



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 15 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

DOUGLAS WANJALA MAKOKHA & 35 OTHERS.....CLAIMANT

VERSUS

JIANGXI ZHONGMEI ENGINEERING

CONSTRUCTION COMPANY LIMITED.....RESPONDENT

JUDGMENT

Introduction

The claimants are all current or former employees of the respondent, a construction company engaged by the Government of Kenya to rehabilitate the Webuye-Kitale Road. According to the claim dated 19th January and filed on 20th January 2015, the claimants seek payment of underpayments, lost hours, house allowance, NSSF/NHIF/PAYE and annual leave. The specific claims of each of the 36 claimants are as set out on the claim. The claimants further seek costs and interest.

The respondent filed a defence on 23rd February 2016 denying the allegations in the claim. The respondent avers that all the claimants were paid all their dues and are not owed any arrears of house allowance, lost hours or annual leave. The respondent prays that the claim be dismissed.

The claimants filed a reply to the defence on 5th May 2015 joining issues with the respondents.

On 5th October 2016 the case was with the consent of parties referred to the County Labour Officer Trans Nzoia to investigate and prepare a report. The claimants thereafter filed written submissions in respect of the report. This judgment is based on the pleadings, the County Labour Officer's report dated 20th February 2017 and filed on 24th February 2017 and the written submissions of the claimants dated 16th May 2017.

No submissions were filed on behalf of the respondent.

The findings in the County Labour Officer's report are reproduced below –

“Following the court's directive that the above matter be investigated and report submitted to the court.

The following are the findings of each employee: -

1. David Muchiri

David Muchiri was engaged in March 2014 and after working for four (4) months he left employment in July 2015.

2. Geoffrey K. Korir

Geoffrey was engaged in July 2013 and left in October 2014 and was paid his dues and he voluntarily signed for the same.

3. Erick M. Sammy

He was engaged as Grader Operator on July 2014 and left on 5th March 2015. He was paid his final dues amounting to Kshs.65,300/= which he acknowledged and signed for the receipt.

4. Anthony Kaloki Musyoka

Mr. Musyoka got employed in August 2013 as a Grader operator and left on 5th March 2015. He was paid Kshs.35,200/= as full and final settlement of his dues which he duly signed and proclaimed he had no more claims.

5. Charles K. Ruto

Mr. Ruto was employed as a mechanic in January 2015 and was summarily dismissed for gross misconduct being theft by servant on 5th March 2015 and paid all wages due.

6. David Simiyu Makokha

Mr. Simiyu was employed as a welder earning Kshs.16,000/= per month and his services were terminated on 16th May 2016. He was paid terminal dues as follows: -

- Accrued leave	- 9,692.00
- Service gratuity	- <u>25,846.00</u>
Total	<u>35,538.00</u>

He confirmed receipt of the dues as full and final settlement

7. Richard Ikamar Orimodi

Richard Orimodi was employed in December 2012 as shovel operator and left in august 2016. He was paid his terminal benefits as follows:-

- Wages	- 21,000.00
- Leave	- 5,140.00
- Service gratuity	- <u>31,984.00</u>
Total	<u>35,538.00</u>

Upon receipt of the above shown amount, he acknowledged by signing the payment slip confirming that he had no further claims against his employer.

8. Lazarus Juma Awuor

Lazarus Juma was employed as a general worker in July 2013 and left through resignation on 11th March 2016. He was paid his full and final terminal dues which consisted of: -

- Wages	- 6,800.00
- Leave	- 10,984.00
- Service gratuity	- <u>863.00</u>
Total	<u>18,647.00</u>

He acknowledged receipt.

9. Bonface Kimeu

Bonface Kimeu was employed on October 2013 as a loader operator earning Kshs.19,600/= and left on 10th January 2015. He was paid his full and final dues as follows: -

- Salary	- 27,566.00
- One month's wage	
- In lieu of notice	- <u>19,600.00</u>
Total	<u>47,166.00</u>

He acknowledged receipt.

10. Benson Nyapara

Mr. Nyapara was engaged as a roller operator in January 2013 and left in January 2016. He was paid his terminal dues amounting to Kshs.56,000/=, which he duly acknowledged.

