REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 289 OF 2013

BETWEEN

KENYA SHOE & LEATHER WORKERS UNION…….....CLAIMANT

VERSUS

SLAPPER SHOE INDUSTRIES …….....…….. RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Julius Maina, General Secretary, instructed by the Claimant Union.

Mr. John Makokha Advocate, instructed by the Federation of Kenya Employers [F.K.E] for the Respondent

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ISSUE IN DISPUTE: UNDERPYAMENT OF SALARIES

AWARD

[Rule 27 [1] [a] of the Industrial Court Procedure Rules 2010]

1. This Claim is filed by the Claimant Union against Shoe Maker, Slapper Shoe Industries. It is brought on behalf of 10 Members of the Claimant Union [Grievants], who were or are Employees of the Respondent. Some are still in employment while others have at the time of presenting this Claim, left employment. The 10:-

- Wycliffe Inzelele
- Aaron Maingi
- Meshack Musyoka
- Alvin Ruto
- John Mwasi
- Frankline Mwenge
- Juma Naricis

- Emmanuel Barasa
- Kamaili Mwanga
- Zuma Vyona

are alleged to have been underpaid their wages. The Statement of Claim was filed on 12th September 2013.

2. The Respondent filed its Statement of Response on 14th November 2013. It is the position of the Respondent, that the Claim for underpayments is misconceived. This claim is based on the allegation that the 10 Grievants were Machine Attendants, while they were General Labourers. When called upon to act as Machine Attendants, they were paid acting allowances in accordance with the Parties' CBA.

3. The Claimant called 1 of the Grievants Kimaili Mwanga who testified on behalf of his Co- Grievants on 4th November 2014. The Respondent called its Assistant Personnel Officer Thomas Nyandwara on the same date, bringing the hearing to a close. Parties confirmed the filing of their Closing Arguments at the last mention in Court on the 5th December 2014, and were advised Award would be delivered on 13th March 2015.

4. Mwanga testified he was employed by the Respondent on 1st June 2009 as a General Worker. He was taken in as a Machine Attendant on 11th May 2011. He continued to be paid the same rate as a General Worker. He left employment in January 2014, earning Kshs. 9,781- the rate applicable to a General Worker.

5. He agreed on cross-examination that he was issued a letter of appointment in 2009, indicating he was to work as a General Labourer. There was no other letter given to him saying he had become a Machine Attendant. He maintained he worked as Machine Attendant from 2011 in continuity, until he left. He conceded he was paid acting allowance and duty allowance.

6. Nyandwara testified the Grievant was a General Labourer. He never changed his designation. He would occasionally operate the machine and was paid acting allowance. From August 2011, he worked as Machine Attendant and was paid acting allowance. There is no other time he worked as such. The terms for all the other Grievants were similar. The Parties went before the Conciliator, who found the Respondent paid acting allowance, but should have employed the Grievants as Machine Attendants. Cross-examined, the Witness was not able to explain the variation in the amount of acting allowance paid to Mwanga. The Conciliator stated the Respondent engaged in bad labour practice.

7. In its Closing Arguments, the Claimant submits that the Grievants were employed as General Labourers, earning Kshs. 8,580 per month. They were assigned the role of Machine Attendant, for more than 2 years, and continued to receive Kshs. 8,580 applicable to a General Labourer, instead of the minimum of Kshs. 9,724 applicable to a Machine Attendant. The CBA allowed the Grievants to receive production incentive, which is captured as duty allowance in the pay slips. There was no acting allowance paid. The Claimant submits the Grievants were underpaid and prays the Court to correct the injustice.

8. The Respondent submits that the Claimant confirmed in its Closing Submissions that the 10th Grievant Zuma Vyona was confirmed as Machine Attendant, therefore not subject of these proceedings. The Grievants were not appointed as Machine Attendants. Their upgrading has never been brought before the collective bargaining platform. They were paid acting allowance in accordance with Clause 19 of the CBA whenever they acted in the higher role. The Conciliator confirmed they were paid acting allowance. These findings were not disputed by the Claimant. The Claimant's sole Witness confirmed acting allowance was paid. There was no incentive pay availed to the Grievants under the CBA as submitted by the Claimant. The variation in acting allowance could be attributed to the Grievants' days of absence from duty without leave.

