



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1938 OF 2013

KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERSCLAIMANT

VERSUS

NAIROBI BOTTLERS LIMITEDRESPONDENT

JUDGEMENT

Appearances

Mr Nyumba – instructed by Kenya union of Commercial Food & Allied Workers, the claimant

Ms Oyombe – instructed by Federation of Kenya Employers, for the Respondent

1. The issue in dispute herein is the violation of Collective Bargaining Agreement (CBA) clause 8 on hours of work. The claim herein was filed on the 4th December 2013 and a defence filed on the 13th February 2014 denying the claim in its entirety. Each party gave extensive evidence in support of their case with the Claimant calling George Juma Omamo and Jack Ochieng Okwayo while the Respondent called Alex Sereti Oira, Julius Gathundia and Sammy Lugado. At the close of the hearing, each party filed their written submissions dated 26th March 2015 and 17th April 2015 for the Claimant and Respondent respectively.

Claimant's case

2. The Claimant is a Trade Union bringing together members in the commercial, food and allied workers in Kenya while the Respondent is a company engaged in manufacture and bottling of soft drinks such as soda, water and juices. Both parties have a Recognition Agreement pursuant to which several agreements have been negotiated, concluded and signed governing the terms and conditions of service for unionisable employees which terms include the work hours.

3. The issue in dispute in this case is the violation of clause 8 of the collective bargaining agreement on hours of work which dispute arose during the life of the CBA covering the period of 1st November 2010 to 31st October 2012. The work hours were agreed upon under the CBA as being 45 hours from Monday to Friday at 9 hours per day based on shifts arrangements and excluding meal/lunch breaks. The

Respondent was to have a relieve system in place. Clause 9 also provided for remuneration of employees with basic wages and according to the scale of wages per the rules in the CBA and the employees who worked overtime was to receive such pay as appropriate.

4. On 30th March 2011 the shop stewards raised the issue of hours of work especially the relieve system with the Respondent human resource manager. On 9th November 2011 concerns on the application of clause 8 of the CBA were raised and on 12th November 2012 a meeting was held to resolve the issue which was not resolved and hence on 28th November 2012 the shop stewards advised the Claimant to take up the matter with the respondent. The issue was not resolved and on 17th December 2012 the Claimant reported a dispute with the Minister and a conciliator was appointed. A meeting convened by the conciliator on 5th February 2013 and 7th June 2013 where both parties made their submissions. On 3rd September 2013 the conciliator released his findings to the parties to which the Claimant accepted but on 1st October 2013, the Respondent rejected the recommendations.

5. The Claimant also averred that at the work place, the Respondent has the production lines where in the warehouse the Respondent has only one operator per machine in every shift being;

One filler 1 operator

One E.B.I operator

The washer operator

One forklift operator

Bottle inspectors, yard attendants, door openers, depalletizers, labellers, etc.

6. The Claimant also averred that the employees loading trucks were given pallet tickets at the start of the day and remained responsible throughout the day for anything that went wrong. An employee who was assigned to load and unload the truck was responsible for damage in the process of loading and was held accountable. The Employees assigned duties as roller conveyor attendants had duties of inspecting and sorting glasses to be taken to the production lines for refilling and the speed they had to work had to correspond with the demand for glasses in the production lines. During this processes, there were no lunch breaks for the employees for the reason that there was no relieve system and the employees had to risk their jobs by depending on the goodwill of fellow employees to perform a thirty (30) minutes double role to enable them to take a break for meals. In the event of any problem, the designated employee was answerable.

7. The Claimant also stated that all the employees who were not on the matrix were assigned cleaning which duty were continuous and required high standards of hygiene.

8. The Claimant thus contended that the CBA provided for a 9 hours working day excluding meal breaks of 30 minutes. To allow employees to have a break for such meals, the Respondent was to have a relieve system. Such a system would ensure continuity in production process while at the same time allowing employees' time for meal breaks. That the Respondent refused to put in place a relieve system during meal times but the employees used their goodwill to ensure that production continued uninterrupted. That while the Respondent neglected to put in place a relieve system, they were categorical that production had to continue without stoppage forcing employees to perform double roles so that they can release themselves by way of rotation to ensure that they find time for meals. This meant that this ad hoc arrangement by staff to undertake double roles meant that the affected staff worked for an extra 30 minutes each day without compensation. That there were no employees assigned relieve duties to relieve others as each and every employee was assigned a role to carry out from reporting time to cloaking out time. The claim herein is that the Respondent failed to pay for overtime accrued by employees who had to do double roles especially for staff working as load pickers, folk lift operators, roller conveyor attendants and those in the warehouse.

