15 months
2. Gulei Bule Hassan – 29 months
3. Victor Githiomi – 29 months
4. Edwin Kiprotich Chumo – 18 months
5. David K. Barusei – 19 months
6. Eliud Galenywa Mwanzi – 22 months
7. Joshua Barasa Karani – 13 months

The claimants seek payment of the following from the respondents:-

**1<sup>st</sup> claimant – Samuel Kipnetich Korir**

Underpayment	401,600/=
Lost hours/overtime	315,000/=
House allowance	94,500/=
NSSF & NHIF Funds	7,800/=
PAYE	13,484/=
Annual leave	42,000/=
<b>Total</b>	<b>874,384/=</b>

**2<sup>nd</sup> claimant – Guleth Bule Hassan**

Underpayment	709,600/=
Lost hours/overtime	609,000/=
House allowance	182,700/=
NSSF & NHIF Funds	15,080/=
PAYE	13,484/=
Annual leave	84,000/=
<b>Total</b>	<b>1,613,864/=</b>

**3<sup>rd</sup> claimant – Victor Githimomi**

Underpayment	709,600/=
Lost hours/overtime	609,000/=
House allowance	182,700/=
NSSF & NHIF Ffunds	15,080/=
Annual leave	84,000/=
<b>Total</b>	<b>1,613,864/=</b>

**4<sup>th</sup> claimant – Edwin Kiprotich Chumo**

Underpayment	470,400/=
Lost hours/overtime	378,000/=
House allowance	113,400/=
NSSF & NHIF Funds	9,360/=
PAYE	6,233/=
Annual leave	42,000/=
<b>Total</b>	<b>1,019.393/=</b>

**5<sup>th</sup> claimant – David K. Burusei**

Underpayment	518,400/=
Lost hours/overtime	399,000/=
House allowance	119,700/=
NSSF & NHIF Funds	9,880/=
PAYE	6,457/=
Annual leave	42,000/=
<b>Total</b>	<b>1,095,437/=</b>

**6<sup>th</sup> claimant – Eliud Galenywa Mwanzi**

Underpayment	633,600/=
Lost hours/overtime	462,000/=
House allowance	138,600/=
NSSF & NHIF Funds	11,440
Annual leave	42,000/=
<b>Total</b>	<b>1,287,640/=</b>

**7<sup>th</sup> claimant – Joshua Barasa Karani**

Underpayment	345,000/=
Lost hours	315,000/=
House allowance	81,900/=
NSSF & NHIF Funds	6,760/=
Annual leave	42,000/=
<b>Total</b>	<b>770,660/=</b>

The respondent did not file any response to the claim.

On 23<sup>rd</sup> May 2016 I referred the claim to the County Labour Office, Trans Nzoia County to investigate and prepare a report to assist the court in determination of the claim. The report of the County Labour Office was filed in court on 5<sup>th</sup> October 2016 in which he made the following findings:-

**Samuel Kipnetich Korir**

Samuel K. Korir was employed in July 2013 as a tipper driver earning Kshs.600 per day until 11/07/2015 when he terminated his employment with the company. On termination he was paid the following terminal dues which he received and confirmed that he had no further claim against his former employer. The dues were:-

Salary	26,259/=
Service gratuity	20,972/=
Accrued leave	19,474/=
<b>Total</b>	<b>66,705/=</b>

## Hours of work

In my investigation, I found out that Mr. Samuel K. Korir used to work hours over and above the normal daily working hours and these were recorded in the job cards and paid as overtime therefore the issue of lost hours does not arise.

## House allowance

All employees including Samuel K. Korir were entitled to house allowance at the rate of 20% of basic pay.

The company paid Kshs.1,000/= per month to cater for house allowance, however, according to Building and Construction Industry Wages order legal notice No. 20 of 1<sup>st</sup> February, 2013, the employee who is not housed by the employer is entitled to house allowance at the rate of 20% of basic pay therefore 20% of 19475 is 3894/80 less 1000=2894/80 x 12 = 34,737.60/=.