The Court Finds:-

9. It agreed all the Grievants were employed by the Respondent as General Workers, in 2009. The issue for determination falls within a very narrow compass- whether the Grievants moved to the higher role of Machine Attendant, and should therefore have earned the superior minimum wage, applicable to a Machine Attendant.

10. The Claimant called 1 of the Grievants, who in his evidence said nothing with respect to the absent Co- Grievants. His evidence was that he was appointed in 2009 as a General Worker. Appointment was in writing. There was no letter given to him appointing him as a Machine Attendant. He conceded he was paid acting allowance. The other Grievants according to the material availed to the Court shared similar terms and conditions of employment with this sole Witness.

11. The Court is of the view that once the Witness conceded he was paid acting allowance, there was no room for the Claimant Union to extend the argument on the nature of the payment itemized as duty allowance in the pay slips. The Witness was clear he was paid acting allowance, and was informed by the Respondent the duty allowance was the acting allowance. The Conciliator found acting allowance was paid. If the incorrect acting allowance was paid, the Claimant should have pursued the difference, not claim that the Grievants were entirely underpaid.

12. Clause 19 of the prevailing CBA between the Parties stipulated that:

‘’*An Employee who is informed in writing to act in higher grade than his substantive appointment and assumes full duties and responsibilities of the higher job shall be entitled to an acting allowance equivalent to the difference between such higher basic minimum wage and his wage. Provided that no acting allowance shall be paid for any period less than 18 days or to any Employee who is being trained for a higher grade responsibility.*’’

13. The Claimant Union was not able to show the Court written instructions from the Respondent to the Grievants, asking them to act in higher grade than their substantive appointment and assume full duties and responsibilities of the higher job, as Clause 19 of the CBA demands.

14. Where some of the Grievants acted without written instructions, there is evidence they were informed in writing they would be paid specified acting allowance, for the specified period served in the higher grade. There are letters attached to Statement of Response advising the involved Grievants as such.

15. The variation in the acting allowance could be attributed to various factors. The number of days served in acting capacities was not static. The Employee could also, as hazarded by the Respondent be absent on certain days while supposed to be acting in higher grade. There was no evidence that the Grievants acted continuously as Machine Attendants. There are months when Duty Allowance is shown as nil on the pay slips, which in the view of the Court would mean perhaps, that the substantive Machine Attendant had resumed duty, for instance, from annual leave. The Witness for the Respondent explained that the Grievants acted as relievers.

16. Clause 2 of the CBA cannot be the explanation for the item characterized as ‘Duty Allowance.’ It states:-

‘’ *The Company shall set up with the Union at the Factory, Consultative Committee, for the purpose of making known to the Employees the prevailing production wages. Any grievances arising from the incentive shall be channeled through the established machinery.*’’

This is a Clause providing the Employer and the Union with a mechanism for determining incentive payable to Employees, based on productivity. The Claimant Union did not demonstrate to the Court that the Parties had consulted, and arrived at any specific rate as an incentive under this Clause. How then would the variable duty allowance be taken as an incentive created under this Clause without the knowledge or participation of the Union?

17. The Court agrees with the Conciliator that by using the Grievants for prolonged periods of time in

acting capacities, while paying them acting allowances, the Respondent engaged in unfair labour practices. It affected the upward mobility of the Grievants' careers, and it is little wonder that some have since left employment. There was no case established however, that the Respondent acted outside the CBA. The issues of acting allowance; incentives; and confirmation of Employees in substantive positions, are issues the Parties should take up in their collective bargaining process. There is need to have the Employees of the Respondent enjoy decent work and fair labour practices, something the Claimant Union should vigorously engage the Respondent on. As concerns the dispute brought before the Court, there are no legal and factual grounds shown by the Claimant, to enable the Court uphold the Claim. ***In the end the Claim is dismissed with no order on the costs.***

Dated and delivered at Mombasa this 13th day of March 2015

James Rika

Judge