9. The Claimant also demonstrated that, on a daily schedule and employee works as follows;

7.30am – employee reports on duty

- Such an employee rotates on tables, uncasing, de-palletizer, filler and pre- Inspection
- Rotation is done in 15-30 minutes
- Rotation continues with rotation throughout the day;

19.30pm clocking out

10. The claim herein is that the Court should direct the Respondent to fully implement Clause 8(b) of the CBA by introducing a relieve system and working matrix which allow clear meal breaks; the Respondent to pay overtime accruing to employees affected by failure to introduce a relieve system as demanded by the CBA effective 1st November 2010 to 31st October 2012; and that costs herein be paid by the respondent.

11. In evidence, the Claimant called **George Juma Omamo**, a Machine Operator and Chief Shop Steward at the Respondent business. He testified that the issue in dispute relate to the implementation of clause 8(b) of the CBA for the period of 1st November 2010 to 31st October 2012 which was to run for 2 years but the violation continued to the current CBA covering the period of 1st November 2012 to 31st October 2014. In the subject CBA, hours of work were 9 per day all adding up to 45 hours for a week. This did not factor any meal breaks and the CBA contemplated a situation where the Respondent would put in place a relieve system with scheduled breaks. Paragraph 9 made provision for payment of overtime but without the full implementation of clause 8(b), such overtime was violated as employees were forced to do double roles. Without a relieve system, two departments – production and warehouse –were affected while the others were running smoothly.

2. The witness also gave evidence that he is placed at the production department and employees therein have grievances in the absence of a relieve system. The witness thus demonstrated based on Annexure 15 – the rotation matrix – that allow employees to do work for their partners so that others can go for lunch break. The employees depend on the goodwill of others to cover for them to go for lunch as there is no set time for meal break. That when workers volunteers to cover for others and in case one fails to do this it leads to a disciplinary case as the goodwill arrangement is between employees as an internal mechanism without the involvement of the respondent.

13. He also testified that efforts by the employees and the union to resolve the problem on the implementation of clause 8(b) with the Respondent failed as the Respondent frustrated the process. The witness as chief shop steward wrote to the human resource manager and a meeting was convened but the issue of having a relieve system in terms of implementing the CBA as envisaged was not concluded. The matter was reported to the minister and a Conciliator appointed, when recommendations were made noting the challenge in not implementing clause 8(b), the Respondent rejected the same and the situation has not been resolved and hence the suit herein.

14. The witness also stated that in the production department there are several machines/lines with 3 major machines enjoined with conveyers to form a line. There are people allocated to their machines;

Ushindi team the matrix was done by the team leader. The team has 19 employees

Gunners team it has 19 employees

15. In this case, employees report to work at 7.30pm; move after 15 to 30 minutes to the next station and rotate through the various lines/stations/department up and until 7.30pm. There is a rotation process with no break for lunch. Each of the 4 lines have different roles and the groups/teams cannot move from one line to the next as there is supposed to be a reliever in each line to step in once one employee takes a

break. The roles each employee takes on a line require a system to operate without stoppage. The witness thus demonstrated that

- In *full goods line* – the sealed goods are ready for the market. These have to proceed for uncasing which requires a hand machine and one person manually has to do it.
- Casing is done manually and picks the good for packing of the product.
- In *stuck in* there is the building of the pallets by palletising after casing and move through the conveyors and the arrangement of the crates. Apart from the duty allocated on the matrix the employees on the line are allocated other duties due to hygiene and with the filling of bottles which has gas, some break and have to be cleaned or removed – the tables and lines must remain clean and failure to clean result in disciplinary action

16. These processes affect other departments in the warehouse but ultimately all departments must work together in a supply chain. Once the machine starts running at 7.30am they do not stop until 7.30pm. To stop the process/lines/production so as to take a break would result in massive disruptions and result in disciplinary action. When one took a break, a colleague has to do double work.