11. Kizito Namusenda Musawa

Mr. Kizito Namusenda was employed as excavator operator in December 2012 and left on 18th November 2014. He was paid his terminal dues of Kshs.16,550/= which he acknowledged by signing the payment slip.

The following claimants are still working for the company, therefore it is premature for them to lodge a claim against the company –

1. Daniel Nyakweba Mogire
2. Thephilus Kisisyo Munyasia
3. Patrick Masika
4. Fredrick Silikha
5. Fredrick Joshua Teka
6. Allan Kemoi Maiyo
7. John Wekesa Wabomba
8. Douglas Wanjala Makokha
9. Saidi Juma
10. Nathaniel Njagi
11. Justus Amakero
12. Vincent Wasike Walekhwa
13. Sositine Wanjala Buyera
14. Rashid Shikuku
15. Metrine Nasimiyu Nguti
16. Silas Okech
17. Charles Musera

NOTES

Note I – Underpayment

The underpayments arrears as demanded by claimants is outrageous in the sense that the counsel calculated it basing on hourly rate which is not provided for in the Building and Construction Industry Wages Order. This order provides that employees in the category of drivers, artisans, general workers be paid on daily rate only. There is no provision for payment of wages on hourly rate.

Note II – Lost hours

Lost hours cannot be explained but it is assumed to be the overtime. This claim is not valid in the sense that all employees who worked extra hours were paid overtime and this can be validated through the records presented by the counsel to the court.

Note III – N.S.S.F AND N.H.I.F Refunds

N.S.S.F and N.H.I.F are statutory deductions which claimants cannot ask for refunds from employer. If the claimants have any sufficient reason to believe these deductions were not remitted then they can contact these organisations.

Note IV – House Allowance

This issue can be considered after verification of records. Where it is found that some of these claimants were not paid house allowance, then the claimants can claim for the same to a maximum of 12 months.

In the claimants' submissions the prayers for house allowance, NSSF, NHIF and PAYE have been abandoned leaving only claims in respect of underpayments, lost hours/overtime and annual leave for determination. It is submitted as follows in respect thereof.

It is submitted that the claimants were paid below the statutory minimum rates of pay applicable between 2012 and 2014. It is further submitted that the respondent also flouted an agreement reached in a Return to Work Formula dated 13th September 2014 witnessed by the County Labour Officer, Bungoma.

On Overtime

It is submitted that claimants worked for 12 hours daily from 7.00 a.m. to 7.00 p.m. thus putting in four hours of overtime daily which they were not compensated for. That in addition they worked for 7 days without a rest day hence the claim for extra hours and rest days.

On annual leave it is submitted that all the claimants were not allowed to go on annual leave and were not paid in lieu thereof.

The final claims for each of the claimants are as follows -

	NAME	UNDERPAYMENTS	LOST HOURS/OVERTIME	ANNUAL LEAVE	TOTAL
1.	Fredrick Silikha	566,800.00	168,000.00		734,800.00
2.	David Muchiri	171,600.00	147,000.00		318,600.00
3.	Geoffrey K. Korir	356,400.00	37,800.00		394,200.00
4.	Daniel Nyakweba Mogire	286,000.00	231,000.00	42,000.00	559,000.00
5.	Thephilus Kisisyo Munyasia	97,200.00	189,000.00		286,200.00
6.	Kenneth Wanjogu	171,600.00	273,000.00	42,000.00	486,600.00
7.	Patrick Masika	468,000.00	399,000.00	42,000.00	909,000.00
8.	Fredrick Joshua Teka	454,800.00	30,720.00	42,000.00	527,520.00
9.	Erick Summy	86,400.00	168,000.00	42,000.00	296,400.00
10.	Douglas K. Rotick	304,560.00	315,000.00	42,000.00	661,560.00

