



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
CAUSE NO. 144 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

EVANS WAFULA SHIKUKU & 18 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 27th April 2015 and filed on 5th May 2015, the claimants seek payment of underpayments, lost hours, house allowance, NSSF/NHIF/PAYE and annual leave. The specific claims of each of the 19 claimants are as set out on the claim. The claimants further seek costs and interest.

The claims by each of the claimants is broken down as follows –

1ST CLAIMANT – EVANS WAFULA SHIKUKU

Under payments	Kshs.177,600/=
Lost hours	Kshs.176,400/=
House Allowance	Kshs.52,920/=
NSSF & NHIF Funds	Kshs.10,920/=
Annual leave	<u>Kshs.16,800/=</u>
TOTAL	KSHS.444,640/=

2ND CLAIMANT – LEONARD SIMIYU MUKHEBI

Under payments	Kshs.466,600/=
Lost hours	Kshs.378,000/=
House Allowance	Kshs.113,420/=
NSSF & NHIF Funds	Kshs.10,920/=

Annual leave	<u>Kshs.36,000/=</u>
TOTAL	KSHS.1,005,120/=

3RD CLAIMANT – KENNEDY MURUMBA

Under payments	Kshs.158,640/=
Lost hours	Kshs.142,800/=
House Allowance	Kshs.42,840/=
NSSF & NHIF Funds	Kshs.8,840/=
Annual leave	<u>Kshs.16,800/=</u>
TOTAL	KSHS.369,920/=

4TH CLAIMANT – ARNOLD FTYANG

Under payments	Kshs.158,640/=
Lost hours	Kshs.142,800/=
House Allowance	Kshs.42,840/=
NSSF & NHIF Funds	Kshs.8,840/=
Annual leave	<u>Kshs.16,800/=</u>
TOTAL	KSHS.369,920/=

5TH CLAIMANT – SIFUNA WANYAMA

Under payments	Kshs.158,640/=
Lost hours	Kshs.142,800/=
House Allowance	Kshs.42,840/=
NSSF & NHIF Funds	Kshs.8,840/=
Annual leave	<u>Kshs.16,800/=</u>
TOTAL	KSHS.369,920/=

6TH CLAIMANT – MARK CHEROBEN KIPTUM

Under payments	Kshs.138,720/=
Lost hours	Kshs.117,600/=
House Allowance	Kshs.35,280/=
NSSF & NHIF Funds	Kshs.7,280/=
Annual leave	<u>Kshs.16,800/=</u>
TOTAL	KSHS.316,680/=

7TH CLAIMANT – JOSPHAT MWANGI MATHIKA

Under payments	Kshs.228,000/=
Lost hours	Kshs.252,000/=
House Allowance	Kshs.75,600/=
NSSF & NHIF Funds	Kshs.7,280/=
Annual leave	Kshs.36,000/=
One month notice in lieu	Kshs.36,000/=
Five months that would have been worked	<u>Kshs.180,000/=</u>
TOTAL	KSHS.815,880/=

8TH CLAIMANT – DAVID NYANUMBA NDUBI

Under payments	Kshs.148,800/=
Lost hours	Kshs.180,000/=
House Allowance	Kshs.54,000/=
NSSF & NHIF Funds	<u>Kshs.5,200/=</u>

TOTAL KSHS.388,000/=

9TH CLAIMANT – EDWIN BITANGE AREGE

Under payments	Kshs.148,800/=
Lost hours	Kshs.180,000/=
House Allowance	Kshs.54,000/=
NSSF & NHIF Funds	<u>Kshs.5,200/=</u>

TOTAL KSHS.388,000/=

10TH CLAIMANT – GEOFFREY OMATO NYAKERIGA

Under payments	Kshs.264,000/=
Lost hours	Kshs.306,000/=
House Allowance	Kshs.91,800/=
NSSF & NHIF Funds	Kshs.8,840/=
Annual leave	<u>Kshs.36,000/=</u>

TOTAL KSHS.706,640/=

11TH CLAIMANT – FALLEN NYAKUNDI

Under payments	Kshs.138,960/=
Lost hours	Kshs.117,600/=
House Allowance	Kshs.35,280/=
NSSF & NHIF Funds	Kshs.7,820/=

