



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
CAUSE NO. 2 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

PETER WASWANI MAKUNDA & 13 OTHERS.....CLAIMANT

VERSUS

JIANGXI ZHONGMEI ENGINEERING

CONSTRUCTION COMPANY LIMITED.....RESPONDENT

JUDGMENT

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 6th January and filed on 7th January 2015, the claimants seek payment of underpayments, lost hours, house allowance, NSSF/NHIF/PAYE and annual leave. The claimants further seek costs and interest.

The claims by each of the 14 claimants is broken down as follows –

1ST CLAIMANT – PETER WASWANI MAKUNDA

Underpayments	Kshs.708,800/=
Lost hours	Kshs.546,000/=
House Allowance	Kshs.163,800/=
NSSF & NHIF Funds	Kshs.15,600/=
Annual leave	<u>Kshs.84,000/=</u>
TOTAL	KSHS.1,532,530/=

2ND CLAIMANT – JAMES GITAU

Underpayments	Kshs.708,800/=
Lost hours	Kshs.546,000/=
House Allowance	Kshs.163,800/=
NSSF & NHIF Funds	Kshs.15,600/=
Annual leave	<u>Kshs.84,000/=</u>
TOTAL	KSHS.1,532,530/=

3RD CLAIMANT – PETER N. WASIKE

Underpayments	Kshs.708,800/=
Lost hours	Kshs.546,000/=
House Allowance	Kshs.163,800/=
NSSF & NHIF Funds	Kshs.15,600/=
Annual leave	<u>Kshs.84,000/=</u>
TOTAL	KSHS.1,532,530/=

4TH CLAIMANT – PHILIMONA NDEYA BARASA

Underpayments	Kshs.614,400/=
Lost hours	Kshs.504,000/=
House Allowance	Kshs.151,200/=
NSSF & NHIF Funds	Kshs.12,480/=
Annual leave	<u>Kshs.84,000/=</u>
TOTAL	KSHS.1,366,080/=

5TH CLAIMANT – EMMANUEL KATILA

Underpayments	Kshs.410,400/=
Lost hours	Kshs.336,000/=
House Allowance	Kshs.100,800/=
NSSF & NHIF Funds	Kshs.4,160/=
Annual leave	<u>Kshs.42,000/=</u>
TOTAL	KSHS.997,520/=

6TH CLAIMANT – MORGAN WASILWA WAFULA

Underpayments	Kshs.585,600/=
Lost hours	Kshs.462,000/=
House Allowance	Kshs.138,600/=
NSSF & NHIF Funds	Kshs.11,440/=
Annual leave	<u>Kshs.42,000/=</u>
TOTAL	KSHS.1,239,640/=

7TH CLAIMANT – GEOFFREY MACHUKA MOGAKA

Underpayments	Kshs.264,000/=
Lost hours	Kshs.210,000/=
House Allowance	Kshs.63,000/=

NSSF & NHIF Funds	<u>Kshs.3,200/=</u>
TOTAL	KSHS.640,300/=

8TH CLAIMANT –BENARD KUSIMBA

Underpayments	Kshs.354,000/=
Lost hours	Kshs.273,000/=
House Allowance	Kshs.63,000/=
NSSF & NHIF Funds	<u>Kshs.5,200/=</u>
TOTAL	KSHS.695,200/=

9TH CLAIMANT – KAMADI ALEX KITING'A

Underpayments	Kshs.524,400/=
Lost hours	Kshs.378,000/=
House Allowance	Kshs.133,400/=
NSSF & NHIF Funds	Kshs.9,360/=
Annual leave	<u>Kshs.42,000/=</u>
TOTAL	KSHS.967,160/=

10TH CLAIMANT – LIVINGSTONE MISAU KILOSA

Underpayments	Kshs.440,400/=
Lost hours	Kshs.336,000/=
House Allowance	Kshs.137,000/=
NSSF & NHIF Funds	Kshs.11,440/=
Annual leave	Kshs.42,000/=
Six months that would have been worked	Kshs.210,000/=
One month notice in lieu	<u>Kshs.42,000/=</u>
TOTAL	KSHS.1,219,640/=

11TH CLAIMANT – JOHN CHUMBEK

Underpayments	Kshs.640,800/=
Lost hours	Kshs.357,000/=
House Allowance	Kshs.107,100/=
NSSF & NHIF Funds	Kshs.8,840/=
PAYE	Kshs.11,022/=
Annual leave	<u>Kshs.42,000/=</u>
TOTAL	KSHS.1,166,762/=