17. The Respondent failed to provide a matrix of relievers thus affected the break system that the CBA had addressed at clause 8(b). This schedule if in place can address the meal break. In the meantime, the employees should be paid for overtime worked each day in the double roles they have to take to cover for each other while on break.

18. The second witness called by the Claimant was **Jack Otieno Okwayo**. He is a Forklift operator with the Respondent and based at the Warehouse department for the last 12 years of which 3 years he was a casual employee and 9 years he has been on permanent basis. He reports on duty at 7.30am and clocks out at 7.30pm or depending on the shift. These are day and night shifts running for 6 days a week which are changed on Sunday. In the department there are 8 lines operated by folk lifters who are all 6 in number per shift. Once work commences at 7.30am there is no provision for breaks on the matrix and according to the matrix schedules, the operators have to run throughout the day until 7.30pm. There is no time allocated for lunch on the matrix.

19. The witness also gave the example of the door opening function and testified that there are two (2) employees who open the doors for the offloading of empty glasses. There are 2 doors that must be opened for the forklift to remove the empty crates or the offloading. The two doors on each side of the 10 tired trucks must remain open for this purpose while the forklifts are on either side removing the empty crates. It is not possible to move on either side as each door opener has to keep to one side at any given time. These duties run through the day and there is no break. The 2 door openers have to depend on each other in the teams in order to get a lunch break. The matrix in this case does not allocate time for lunch break. Annexure 15 to the claim lists Gatumo and Makori as the door openers.

20. The witness also took the Court through the procedures at the warehouse in loading where Annexure 15 lists Karanja, Mulwa, Machoka and Ombima but there is no provision for lunch break. The same case applies to load picking. That in all these departments, the employees go for lunch through mutual understanding. Each team member has to do extra duty while a colleague has to stand in for the other to go for lunch. Two roles are undertaken in this case but there is no compensation yet if anything goes wrong, the responsible person is accountable.

21. The witness also testified that in 2010 the Respondent had no relieve system to allow staff to go for lunch. Nobody was allowed to stop work to go for lunch and where one was found absent, they faced disciplinary action. In his department, cleaning services have since been outsourced to help them concentrate on their roles. The applicable CBA at the time had put 45 hours per week to be taken in 9 hours per day subject to a relieve system being put in place yet there is no such relieve system. There is no matrix attached to confirm such a relieve system was in operation.

22. In cross examination the witness confirmed that he did the matrix at appendix 15 as the Respondent had none. The matrix is done based on what is on the ground and the roles taken by each

employee. Those listed as relievers were not such as they were allocated duties. The door openers are at their stations throughout the day as there are trucks coming in for offloading throughout the day. Over 100 trucks have to be attended to and to stop this process would affect operations and attract disciplinary action against the door openers. The colleagues who are fork lifters can only operate one such forklift one at a time.

23. He also confirmed that the Respondent came up with a 15 minutes tea break that was closely monitored. There was still need for good will due to ongoing work. One had to do work for a colleague. In his case he could operate the forklift and then do offloading with one truck door open.

Respondent's case

24. In defence the respondents stated that the dispute herein stems from the interpretation and implementation of clause 8 of the 1st November 2010 to 31st October 2012 CBA. The Respondent is alleged to have violated clause 8 (b) and (d) of the CBA which is not true as there is a relieve system in place and as a result employees do not depend on each other or on good will of each other to carry out double role for them to have a break of 30 minutes rotation. All the work done is compensated. The respondents have a relieve system in place and further provide meals to all Claimant members free of charge at the staff canteen within the factory. The lunch break runs for 30 minutes from 12.00 to 3.00pm with each employee having 30 minutes taken in turns for lunch. The nature of business does not allow a shut down of production lines as machines require 2 hours to restart and once started they have to run for the day until close. There is provision for 2 additional employees per production line and in the warehouse which creates employees over and above the stipulated and specified manning levels for the production line. These 2 additional employees (relievers) at each line enables the production lines and the work stations to continue running at optimum while others take breaks. The Respondent has thus complied with the CBA terms.