Annual leave Kshs.16,800/=

TOTAL KSHS.325,920/=

12TH CLAIMANT – BENARD W. KEYARI

Under payments Kshs.141,120/=

Lost hours Kshs.117,600/=

House Allowance Kshs.35,280/=

NSSF & NHIF Funds Kshs.7,820/=

Annual leave Kshs.16,800/=

One month notice in lieu Kshs. 16,800/=

Five (5) months that would have been worked Kshs.84,000/=

TOTAL KSHS.418,880/=

13TH CLAIMANT – OSOU E. SHEM

Under payments Kshs.249,600/=

Lost hours Kshs.198,000/=

House Allowance Kshs.59,400/=

NSSF & NHIF Funds Kshs.5,720/=

TOTAL KSHS.512,720/=

14TH CLAIMANT – JOSEPH BARASA

Under payments Kshs.141,120/=

Lost hours Kshs.117,600/=

House Allowance Kshs.35,280/=

NSSF & NHIF Funds Kshs.7,820/=

Annual leave Kshs.16,800/=

TOTAL KSHS.318,080/=

15TH CLAIMANT – MOSES WANAMBISI KARANI

Under payments Kshs.231,552/=

Lost hours Kshs.182,580/=

House Allowance Kshs.39,505/=

NSSF & NHIF Funds Kshs.8,840/=

Annual leave Kshs.15,492/=

TOTAL KSHS.477,969/=

16TH CLAIMANT – ELIAS WANJALA

Under payments	Kshs.125,040/=
Lost hours	Kshs.144,000/=
House Allowance	Kshs.43,200/=
NSSF & NHIF Funds	Kshs.12,480/=
Annual leave	<u>Kshs.24,000/=</u>
TOTAL	KSHS.348,720/=

17TH CLAIMANT – PAUL JOSEPH SIMIYU

Under payments	Kshs.24,336/=
Lost hours	Kshs.41,076/=
House Allowance	Kshs.12,322/=
NSSF & NHIF Funds	<u>Kshs.3,640/=</u>
TOTAL	KSHS.81,374/=

18TH CLAIMANT – JOSEPHINE NASAMBU WALELA

Under payments	Kshs.219,456/=
Lost hours	Kshs.193,320/=
House Allowance	Kshs.41,850/=
NSSF & NHIF Funds	Kshs.9,360/=
Annual leave	<u>Kshs.21,480/=</u>
TOTAL	KSHS.465,556/=

19TH CLAIMANT – LUCY INDUSA

Under payments	Kshs.630,000/=
Lost hours	Kshs.441,000/=
House Allowance	Kshs.132,300/=
NSSF & NHIF Funds	Kshs.10,920/=
PAYE	Kshs.1,401/=
Annual leave	<u>Kshs.42,000/=</u>
TOTAL	KSHS.1,267,621/=

The respondent did not file a defence to the claim or attend court for hearing. in view of the sketchy information and documentation in the claim and in view of the fact that what is claimed is within the powers of the Labour Officer to investigate under Section 87 of the Employment Act and Section 35 as read with Section 48 of the Labour Institutions Act, I referred the case to the County Labour Officer, Trans Nzoia to investigate and file a report to assist the court to arrive at a just and fair determination of the claim.

The Labour Officer filed his report in court on 24th February 2017. The findings in the County Labour Officer's report are reproduced below

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

The following are the findings of each claimant: -

1. Evans Wafula Shikuku

Evans Wafula Shikuku was employed a general labourer in February 2013 and his employment terminated on 23/12/2014. He was paid terminal dues all totalling to Kshs.23,900/= and he acknowledged receipt.

2. Leonard Simiyu Mukhebi

Leonard was employed in 2013 as a leveller at a back wage of Kshs.17,550/= per month until March 2016 when his employment was terminated due to reduction of work. He was paid terminal dues which consisted of:-

• Prorata leave	-	1,519.00
• Severance pay	-	<u>28,350.00</u>
Total		<u>29,869.00</u>

Mr. Leonard Simiyu received the money and acknowledged the same.

3. Kennedy Murumba

Kennedy Murumba was employed as a general worker in June 2013 and his employment ended in June 2014. He was paid terminal dues amounting to Kshs.11,600/=.

4. Josphat Mwangi Mathiaka

Mr. Mathiaka was employed in September 2013 as a leveller and his employment ended in June 2016. He was paid final dues which consisted of: -

• One month's notice	-	19,500.00
• Gratuity	-	<u>19,500.00</u>
Total		<u>39,000.00</u>

Mr. Mathiaka acknowledged receipt.

5. David Nyanumba Ndubi

Mr. Ndubi was employed in January 2014 as a foreman and left in November 2014. He did not complete the year. He was paid his final dues amounting to Kshs.16,200/=.

6. Edwin Bitange Arege

Mr. Arege Bitange was employed in January 2014 as a surveyor and left in November 2014. He did not complete the year. He was paid his terminal dues amounting to Kshs.14,400/=.

7. Josephine Nasambu Walela

Ms Walela was employed in February 2013 as a lab attendant and left employment on 27th January 2014. She was paid her terminal dues of notice, leave and salary amounting to Kshs.33,400/=.