12TH CLAIMANT – RAINI ONDARI

Underpayments	Kshs.364,800/=
Lost hours	Kshs.272,400/=
House Allowance	Kshs.81,720/=
NSSF & NHIF Funds	Kshs.9,360/=
Annual leave	<u>Kshs.42,000/=</u>
TOTAL	KSHS.770,280/=

13TH CLAIMANT – ANDREW KISI SONGWA

Underpayments	Kshs.138,000/=
Lost hours	Kshs.105,200/=
House Allowance	Kshs.131,500/=
NSSF & NHIF Funds	<u>Kshs.2,600/=</u>
TOTAL	KSHS.277,100/=

14TH CLAIMANT – ALI NOOR ADEN

Underpayments	Kshs.700,800/=
Lost hours	Kshs.546,000/=
House Allowance	Kshs.163,800/=
NSSF & NHIF Funds	Kshs.13,520/=
PAYE	Kshs.5,529/=
Annual leave	<u>Kshs.84,000/=</u>
TOTAL	KSHS.1,513,649/=

The respondent filed a defence denying the averments in the claim. The respondent avers that the claimants were paid on hourly basis hence they are not entitled to both annual leave and house allowance.

The respondent annexed copies of receipts and schedules for payments of NSSF, NHIF and PAYE. The respondent further annexed copies of pay schedules for the claimants reflecting rate of pay from 2012 to 2014 as well as payslips and clearance certificates signed by some of the claimants upon receipt of final pay.

When the case came up for hearing on 18th July 2014, I referred the case to the County Labour Officer Trans Nzoia to investigate and prepare a report. The report was filed on 14th September 2016.

The respondent did not attend court for hearing even though it was served with hearing notices. On 14th September 2016 when the matter came up for mention I directed parties to file submissions on all issues in dispute including the County Labour Officer's report on the basis of which the judgment would be written. The claimants filed submissions on 19th May 2017 but the respondent did not.

It is on the basis of the pleadings, report of Labour Officer and submissions by the claimant that the judgment has been written. The findings in the report of the Labour officer are reproduced here below–

“Following the court’s directive that the above matter be investigated and report submitted your office. The following are the findings of each employee: -

1. Peter Waswani Makunda

Peter Waswani Makunda was employed on 1st January 2013 as Oil Tank Driver earning Kshs.19,600/= and left on 31st March 2015.

On leaving employment Mr. Makunda was paid his terminal dues as follows:

- Wages arrears	-	43,195.00	
- Leave allowance	-	5,008.00	
- Service gratuity	-	<u>11,307.00</u>	
			59,510/=
- Less deductions		<u>3,000/=</u>	
Total		<u>56,510.00</u>	

Mr. Peter Makunda upon receipt of the above amount willingly signed for the same stating that he had no more claim against the employer.

The claim by the counsel which is as follows:

Underpayments	Kshs.708,800/=
Lost hours	Kshs.546,000/=
House Allowance	Kshs.163,800/=
NSSF & NHIF Funds	Kshs.15,600/=
Annual leave	<u>Kshs.84,000/=</u>
TOTAL	<u>KSHS.1,532,530/=</u>

The above cannot be validated on the following grounds: -

Underpayment

The underpayments arrears as claimed by the complainant 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.

Perusing through the final payment payroll, it is indicated that Mr. Makunda was paid Kshs.43,195/= as salary arrears which he took and confirmed receipt by signing for the same.

Lost hours

Lost hours cannot be explained but it is assumed to be the overtime. The claim is not valid. Through the records presented to the court by the same counsel it is clearly indicated whenever the employee worked overtime it was recorded and paid accordingly. For example overtime worked during weekday was paid at the rate of one and half of hourly rate 1.5 and rest days or public holiday at double (2) the rate.

House Allowance

According to records presented, the investigator cannot authoritatively say house allowance was paid to the claimant therefore he can claim for the same for 12 months only basing on his last basic pay as provided under Section 48 of Labour Institutions Act.

Refunds

N.S.S.F and N.H.I.F are statutory deductions which claimants cannot

ask for refunds from employer. If he feels the employer was not remitting to the two organizations then the right procedure is to report the matter to the organizations who have competent officers to handle such matters.

Annual Leave

Annual leave is due to an employee on completion of twelve months with his employer. Mr. Maunda was entitled to 24 days per year and according to the final settlement payroll he was paid Kshs.5,000/= which it is believed to be leave payment which he accepted by having acknowledged and signed for receipt.