25. The Respondent also states that there is no extra workload on the employees remaining on the line since there are two or more extra employees above the recommended number and those left after rotation for lunch break, production continues at manageable level. The roles of Filler Operator, EBI and Washer Operator are not specialised; the yard attendants de-palletise empty bottles but also perform other duties allocated by their supervisors and do not require relievers as their work is not continuous; door openers open truck doors when they come from the market and once offloading is complete they close the doors and are allocated other duties by their supervisors and do not require relievers as their work is not continuous; forklift operators lift loads onto the trucks, tow motor or staking slots and one forklift cannot be run by more than one employee at time; a pallet ticker is a document which instructs a load builder to load the indicated truck with specific products and upon completion of loading it is confirmed with a signature on the document for security confirmation. Where the particular truck does not turn up, this process is not undertaken and the employee is not held responsible. When the employee is taking a break, there is a hand over that is documented and in case of any incident, the responsible employee is the one responsible. The Respondent also stated that the roller conveyor attendants have duties to sort and inspect glass going to the production line. The number of bottles to be used by the production lines is pre-set before production begins. The speed of the attendants does not affect production lines.

26. When employees taken meal breaks, they use a smart card to access the canteen and the system generates a report which indicates the time the employees break off from their lines. There is no 30 minutes double role for any employee to allow another go for meal break. Cleaning duties are a responsibility of all employees and there are no separate staffs for these duties. All worked time is compensated, the rotation system ensures meal breaks are taken and there is no issue of overtime payment.

27. The recommendations and findings of the conciliator have no rational as payment for 30 days instead of lunch breaks is not commensurate or practical. The conciliator failed to make a finding as to the number of hours each employee was entitled to as overtime on specified or verifiable dates. The suit should therefore be dismissed.

28. In evidence, the Respondent called **Alex Sereti Oira** who has worked in Sales, Operations and Warehouse manager since 2005 and thus conversant with the case. He is aware of the CBA and clause 8 to which the Respondent has fully complied. In the warehouse, it is divided into 2 parts, finished goods and other activities on empties. There are 2 shifts of finished goods and yard activities. The shift system is used to manage finished goods and there is a shift during the day and night. For efficiency, tow forklifts are used so as to work fast. In the yard there is no specific person to open the doors as the team leader has to ensure the empties and loaded trucks are attended to. The team leaders have to ensure the breaks are taken and managed and when breakages occur, the team leader has to allocate and attend. The coordinator has to oversee all forklift activities and the operators must assist with loading as there are relievers. The department has a schedule with timelines with 6 machines and 8 employees to ensure the relieve system is effective and others take break. There is no additional work to any particular employee and each team leader has to manager the team to ensure lunch breaks are taken. The process of relieving ensures there is no double work.

29. The next witness was **Julius Gathundia** the Manufacturing Unit Manager since 2005. Clause 8 of the CBA provides for 45 hours of work and a relieve system. The Respondent implemented this by ensuring that each production line had more employees than required to have some as relievers. Each line supports the entire system from pre-inspection to decasing; washer for cleaning; EBI, filler to full goods inspection. At casing the bottles go into cases which are palletised then tagged before going out to the market. At each stage on the lines, the work stations have to be kept clean as a requirement to all staff. Some lines use plastic bottles and other glass and there are breakages. In all the work stations, the employees take break. Some roles are repetitive but employees are trained in different areas to make the rotations effective. He gave the example of Mr Kivuva in the full good station

He reports at 7.30am

7.45 He moves to accumulation

15 minutes later moves to empties

A5 minutes later back at accumulation

15 minutes later moves to cleaning

8.30 to 9.00 he takes a break

15 minutes alter moves to full goods

15 minutes later accumulation table

30. In that rotation. Cleaning is on a needs basis and when not required, the employee is free. The cycle operates throughout the shift for 1 ½ hours an employee is active before taking a break. The team leader has to monitor the teams to ensure follow up and taking of breaks. The team leader has to keep a schedule. All breaks are paid for except the lunch breaks.

31. The witness also testified that annexure 15 to the claim is incomplete as the matrix in use at the Respondent is kept by the team leader and not the one done by the Claimant on their own. The smart card system ensures that all employees take a break without production stopping or having another employee having more work or double roles as the team leader have to ensure no such double functions. All lines have different dimensions, some lines can have one person away while others can have two or more away at any given time. The team leader is responsible to ensure a proper coordination of their teams and compliance with break times.

