



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU

CAUSE NO. 113 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

LAZARUS SINDANI & 14 OTHERS.....CLAIMANT

VERSUS

JIANGXI ZHONGMEI ENGINEERING

CONSTRUCTION COMPANY LIMITED.....RESPONDENT

JUDGMENT

This suit was filed by the 15 claimants vide claim dated 15th April 2015 and filed on 21st April 2015. The claimants aver that they were employed by the respondent, a contractor carrying out rehabilitation of the Kitale-Webuye Road, between 2012 and 2014. Their claim is for underpayments, lost hours, house allowance, NSSF/NHIF/PAYE and annual leave. Their total claim is for the sum of Kshs.9,932,177 costs and interest. The claims by each of the claimants is broken down as follows –

1ST CLAIMANT – LAZARUS SINDANI

1. Under payments Kshs.628,560/=
2. Lost hours Kshs.439,200/=
3. House Allowance Kshs.131,760/=
4. NSSF & NHIF Funds Kshs.15,600/=
5. Annual leave Kshs.58,560/=

TOTAL KSHS.1,273,680/=

2ND CLAIMANT – CHARLES JUMA

1. Under payments Kshs.628,560/=
2. Lost hours Kshs.439,200/=
3. House Allowance Kshs.131,760/=
4. NSSF & NHIF Funds Kshs.15,600/=
5. Annual leave Kshs.58,560/=

TOTAL KSHS.1,273,680/=

3RD CLAIMANT – CHRISTOPHER KARANJA NGUGI

1. Under payments Kshs.624,360/=
2. Lost hours Kshs.453,840/=
3. House Allowance Kshs.136,152/=
4. NSSF & NHIF Funds Kshs.16,120/=
5. Annual leave Kshs.58,560/=
6. Lost months (3) Kshs.87,876/=
7. One month notice in lieu Kshs.29,293/=

TOTAL KSHS.1,396,201/=

4TH CLAIMANT – JOHN OLOO ODONGO

1. Under payments Kshs.130,080/=
2. Lost hours Kshs.102,480/=
3. House Allowance Kshs.30,744/=
4. NSSF & NHIF Funds Kshs.3,640/=

TOTAL KSHS.266,844/=

5TH CLAIMANT – GORDON OCHIENG AMACHI

1. Under payments Kshs.37,162/=
2. Lost hours Kshs.46,896/=
3. House Allowance Kshs.14,068/=
4. NSSF & NHIF Funds Kshs.4,160/=

TOTAL KSHS.102,286/=

6TH CLAIMANT – JUSTUS SIEKISA CHAPURUKHA

1. Under payments Kshs.121,944/=
2. Lost hours Kshs.58,620/=
3. House Allowance Kshs.17,586/=
4. NSSF & NHIF Funds Kshs.5,200/=

TOTAL KSHS.203,350/=

7TH CLAIMANT – HEZRON WANJALA LUSWETI

1. Under payments Kshs.293,760/=
2. Lost hours Kshs.248,880/=
3. House Allowance Kshs.74,664/=
4. NSSF & NHIF Funds Kshs.8,840/=