The following employees are still working for the employer –

1. Arnold Etyang
2. Benedict Sifuna Wanyama
3. Mark Cheroben Kiptum
4. Geoffrey Omato Nyakeria
5. Fallen Nyakundi

6. Bernard W. Keyari

7. Oson E. Shem

8. Joseph Barasa

9. Moses Wanambisi Kkarani

10. Elias Wanjala

11. Paul Joseph Simiyu

12. Lucy Indusa

The above are still in employment therefore it is premature to lodge claims against the employer.

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.”

Upon receipt of the report of the Labour Officer, counsel for the claimants was directed to file written submissions on the basis of which the court would write the judgment.

In the written submissions filed on 19th May 2017, the claimants withdrew their claims in respect of house allowance, NSSF and NHIF deductions and PAYE. This leaves only the claims on underpayments, overtime and annual leave for determination

It is submitted that the claimants were paid bellow 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	PAY IN LIEU OF NOTICE	TOTAL
1.	Evans Shikuku Wafula	177,600	176,400	16,800		370,800

2.	Leonard Simiyu Mukhebi	466,600	378,000	36,000		880,600
3.	Kennedy Murumba	158,640	142,800	16,800		318,240
4.	Arnold Etyang	158,640	142,800	16,800		318,240
5.	Sifuna Wanyama	158,640	142,800	16,800		318,240
6.	Mark Cheroben Kiptum	138,720	117,600	16,800		273,120
7.	Josphat Mwangi Mathiaka	228,000	252,000	36,000	36,000	552,000
8.	David Nyanumba Ndubi	148,800	180,000			328,800
9.	Edwin Bitange Arege	148,800	180,000			328,800
10.	Geoffrey Omatu Nyakeria	264,000	306,000	36,000		606,000
11.	Fallen Nyakundi	138,960	117,600	16,800		273,120
12.	Bernard W. Keyari	141,120	117,600	16,800	16,800	293,320
13.	Oson E. Shem	249,600	198,000			447,600
14.	Joseph Barasa	141,120	117,600	16,800		275,520
15.	Moses Wanambisi Kkarani	231,552	182,580	15,492		429,624
16.	Elias Wanjala	125,040	144,000	24,000		293,040
17.	Paul Joseph Simiyu	24,336	41,076			65,412
18.	Josephine Nasambu Walela	219,456	193,320	21,480		434,256
19.	Lucy Indusa	630,000	441,000	42,000		1,113,000

The claimants relied on the case of –

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 and the documents filed with the pleadings, the County Labour Officer's report and the written submissions filed on behalf of the claimants. The issues arising for determination therefore are the following –

- i. Whether the claimants were underpaid by the respondent.
- ii. Whether the claimants are entitled to overtime as claimed.
- iii. Whether the claimants are entitled to annual leave.

i. Underpayments

In both the claim and the submissions it is alleged that the claimants were paid wages below statutory minimum rates of pay. The prayer for underpayments is based on hourly rates of pay. However in the report of the County Labour Officer, it is stated that the claimants were paid monthly rates of pay. The claimants did not comment on these rates in the written submissions.

According to the Return to Work Formula alluded to in the claim and the written submissions, there was agreement that the claimants would be paid wages in accordance with the Regulation of Wages (General) (Amendment) Order.

I considered all the documents filed by the claimants and none of them states the rate of pay. The documents filed are time sheets showing hours worked but not reflecting payment made.

The County Labour Officer's report on the other hand lists the payments that were made before the Return to Work Formula was signed and after. Before the Return to Work Formula the payments were per day and after the payments were per month. There is therefore no evidence that the claimants were paid hourly as alleged or that they were underpaid.

The prayer for underpayments is accordingly dismissed.

ii. Overtime

The claimant submitted that they worked overtime but were not paid. It is submitted that they worked from 7 a.m. to 7 p.m. thus doing 4 hours overtime daily. The records filed by the claimants include time sheets in which all hours worked were recorded. The time sheets reflect both normal hours worked and overtime at 1.5 and double rates. This means that all overtime worked was recorded and paid for.

There is therefore no evidence that the claimants were not paid overtime. The claim is accordingly dismissed.

iii. Annual Leave

The report of the County Labour Officer does not refer to any leave. The claimants have in both the claim and the submissions stated that they were not given any leave or compensated in lieu. Among the records filed there is no reflection of leave. I therefore find that the claimants were not given leave or paid in lieu.

It is however not possible for the court to assess the leave entitlement as the claimants did not state the date of employment the last date worked and the last salary that are required to tabulate the same. The respondent is directed to work out the leave due to each of the claimants up to the month of April 2015 being the last full month for tabulation as the claim was filed on 5th May 2015.

Conclusion

In conclusion, I find that the claimants have proved only the prayer for annual leave. The prayers for underpayments and overtime having not been proved are dismissed.

DATED AND SIGNED AT NAIROBI ON THIS 6TH DAY OF JUNE 2018

MAUREEN ONYANGO

JUDGE

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

MATHEWS NDERI NDUMA

JUDGE