Therefore Samuel Korir is owed Kshs.34,737.60 only as house allowance arrears.

## Edwin Chumo

Edwin Chumo was employed as a tipper driver in September 2013 earning Kshs.600/= per day, thereafter in September, 2014 the salary was adjusted to Kshs.19,474.00 there the issue of underpayment of wages does not arise however, the company paid Mr. Chumo Kshs.1,000/= per month as house allowance instead of 3894/80 which resulted into underpayment of house allowance. Therefore for 12 months Mr. Chumo is owed by the company Kshs.2,894 x 12 months=34,737/60 only.

## David K. Barusei

Mr. David K. Barusei was employed by the company as a tipper

driver earning Kshs.600/= per day which was thereafter adjusted to Kshs.19,600/= per month. He left employment in November, 2015 and was paid his terminal dues in full and final settlement as follows:-

Wages for days worked	5,131/=
Service gratuity	20,792/=
Accrued leave	16,852/=
<b>Total dues</b>	<b>42,775/=</b>

**He received Kshs.42,800/=.**

During the employment period David K. Barusei was paid Kshs.1,000/= per month as house allowance instead of 3,920/80 which resulted in underpayment of house allowance therefore Mr. Barusei is owed by the company Kshs.2,920 x 12 months = 35,040/= only.

The remaining four employees namely:-

1. Victor Githiomi Charles
2. Hassan B. Guleth
3. Joshua Barasa Karani
4. Eliud Mwanzi

are still in employment and therefore the matter can be handled at the company level.

Finally, the issue of underpayment can be said to have been resolved in that in September, 2014 the company adjusted wages for all workers including the claimants as per the Building and Construction Industry Wages Order Legal Notice No. 20 (see attached copy).

I directed counsel for the claimant Ms Situma and Company Advocates to file written submissions in response to the County Labour Officer's report which were filed on 19<sup>th</sup> May 2017.

It is submitted that the claimants were underpaid in contravention of the Regulations of Wages (General) Order 2013 as they were paid Kshs. 50/=, 60/= and 65/= during the period they worked instead of Kshs.175/= per hour worked. It is further submitted that the claimants worked for 12 hours daily from Monday to Sunday from 7 a.m. to 7 p.m. but were paid for 8 hours only thus each of them is entitled to overtime of 4 hours a day, the claimants further submit that they were not given or paid in lieu of annual leave and are entitled to payment for the same.

The claimants however abandoned their prayers for NSSF, NHIF and PAYE. Their final claims are therefore as follows:-

**1<sup>st</sup> claimant – Samuel Kipnetich Korir**

Underpayment	401,600/=
Lost hours/overtime	315,000/=
Annual leave	42,000/=
<b>Total</b>	<b>758,600/=</b>

**2<sup>nd</sup> claimant – Guleth Bule Hassan**

Underpayment	709,600/=
Lost hours/overtime	609,000/=
Annual leave	84,000/=
<b>Total</b>	<b>1,402,600/=</b>

**3<sup>rd</sup> claimant – Victor Githimomi**

Underpayment	709,600/=
Lost hours/overtime	609,000/=
Annual leave	84,000/=
<b>Total</b>	<b>1,402,600/=</b>

**4<sup>th</sup> claimant – Edwin Kiprotich Chumo**

Underpayment	470,400/=
Lost hours/overtime	378,000/=
Annual leave	42,000/=
<b>Total</b>	<b>890,400/=</b>

**5<sup>th</sup> claimant – David K. Burusei**

Underpayment	518,400/=
Lost hours/overtime	399,000/=
Annual leave	42,000/=
<b>Total</b>	<b>959,400/=</b>

**6<sup>th</sup> claimant – Eliud Galenywa Mwanzi**

Underpayment	633,600/=
Lost hours/overtime	462,000/=
Annual leave	42,000/=
<b>Total</b>	<b>1,137,600/=</b>

**7<sup>th</sup> claimant – Joshua Barasa Karani**

Underpayment	345,000/=
Lost hours/overtime	315,000/=
Annual leave	42,000/=
<b>Total</b>	<b>702,000/=</b>

### **Determination**

I have considered the claims herein. The claim is limited to the terminal dues payable to the claimants only. The issue for determination is therefore whether each of the claimants is entitled to underpayments, lost hours/overtime and annual leave.