5. Annual leave Kshs.29,280/=

TOTAL KSHS.655,424/=

8TH CLAIMANT – ZABLON MITEMA ARISI

1. Under payments Kshs.251,040/=

2. Lost hours Kshs.214,800/=

3. House Allowance Kshs.64,440/=

4. NSSF & NHIF Funds Kshs.10,400/=

5. Annual leave Kshs.29,480/=

TOTAL KSHS.562,160/=

9TH CLAIMANT – STEPHEN ANDAHI KIHUGWA

1. Under payments Kshs.244,020/=

2. Lost hours Kshs.182,580/=

3. House Allowance Kshs.54,744/=

4. NSSF & NHIF Funds Kshs.8,840/=

5. Annual leave Kshs.21,480/=

TOTAL KSHS.501,704/=

10TH CLAIMANT – JULIUS ROBIN NASONG'O

1. Under payments Kshs.42,156/=

2. Lost hours Kshs.52,758/=

3. House Allowance Kshs.15,822/=

4. NSSF & NHIF Funds Kshs.4,680/=

TOTAL KSHS.115,416/=

11TH CLAIMANT – DOUGLAS BARASA JUMA

1. Under payments Kshs.129,528/=

2. Lost hours Kshs.128,964/=

3. House Allowance Kshs.38,676/=

4. NSSF & NHIF Funds Kshs.11,440/=

5. Annual leave Kshs.11,724/=

TOTAL KSHS.320,332/=

12TH CLAIMANT – JOSPHAT N. MUKHWANA

1. Under payments Kshs.93,600/=

2. Lost hours Kshs.117,240/=

3. House Allowance Kshs.35,172/=
4. NSSF & NHIF Funds Kshs.10,400/=
5. Annual leave Kshs.11,724/=

TOTAL KSHS.268,136/=

13TH CLAIMANT – WYCLIFFE WAFULA MANG'OLI

1. Under payments Kshs.648,480/=
2. Lost hours Kshs.439,200/=
3. House Allowance Kshs.131,760/=
4. NSSF & NHIF Funds Kshs.15,600/=
5. Annual leave Kshs.58,560/=

TOTAL KSHS.1,293,600/=

14TH CLAIMANT – SIMON WAMALWA WAFULA

1. Under payments Kshs.374,640/=
2. Lost hours Kshs.244,800/=
3. House Allowance Kshs.73,440/=
4. NSSF & NHIF Funds Kshs.7,800/=
5. Annual leave Kshs.32,640/=

TOTAL KSHS.733,320/=

15TH CLAIMANT – JAMIN WANGILA SANGURA

1. Under payments Kshs.485,568/=
2. Lost hours Kshs.338,100/=
3. House Allowance Kshs.101,016/=
4. NSSF & NHIF Funds Kshs.11,960/=
5. Annual leave Kshs.29,400/=

TOTAL KSHS.1,293,600/=

The respondent did not file a response to the claim.

In view of the nature of claim, the number of employees involved and the sketchy documentation in the file, this matter together with several other cases filed by employees of the respondent were referred to the County Labour Officer Kitale to investigate and file a report in court.

In the County Labour Officer's report dated 21st February 2017 he makes the following findings –

1. Christopher Karanja Ngugi

Mr. Ngugi was employed in December 2013 as a headman and left employment on October 2014. He was paid terminal dues amounting to Kshs.28,800/=.

2. John Oloo Ondongo

Mr. Odongo was engaged in April 2014 and left in November 2014 after working for five months only. He was paid wages in lieu of notice amounting to Kshs.6,500/=.

3. Gordon Ochieng Amachi

Mr. Ochieng Amachi was employed in July 2013 as a laboratory attendant and left employment in January 2014. He was paid his terminal dues which included wages and prorata leave, all amounting to Kshs.13,900/=.

4. Douglas Barasa Juma

Mr. Juma was employed in January 2013 as a general worker and left employment on 21st March 2015. He was paid all his terminal dues which included: -

- Wages - 10,045.00

- Leave - 6,500.00

- Service - 7,000.00

Total 23,545.00

The following workers are still in employment: -

1. Simon Wamalwa Wafula

2. Hezron Wanjala Lusweti

3. Wycliffe Wafula Mangoli

4. Lazaro C. Sindani

5. Charles Juma

6. Jamin Wafula Sang

7. Josphat N. Mukhwana

8. Julius Rolai Nasong'o

9. Stephen Andahi Kihugwa

10. Zablon Mitema Arisi

11. Justus Siekisa Chepurukha

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.

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.

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.

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.