32. In cross examination the witness confirmed that some employees take longer breaks than others, some remain idle for long hours and in some cases due to the nature of work, longer breaks are allowed. He gave an example of a day shift where;

Muthungu took 12 breaks of 15 minutes plus 30 minutes lunch break;

Mbithi took 4 breaks plus 30 minutes lunch breaks; and

Wanjau took 3 breaks plus 30 minutes lunch break.

33. That the basis for these differences is that workloads differ and cannot be compared. In this case Muthungu was a de-palletiser, while Mbithi and Wanjau had different roles. The witness could not tell which date the referenced matrix related to. Whether it was for the subject period in 2010/2011 or afterwards.

34. The next witness was **Sammy Lugado** the Human Resource Manager. He testified that the Respondent has implemented clause 8(b) and (d) of the CBA on work hours and lunch breaks and employees are not dependent of the goodwill of each other to work. According to the CBA each employee has to work for 45 hours a week on a daily schedule of 9 hours without counting the breaks and the Respondent was to put in place a relieve system. The Respondent has 2 shifts of 9 hours and 11.9 hours. The relievers exist to ensure no stoppage of work throughout the day. Lunch breaks are from 12.00 to 3.00pm which period is long enough for all staff to take meal break and the team leader has to enforce the 30 minutes break. There is also a 15 minutes tea break and other breaks that are natural and necessary all being health break structured in the system. The employees on night shift have 2 tea breaks and dinner break to ensure the staff are active and take rest. The tea and lunch breaks are all at the expense of the Respondent – free. Each employee is issued with a biometric card and at the canteen there is a card reader and thumb print for recognition and only activated by the exact employee for a meal voucher that is not transferrable. The meal voucher has a name and time; cost and nature of meal taken. Tea breaks run from 8 am to 10am while lunch breaks run from 12 to 3pm. These times are strictly adhered to as the system has to register the tea or lunch taken.

35. The witness also testified that the Respondent has a Workers Council – comprising management and union and hold monthly meetings. When the shop stewards are out of the lines, the Respondent has provision for casuals to take over such duties. This is different from the relieve system as the employees have to be on site as against when an employee is away on union activities and such period must be covered by casuals.

36. The Respondent provides meals at a huge cost of over Kshs.900, 000.00 a month on site to facilitate productivity and welfare of employees. Staff do not depend on each other to work and those not on their lines are either taking their rotation break for tea or lunch or as directed by each team leader. The CBA agreed upon work hours are all paid for. The CBA 30 minutes break is unpaid but other than this, there exists other breaks that are all paid for.

37. On 12th November 2012, the alleged meeting where the witness is alleged to have been in attendance is not correct. All Work Council meetings are organised between management and union on employee's welfare; there are 2 secretaries who must agree on the agenda and sign the minutes in approval. In this case the minutes are not signed and the agenda was not agreed. The investigator who did a report with recommendation never visited the site to witness the systems put in place for the implementation of the CBA and to make findings without appropriate information made the Respondent object to the report. The Respondent has a matrix that team leaders follow in supervising their team members work hours and breaks. The conciliator findings therefore do not recognise the steps taken to implement the CBA. The two recommendations by the conciliator that overtime be paid is a recommendation without basis as all overtime hours were paid for. The second recommendation that the union and the Respondent should come up with a matrix on meal breaks is not appropriate as the Respondent retains the right to plan its shifts as the employer. The employer has to set the tasks an employee has to perform, allocate and ensure performance. To leave it open to negotiations would create a negative work environment when employees chose what to do. The employer has a high level of accountability in duty allocation, breaks and paying the dues. The employer must allocate work and pay for it.

38. In cross examination the witness confirmed that the Respondent did not involve the union in planning the matrix with the relievers. It was done by the Respondent and it has a provision for lunch breaks.

Submissions

39. In submissions the Claimant analysed the presented facts noting that there is no relieve system in place since 1st November 2010 to date. The Claimant witnesses gave their own experiences noting that they had their schedule of work that does not allow for relievers as these do not exist. On the other hand, the Respondent was not able to demonstrate the existence of a relieve system from the date of the CBA commencement but in November 2011. Each production line has 19 employees with one being a pre-inspector and not factored among the employees directly on the same line and they have to cover the difference of the missing person on the line. This extra work is not compensated and the basis of the claim herein.