I have noted that in the written submissions no attempt was made to address the findings in the report of the Labour Officer. The claimants did not deny that they were paid as stated in the report of the County Labour Officer for Korir, Chumo and Barusei nor did they deny that the other 4 claimants being Githiomi, Guleth, Karani and Mwanzi were still in employment at the time of filing suit and even at the time of preparation of the County Labour Officer's report on 6<sup>th</sup> September 2016. For these reasons I will consider the report to represent the factual position.

An extract of payroll for the claimants is attached to the report of the County Labour Officer which reflects that all the claimants were Tipper drivers paid at a monthly basic salary of 19,474 as at September 2014. They were also paid house allowance, normal overtime, holidays and rest days.

From the foregoing, I confirm the findings of the County Labour Officer. I however note that apart from Korir (1<sup>st</sup> claimant) and Barusei (5<sup>th</sup> claimant) no mention is made about payment of annual leave. Annual leave is a right of all employees. All employees are therefore entitled to annual leave or pay in lieu thereof, whether still in employment or not.

### **Conclusion**

Based on the foregoing I enter judgment as follows:-

#### **Samuel Kipngetch Korir**

There is no proof of the claims in respect of underpayments, lost hours and overtime.

On annual leave, he is entitled to annual leave for 15 months being 26.25 days. At a salary of Kshs.26,859 he is entitled to Kshs.22,976.70. Having been paid Kshs.19,705, he is entitled to the balance of **Kshs.3,502.70/=** which I award him.

#### **Guleth Bule Hassan**

The prayer for underpayment has not been proved and is dismissed. The prayer for lost hours/overtime is also not proved and is dismissed. His claim for annual leave is allowed for the period of 29 months in the sum of **Kshs.35,985.40/=** which I award him.

#### **Victor Githiomi**

The claims for underpayments, lost hours and overtime are dismissed for want of proof. The claim for annual leave is allowed. I award the claimant **Kshs.35,985.40/=** for 29 months served.

#### **Edwin Kiprotich Chumo**

The prayers for underpayments, lost hours and overtime are dismissed. The prayer for annual leave is granted for 18 months at Kshs.22,335.75. This will be in addition to Kshs.34,737.60 found to be due to him on account of house allowance by the County Labour Officer making a total of Kshs.57,073.40. I therefore award him **Kshs.57,073.40/=**.

#### **David Barusei**

The claim for underpayment, lost hours and overtime are dismissed as not having been proved. The prayer for annual leave is granted for a period of 19 months at Kshs.23,576.50 less the sum of Kshs.16,852 paid. He is therefore entitled to **Kshs.6,724.50/=**.

#### **Eliud Gulenywa Mwanza**

The claims for underpayments, lost hours and overtime are dismissed. The prayer for annual leave is granted for 22 months at **Kshs.21,865/=**.

#### **Joshua Barasa**

The claim for underpayments, lost hours and overtime are dismissed for want of proof. The prayer for annual leave is granted for 13 months at **Kshs.16,131.30/=**.

The respondent shall pay claimant's costs on the lower scale on the basis that it is an undefended claim.

**DATED AND SIGNED THIS 14<sup>TH</sup> DAY OF MARCH 2018**

**MAUREEN ONYANGO**

**JUDGE**

**DATED AND DELIVERED AT ON THIS 10<sup>TH</sup> DAY OF MAY 2018**

**MATHEWS NDERI NDUMA**

**JUDGE**