A summary of the particulars of the claimants is contained in the table below: -

	NAME	ID	TRADE	STARTED TIME	ENDED	BEFORE RATE	CURRENT RATE	STATUS
1	Simon Wamalwa Wafula	20416202	Carpenter	08/2013		360	9,500	Working
2	Hezron Wanjala Lusweti	27728198	Carpenter	07/2013		440	18,000	Working
3	Wycliffe Wafula Mangoli	22716305	Carpenter	12/2013		400	10,000	Working
4	Lazaro C. Sindani	8045269	Mason	12/2013		376	10,000	Working
5	Charles Juma	25828897	Mason	12/2013		376	10,000	Working
6	Jamin Wafula Sang	10856145	Carpenter	01/2013		360	10,000	Working
7	Josphat N. Mukhwana	7986533	Labourer	03/2013		280	6,500	Working
8	Julius R. Nasong'o	13436369	Labourer	02/2014		248	6,500	Working
9	Stephen Andahi Kihugwa	25990817	Labourer	06/2013		296	720/DAY	Working
10	Zablon Mitema Arisi	23241986	Labourer	03/2013		320	6,500	Working
11	Justus Siekisa Chepurukha	13660544	Labourer	01/2014		248	6,500	Working
12	Christopher Karanja Ngugi	22181827	Headman	12/2013	10/2014	480	12,000	Left
13	John Oloo Ondongo	32557244	Labourer	07/2013	10/2014	700	10,071	Left
14	Gordon Ochieng Amachi	9597004	Labourer	04/2014	11/2014	280	6,500	Left
15	Douglas Barasa Juma	23202031	Labourer	01/2013	03/2013	280	6,500	Left

The court directed the counsel for the claimants to make written submissions in respect of the report of the County Labour Officer on the basis of which judgment would be written.

In the written submissions, counsel for the claimant's submitted that all the claimants were grossly underpaid their wages, that the claims are secured on an agreement reached between the respondent and the workers' representatives on 13th September 2014 which was witnessed by the County Labour officer at Bungoma. That under the agreement employees would be paid according to the rates of pay in the Regulation of Wages (General) Order, that they would in addition be paid overtime and house allowance as provided by law.

On overtime it was submitted that the employees worked for 12 hours daily from 7 a.m. to 7 p.m. thus doing 4 hours overtime for 7 days every week including on rest days.

On annual leave it was submitted that the claimants were never allowed to go on leave. The prayers in respect to house allowance, NSSF, NHIF and PAYE were abandoned. The prayers for each of the claimants was revised as follows –