Recommendation

The investigator having gone through both records presented by the counsel for the complainant and the employer recommends that the underpayments and a lost hours claims be disregarded. However the issue of house allowance can be considered for a period of 12 months. The other claims such as NSSF, NHIF and PAYE are statutory deductions which can be addressed by the relevant organizations.

2. James Gitau

Was employed in January 2013 as a lorry driver and left in March 2016. On leaving employment through resignation he was paid the following terminal dues:

1. Wages for days worked - 9,138.00
2. Prorata leave - 8,426.00
3. Service gratuity - 31,458.00

Total dues 49,012.00

He received the above amount and signed certificate stating that he has no further claim against the employer.

3. Livingstone Misau Kilosa

Livingstone Kilosa was employed in September 2013 as a lorry driver earning Kshs.19,474 and left in October 2014. On leaving was paid the following terminal benefits: -

1. Annual leave 52 days - 22,282.00
2. One month's wage in lieu of notice - 19,474.00

Total dues 41,800.00

Upon receiving this amount he accepted as full and final terminal dues and exonerated the company against any further claims.

4. Ali Noor Aden

Ali Noor Aden was employed in March 2013 as a lorry driver earning Kshs.14,625 and left in October 2014. He was paid the following as final terminal dues which he duly accepted under no duration.

1. One month's wage in lieu of notice - 14,625
2. Service gratuity - 9,000
3. Accrued leave - 31,200

Total dues 54,825

5. Raini Ondari

Was not able to get any detail for Raini Ondari but have requested for the same.

The following employees are still in employment: -

1. Morgan Wasilwa Wafula
2. Peter Nangulwa Wasike
3. Andrew Kisi Soywa

4. Emmanuel Katila
5. Bernard Kusimba
6. John Chumek
7. Geoffrey Machuka
8. Alex Kamadi Kitinga
9. Philomona N. Barasa

Conclusion

Having investigated the matter thoroughly I have come to the conclusion that the four employees namely –

1. Peter Waswani Makunda
2. James Gitau
3. Ali Noor Aden
4. Livingstone M. Kilosa

Were properly paid their terminal benefits in accordance with the Employment Act No. 11 of 2007.

That the remaining claimants are still in employment therefore it is premature to lodge claims with the Honourable Court.

That the Honourable Court should also consider the nature of work carried out by the company in the sense that the project was tendered long time ago and if it were to entertain the claims of the claimants, the company may not be able to pay, owing to the fact that tendered wages were much lower than the current wages.”

Claimant’s Submissions

In the written submissions filed by the claimants, it submitted that they worked for the respondent between 2012 and 2014 and their respective claims are based on the period worked by each of them. It is submitted that the claimants were grossly underpaid in contravention of the Labour Institutions Act (General) (Amendment) Order 2013.

It is submitted further that the claimants secured an agreement through a Return to Work Formula presided over by the County Labour Officer Bungoma under which it was agreed that the claimants would be paid overtime and house allowance as provided by law.

On the claim for overtime it is submitted that the claimants worked for 12 hours daily from 7 a.m. to 7 p.m. for seven days a week thus putting in 4 hours of overtime daily, without a rest day. It is submitted that this is the basis of the claim for extra hours.

On the claim for annual leave it is submitted that the claimants are entitled to 21 days per year as provided in Section 28 of the Employment Act which they were not allowed to take or paid in lieu of.

The claim for house allowance, NSSF and NHIF deductions and PAYE were abandoned by the claimants. The revised claims as set out in the submissions are as follows: -