40. The CBA Clause 9(b) detail how extra work is paid an in this case where employees stand in for each other, they are entitled to this pay based. The conciliator already made investigations and presented a report giving recommendations that the Claimant agreed with. The Court should direct the Respondent to fully implement clause 8(b) of the CBA, pay the overtime accruing to employees who perform extra 30 minutes work occasioned by failure to have a relieve system, and costs herein.

41. The Respondent on their part submitted that they have a relieve system in place that is managed closely within teams to ensure that there are meal breaks and employees work for their time. Each production line has a standard requirement to have 17 employees but they have put 19 to ensure relievers that take over roles and production is not affected when others take meal break. The relieve system was put in place by the Respondent without consultation with the Claimant as under section 27 of the Employment Act, the employer retains the responsibility to allocate work and pay for it.

42. The Respondent has fully complied with the terms of the CBA, there are no employees doing double roles as they all have meal breaks that are provided for free by the Respondent at a huge cost to ensure continued productivity and welfare of employees. There is no good will required by the employees to take breaks as this is a responsibility taken by the employer who has matrices done by each team leader. There is no employee who works overtime to warrant a claim for extra payment. The suit should be dismissed with costs.

Determination of the issues

The issues herein identified are;

Whether there is a violation of Clause 8(b) of the CBA for the period 1st November 2010 to 31st October 2012;

Whether there is overtime accruing to employees affected by the violation of the CBA; and

Whether cost are payable.

43. The sanctity of a CBA cannot be overemphasised here. This is the document that parties have negotiated to have so as to govern their relationship in employment and labour relations. This is well recognised by the Labour Relations Act that has dedicated Part VII on the making, endorsement and review of a CBA so as to give it the necessary legal force. In this case parties agreed and Court registered CBA running for the period 1st November 2010 to 31st October 2012. Clause 8(b) the subject of litigation herein provided that;

HOURS OF WORK

(b) such standard hours will be based upon a working week of 45 hours from Monday to Friday, 9

hours a day (and/or as per shift arrangement), excluding meal breaks. Management shall have a relieve system in place.

44. The essence of the above agreed upon terms I find to be that;

- a. Total work hours per week were 45;
- b. Total work hours per day were 9;
- c. Such hours excluded meal breaks; and
- d. The Respondent was to set a relieve system.

45. Were the above terms of the CBA implemented? If yes, how and if not, is there a violation of the CBA?

46. For the above issues to be addressed, the evidence of the parties came in crucial. However, going back to the CBA, this document was negotiated and registered in the terms outlined above. This becomes the primary document of reference even in a scenario where the Respondent had the duty to act on it. The basic tenets were already set out by the parties to it. Each employee, in whatever role they take had to give the employer a total of 45 hours a week. Within these 45 hours, each day took 9 hours in total whether running in the day shift or night shift and such 9 hours were to be calculated less the lunch break taken by the subject employee. I take it then the relieve system that the Respondent was to put in place was to ensure these terms were met in full – ensuring that each employee worked for 9 hours a day totalling to 45 hours a week that was spread for 6 days – Monday to Friday.

47. This well outlined, the subject CBA was settled. The demonstration with regard as to whether the CBA was violated must therefore show how many hours each employee gave per day and whether these hours added up to 45 per week. The core of this is that where the employees were unable to do their agreed upon hours, then question would be to assess on what support systems were put in place by the Respondent such as a relieve system to ensure the work hours were achieved. This is crucial to state as the employee has the duty to give their labour for pay as agreed and the employer retains the duty to allocate work and time for the agreed period/duration of work and pay for that work or time. Where an employer take up an employee and lets them seat without work for long periods, that time even without work must be paid for and on the other hand an employee who reports to work and is allocated work, that employee has a duty to perform and where time allocated is not adequate, the right exists for compensation for the extra hours/time. In this case, the work hours were agreed. This is fundamental as this is a legal requirement under section 27 of the Employment Act thus;

27. (1) an employer shall regulate the working hours of each employee in accordance with the provisions of this Act and any other written law.