1	1. Allan Kemboi Mayo	346,320.00	273,000.00	42,000.00	661,320.00
1	2. John Wekesa Wabomba	530,400.00	420,000.00	42,000.00	992,400.00
1	3. Douglas Wanjala Makokha	241,200.00	210,000.00		451,200.00
1	4. Bonface Kimeu	419,400.00	273,000.00	42,000.00	734,400.00
1	5. Saidi Juma	379,440.00	189,000.00	37,800.00	606,240.00
1	6. Nathaniel Njagi	284,400.00	336,000.00	42,000.00	662,400.00
1	7. Anthony Kaloki Musyoka	428,400.00	336,000.00	42,000.00	806,400.00
1	8. Justus Amakero	418,200.00	462,000.00	42,000.00	922,200.00
1	9. Enock K. Rotich	228,991.00	336,000.00	42,000.00	606,991.00
2	0. Vincent Wasike Walekhwa	729,600.00	462,000.00	42,000.00	1,233,600.00
2	1. Sositine Wanjala Buyera	181,120.00	420,000.00	42,000.00	643,120.00
2	2. Lazarus Ojwang Awuor	181,120.00	420,000.00	42,000.00	643,120.00
2	3. Rashid Shikuku	249,600.00	252,000.00	42,000.00	543,600.00
2	4. Ruto Charles Kipyegon	285,600.00	210,000.00		495,600.00
2	5. Caleb Sasaka	604,800.00	504,000.00	84,000.00	1,192,800.00
2	6. David Simiyu	360,000.00	294,000.00	42,000.00	696,000.00

2	7. Nganga Isaac Njure	403,600.00	294,000.00	42,000.00	739,600.00
2	8. Metrine Nasimiyu Nguti	856,934.00	441,378.00	42,866.00	1,341,178.00
2	9. Millicent Musyoka Sabwami	443,424.00	354,312.00	50,616.00	848,352.00
3	0. Richard Ikamar Orimodi	609,600.00	546,000.00	84,000.00	1,239,600.00
3	1. Harrison Wachira	336,000.00	294,000.00	42,000.00	672,000.00
3	2. Silas Okech	110,400.00	84,000.00		194,400.00
3	3. Charles Musera	598,560.00	399,000.00	42,000.00	1,039,560.00
3	4. Kizito Namusenda Musava	566,400.00	504,000.00	84,000.00	1,154,400.00
3	5. John Njagi Mwangi	266,400.00	210,000.00		476,400.00
3	6. Benson O. Nyapara	583,200.00	462,000.00	42,000.00	1,087,200.00

The claimants relied on the following decisions –

1. *Evans Katiezo Aligulah -v- Eldomatt Wholesale and Supermarket Limited [2016] eKLR.*
2. *John Rioba Maugo -v- Riley Falcon Security Services Limited [2016] eKLR.*
3. *Kenya Guards and Allied Workers Union -v- Lavington Security Limited [2013] eKLR.*

Determination

I have carefully considered the pleadings, the documents filed therewith, the County Labour Officer's report and the submissions filed on behalf of the claimants. It is not in dispute that all the claimants worked for the respondent at one time or other.

The issues for determination are therefore whether or not the claimants were underpaid and if they are owed any overtime and/or annual leave by the respondent.

1. Underpayments

In the claim it is stated that the claimants worked in different capacities as operators, mechanics, machine attendants, artisans, technicians and one as secretary. However in the County Labour Officer's report, he states that the claimants were engaged as follows–

	NAME	ID	TRADE	STARTED TIME	ENDED	BEFORE RATE	CURRENT RATE	STATUS
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1	Fredrick Silikha	3968339	Roller Operator	03/2014		560	13,520	Working
2	David Muchiri	30544861	EX Operator	03/2014	03/2014	660	19,474	30544861
3	Geoffrey K. Korir	28161713	Operator	07/2013	10/2014	360	9,500	
4	Daniel Nyakweba Mogire	23612963	Roller Operator	12/2013		520	680	Working
5	Theophilus Kisisyo Munyasia	24993521	Grader Operator	04/2014		1,240	22,984	Working
6	Kenneth Wanjogu	22357837	Grader Operator	12/2013		1,240	21,216	
7	Patrick Masika	7962680	Dozer Operator	06/2013		640	19,474	Working
8	Fredrick Joshua Teka	25429144	Paver	07/2013		800	1,240	Working
9	Erick Summy	25112734	Grader Operator	07/2014	10/2014	1,040	22,984	
10	Douglas K. Rotich	30252820	Shovel Operator	09/2013	11/2014	360	9,000	
11	Allan Kemoi Maiyo	27660054	Labourer	07/2013		360	9,000	Working
12	John Wekesa Wabomba	10672353	Labourer	09/2013		640	19,600	Working
13	Douglas Wanjala Makokha	22917366	Crane Driver	03/2013		640	19,474	Working
14	Bonface Kimeu	22748805	Dozer Operator	10/2013	11/2014	680	19,474	
15	Saidi Juma	24162912	Shovel Operator	07/2013		360	9,300	Working
16	Nathaniel Njagi	12882293	Labourer	08/2013		1,240	170	Working
17	Anthony Kaloki Musyoka	29216611	Grader attachment Operator	08/2013	12/2014	680	19,474	
18	Justus Amakero	6331784	Shovel Operator	01/2013		680	19,474	Working
19	Enock K. Rotich	23351507	Labourer	07/2013	11/2014	360	9,500	