1ST CLAIMANT – LAZARUS SINDANI

Under payments Kshs.628,560/=

Lost hours Kshs.439,200/=

Annual leave Kshs.58,560/=

TOTAL KSHS.1,126,320/=

2ND CLAIMANT – CHARLES JUMA

Under payments Kshs.628,560/=

Lost hours Kshs.439,200/=

Annual leave Kshs.58,560/=

TOTAL KSHS.1,126,320/=

3RD CLAIMANT – CHRISTOPHER KARANJA NGUGI

Under payments Kshs.624,360/=

Lost hours Kshs.453,840/=

Annual leave Kshs.58,560/=

Pay in lieu of notice Kshs.29,293/=

TOTAL KSHS.1,166,053/=

4TH CLAIMANT – JOHN OLOO ODONGO

Under payments Kshs.130,080/=

Lost hours Kshs.102,480/=

TOTAL KSHS.232,560/=

5TH CLAIMANT – GORDON OCHIENG AMACHI

Under payments Kshs.37,162/=

Lost hours Kshs.46,896/=

TOTAL KSHS.84,058/=

6TH CLAIMANT – JUSTUS SIEKISA CHAPURUKHA

Under payments Kshs.121,944/=

Lost hours Kshs.58,620/=

TOTAL KSHS.180,564/=

7TH CLAIMANT – HEZRON WANJALA LUSWETI

Under payments Kshs.293,760/=

Lost hours/Overtime Kshs.248,880/=

Annual leave Kshs.29,280/=

TOTAL KSHS.571,920/=

8TH CLAIMANT – ZABLON MITEMA ARISI

Under payments Kshs.251,040/=

Lost hours Kshs.214,800/=

Annual leave Kshs.29,480/=

TOTAL KSHS.495,320/=

9TH CLAIMANT – STEPHEN ANDAHI KIHUGWA

Under payments Kshs.244,020/=

Lost hours Kshs.182,580/=

Annual leave Kshs.21,480/=

TOTAL KSHS.448,080/=

10TH CLAIMANT – JULIUS ROBIN NASONG'O

Under payments Kshs.42,156/=

Lost hours Kshs.52,758/=

TOTAL KSHS.94,914/=

11TH CLAIMANT – DOUGLAS BARASA JUMA

Under payments Kshs.129,528/=

Lost hours Kshs.128,964/=

Annual leave Kshs.11,724/=

TOTAL KSHS.270,216/=

12TH CLAIMANT – JOSEPHAT N. MUKHWANA

Under payments Kshs.93,600/=

Lost hours Kshs.117,240/=

Annual leave Kshs.11,724/=

TOTAL KSHS.222,564/=

13TH CLAIMANT – WYCLIFFE WAFULA MANG'OLI

Under payments Kshs.648,480/=

Lost hours Kshs.439,200/=

Annual leave Kshs.58,560/=

TOTAL KSHS.1,146,240/=

14TH CLAIMANT – SIMON WAMALWA WAFULA

Under payments Kshs.374,640/=

Lost hours Kshs.244,800/=

Annual leave Kshs.32,640/=

TOTAL KSHS.652,080/=

15TH CLAIMANT – JAMIN WANGILA SANGURA

Under payments Kshs.485,568/=

Lost hours Kshs.338,100/=

Annual leave Kshs.29,400/=

TOTAL KSHS.853,068/=

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 considered the pleadings in the claim, the report of the Labour Officer and the written submissions filed by the claimants. The only issue for determination is whether the claimants are entitled to underpayments, lost hours/overtime and annual leave. For the 3rd claimant Christopher Karanja Ngugi, there is a further prayer for pay in lieu of leave.

In the witness statements filed by the claimants they all do not state that they had left employment of the respondent except the 3rd claimant Christopher Karanja Ngugi who states he was dismissed on 7th November 2014 after the workers went on strike.

The claimants' submissions also does not address the issue even though the report of the Labour Officer states that apart from Christopher Karanja Ngugi (3rd claimant), John Oloo Odongo (4th claimant), Gordon Ochieng Amachi (5th claimant) and Douglas Barasa Juma (11th claimant), all the other claimants were still in employment at the time the report was prepared on 21st February 2017.

I have confirmed that all the employees still in employment were not underpaid the basic salary which was as follows –

General Labourer

From Per Month Per Day

1-5-2011 4,047.00 205.15

1-5-2012 4,577.20 232.15

1-5-2013 5,218.00 264.50

Mason/Carpenter (Ungraded Artisan)

From Per Month Per Day

1-5-2011 7,811.00 375.30

1-5-2012 8,834.20 424.50

1-5-2013 10,071.00 483.95

All the grievants were either labourers, carpenters or masons. Only one was a headman whose rate of pay is not among the grades in the General Order.

Going by the Labour Institutions Act (Building and Construction Industry) (Wages) Order 2012 which was gazetted on 1st February 2013, the rates of pay are as follows –

Labourer Kshs.411.00 per day

Ungraded Artisans Kshs.538.00 per day

Junior headman Kshs.459.00 per day

Senior headman Kshs.503.00 per day

Based on the forgoing I do not find any proof of underpayment of the claimants in respect of basic pay.

On the prayer for annual leave, each of the grievants in service is entitled to 21 days per year as provided in Section 28 of the Employment Act. The respondent is directed to work out and pay all the claimants in lieu of all leave due up to the date of filing suit on 21st April 2015.

On the prayer for salary in lieu of notice of Christopher Karanja Ngugi, no evidence was adduced on how he left employment. There is therefore no proof that he is entitled to pay in lieu of notice and the clam is dismissed.

DATED AND SIGNED AT NAIROBI ON THIS 5TH DAY OF JUNE 2018

MAUREEN ONYANGO

JUDGE

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

MATHEWS NDERI NDUMA

JUDGE