1ST CLAIMANT – PETER WASWANI MAKUNDA

Underpayments Kshs.700,800/=

Lost hours Kshs.546,000/=

Annual leave Kshs.84,000/=

TOTAL KSHS.1,330,800/=

2ND CLAIMANT – JAMES GITAU

Underpayments Kshs.700,800/=

Lost hours Kshs.546,000/=

Annual leave Kshs.84,000/=

TOTAL KSHS.1,330,800/=

3RD CLAIMANT – PETER N. WASIKE

Underpayments Kshs.700,800/=

Lost hours Kshs.546,000/=

Annual leave Kshs.84,000/=

TOTAL KSHS.1,330,800/=

4TH CLAIMANT – PHILIMONA NDEYA BARASA

Underpayments Kshs.614,400/=

Lost hours Kshs.504,000/=

Annual leave Kshs.84,000/=

TOTAL KSHS.1,202,400/=

5TH CLAIMANT – EMMANUEL KATILA

Underpayments Kshs.410,400/=

Lost hours Kshs.336,000/=

Annual leave Kshs.42,000/=

TOTAL KSHS.788,400/=

6TH CLAIMANT – MORGAN WASILWA WAFULA

Underpayments Kshs.585,600/=

Lost hours Kshs.462,000/=

Annual leave Kshs.42,000/=

TOTAL KSHS.1,089,600/=

7TH CLAIMANT – GEOFFREY MACHUKA MOGAKA

Underpayments Kshs.264,000/=

Lost hours Kshs.210,000/=

TOTAL KSHS.474,000/=

8TH CLAIMANT – BENARD KUSIMBA

Underpayments Kshs.354,000/=

Lost hours Kshs.273,000/=

TOTAL KSHS.627,000/=

9TH CLAIMANT – KAMADI ALEX KITING'A

Underpayments Kshs.524,400/=

Lost hours Kshs.378,000/=

Annual leave Kshs.42,000/=

TOTAL KSHS.944,400/=

10TH CLAIMANT – LIVINGSTONE MISAU KILOSA

Underpayments Kshs.440,400/=

Lost hours Kshs.336,000/=

Annual leave Kshs.42,000/=

Pay in lieu of notice Kshs.42,000/=

TOTAL KSHS.860,400/=

11TH CLAIMANT – JOHN CHUMEK

Underpayments Kshs.640,800/=

Lost hours Kshs.357,000/=

Annual leave Kshs.42,000/=

TOTAL KSHS.1,039,800/=

12TH CLAIMANT – RAINI ONDARI

Underpayments Kshs.364,800/=

Lost hours Kshs.272,400/=

Annual leave Kshs.42,000/=

TOTAL KSHS.679,200/=

13TH CLAIMANT – ANDREW KISI SONGWA

Underpayments Kshs.138,000/=

Lost hours Kshs.105,200/=

TOTAL KSHS.243,000/=

14TH CLAIMANT – ALI NOOR ADEN

Underpayments Kshs.700,800/=

Lost hours Kshs.546,000/=

Annual leave Kshs.84,000/=

TOTAL KSHS.1,330,800/=

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, documents filed with pleadings, the County Labour Officer's report and submissions by the claimant. The issue for determination is whether the claimants are entitled to their revised claims under heads – underpayments, lost hours and annual leave as set out in the written submissions.

The claimants were all employed as drivers except the 12th claimant RAINI ONDARI who states he was employed as Headman.

Under the Regulation of Wages (General) (Amendment) Order 2012 and 2013 that are relevant for the purpose of this claim the wages for drivers were as follows –

Monthly Daily Hourly

1st May 2012 17,082.60 821.10 153.65

1st May 2013 19,474.15 936.05 175.15

According to the report of the Labour Officer, Peter Wamasi Mukunda left employment on 31st March 2015 and his salary was Kshs.19,600. He was paid wages arrears of shs.43,195, service gratuity and leave allowance.

I find that he has not proved that he was owed any underpayments, overtime on annual leave.

James Gitau left employment in March 2016 and was paid terminal benefits including prorata leave and service gratuity which he signed for in full and final settlement. The same applies to Livingstone Misau Kilosa and Ali Noor Aden who were paid as set out in the report of the County Labour Officer and signed in full and final settlement. Their claims for underpayments, lost hours/overtime, pay in lieu of notice and/or annual leave have not been proved.

The other nine claimants still in employment are claiming underpayments, lost hours/overtime and annual leave. As is reflected in their payslips filed together with the claim and in the Labour Officer's report, they were paid for all overtime worked. They are further not entitled to underpayments claimed as the salaries were converted to monthly rates of pay from the time of the Return to Work Formula as pleaded in the claim with a copy thereof at page 96 to 97 of the claimant's bundle of documents.

The claimants are however entitled to annual leave as the respondent pleaded at paragraph 6 of defence that it has not been paying annual leave.

I therefore find that Morgan Wasilwa Wafula, Peter Nangulwa Wasike, Andrew Kisi Songwa, Emmanuel Katila, Bernard Kusimba, John Chumeki, Geoffrey Machuka, Alex Kamadi Kitinga and Philimona N. Barasa who were still in employment as at July 2016 when the County Labour Officer's report was prepared are entitled to annual leave. The court is however unable to tabulate the same as the claimants did not submit information on date of employment and last salary. The respondent is directed to work out and pay them the leave due from date of recruitment to December 2014.

All other prayers 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