2 0	Vincent Walekhwa	Wasike	12998194	Mechanic	01/2013		520	14,000	Working
2 1	Sositine Buyera	Wanjala	30760391	Labourer	09/2013		360	6,500	Working
2 2	Lazarus Ojwang Awuor		20386952	Labourer	07/2013		320	6,400	Working
2 3	Rashid Shikuku		10531066	Distribute Op	11/2013		680	18,000	Working
2 4	Ruto Charles Kipyegon		13008204	Mechanic	01/2014	03/2015	600	13,580	
2 5	Caleb Sasaka		20540743	P. Mechanic	02/2013	11/2014	600	19,474.15	
2 6	David Simiyu		11562293	Welder	09/2013		480	13,580	
2 7	Nganga Isaac Njure		13458728	Mechanic	01/2014	12/2014	600	13,580	
2 8	Metrine Nguti	Nasimiyu	30489297	Lab Technician	01/2013		22,000	31,000	Working
2 9	Millicent Sabwami	Musyoka	24926639	Secretary	12/2012	01/2015	420	12,000	
3 0	Richard Orimodi	Ikamar	11030972	Shovel Operator	12/2012	08/2016	680	19,474	
3 1	Harrison Wachira		29393185	Excavator Operator	06/2013	10/2014	680	19,474	

From the pleadings and documents filed on behalf of the claimants, it is not clear how the sums claimed for underpayments were arrived at. It is not even clear what rate was used to work out the underpayments.

The claimants state the rate at which they were paid but do not state the rate they allege they were supposed to be paid. According to the Regulation of Wages (General) Order 2013, the hourly rates range from Kshs.48.85 for general labourer to Kshs.89.55 for ungraded artisan and Kshs.175.15 for grade 1 Artisan.

According to the documents in the claim it is not possible to tell what rate was used to pay each of the claimants. It is therefore not possible to determine whether or not any of the claimants was underpaid, based on the documents on record. This claim must therefore fail for want of proof. The prayer for underpayments is accordingly dismissed on grounds that it has not been proved.

2. Overtime/Lost Hours

The claimants allege that they worked 12 hours each day for 7 days without a break. I have checked the few time sheets that have been filed in court together with the payslips. It is clear that the hours worked are clearly recorded. The time sheets even recorded the hours worked as normal overtime paid at 1.5 hourly rates and overtime for public holidays and rest days paid at double (2 times) the normal hourly rates. The same is also reflected in the payslips. This means that all overtime worked was recorded and paid and the same is reflected in the time sheets and payslips.

The claim for overtime/lost hours accordingly fails and is dismissed.

3. Annual leave

The respondent did not deny that it did not pay the claimants annual leave. Section 28 of the Employment Act provides for payment of annual leave for any employee who has worked for a minimum of two months. None of the claimants worked for less than two months. Each of them is therefore entitled to annual leave at the rate of 1.75 days for each month worked.

The respondent is directed to compute and pay the claimants all leave due from date of recruitment to date of either leaving employment or to date of filing suit being December 2014.

Conclusion

In conclusion judgment is entered for the claimants against the respondent in respect of annual leave only, the claims for underpayments and lost hours/overtime having been dismissed for want of proof.

The respondent will pay costs of the suit at half rate on the lower scale as the bulk of the claim has been dismissed and also taking into account that the case was determined on pleadings and documents without calling evidence.

DATED AND SIGNED AT NAIROBI ON THIS 4TH DAY OF JUNE 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 5TH DAY OF JULY 2018

MATHEWS NDERI NDUMA

JUDGE