(2) Notwithstanding subsection (1), an employee shall be entitled to at least one rest day in every period of seven days.

48. From the claimants' witnesses, it was clear that they worked for periods spreading from 7.30am to 7.30pm. These are exactly 12 hours in a day. Their 9 hours were computed from the 12 hours. The witnesses further testified that they were paid for their time and whenever they worked overtime, such time was paid for. What is in issue here is that since there was no relieving system to allow them to have breaks, they were forced into double roles and the extra work done for 30 minutes was not compensated. What the claimants' witnesses were emphatic about is that they had to take their meal breaks depending on the goodwill of colleagues and whatever went wrong while absent, they were held accountable. That due to lack of a relieve system, the employees had to depend on the goodwill of each other to cover for 30 minutes while the other took a meal break. Based on the evidence by the claimant's witnesses, if the production lines were busy as outlined, then this left no room for break and any single person absent meant a disruption of the process for the entire line. Equally where the employees depended on the goodwill of each other to take meal breaks and where there was a problem the designated employee became answerable.

49. However, I find no cited case of such an eventually, victimisation, disciplinary action taken against any employee for working double role or for being away on a goodwill break. This therefore means the production lines were running smoothly and also that whatever break was taken by any employees from any of the lines, there was no disruption of production. Otherwise where any single employee went off the line without a reliever or any single employee had a break of up to 30 minutes for meals without a similar reliever, production would have come to a standstill causing the Respondent serious losses and or good reason to address the same.

50. I take it that there can only be one filler operator at a time, whether doing so by hand or machine. There can be only one forklift operator at a given time. A machine that is motorised, driver controlled or requires a human hand to operate, to do so smoothly requires a person at a time to handle the same. No one person can handle two forklifts at a time; it takes one person to open a door of single panel unless it is a double panelled door; one person to depalletises, inspect or label. To suggest as the claimants have done that they required goodwill from each other to operate such tasks for and on behalf of each other is far-fetched. A human being can only do so much in a minute, in an hour or in a work shift. Where an employee is required to work for 9 hours a day, and such an employee remains at the work place for such hours, the nature of work allocated to complete such 9 hours is the value given for consideration by the employer. Such hours cannot have more quality or value for consideration simply because such an employee works harder than the other or the work allocated is finished faster than the next employee. To seek overtime pay or extra pay for working for the agreed 9 hours is an issue not covered by the CBA subject of this claim. Where an employee went beyond the allocated hours of work, the claimants admitted that overtime was paid.

51. Where the claimants failed to finish allocated work, the Respondent takes responsibility. The duty was not on the Claimant or the employees to put in place their own mechanisms to cover any flawed system as to do so would be to leave their positions and attend to duties ordinarily the responsibility of the employer. In this case, the Respondent was supposed to ensure a relieve system was in place. This requirement by the CBA was not to override the provision for the number of work hours the employees were to give. Whether this was done or not, all what the claimants' were required to do is work for their allocated hours and nothing more.

52. That said, I have had occasion to look at the CBA, once more, and the terms set out under clause 8 were quite ambitious for both parties to agree on. Why the union agreed to sign to such terms is not for the Court to determine and why the employer agreed to set a relieve system is equally not possible to discern here. What is apparent is that when the Claimant union agreed to have their members work for 9 hours with a rider that such 9 hours would not include lunch breaks is a matter not clear, but this surely set the stage for litigation as herein. A creative employer like the Respondent given such time and space, went ahead and ensured in their meeting the legal requirements and the terms of the CBA they got their 9 hours spread n a 12 hours period per day and to ensure compliance with the law, structured such meal breaks by offering free meals. The respondent therefore met the obligation under the CBA to allocate 9 hours at work each day, ensured there was rest through breaks and a provision of food that was free. The Claimant during negotiations of the CBA should have seen the flaw – an employee could not be made to work continuously for 9 hours a day, excluding lunch hour or to attend to other natural health breaks. This cannot be visited upon the Respondent as the employer. To agree on the CBA as structured was well enough to offer the Respondent a document within which to work with. I find no departure whatsoever from the agreed upon terms of the CBA by the respondent. Parties are encouraged to read and appreciate every written word to a CBA before appending that signature. In most instances parties are concerned with the total figures added or affecting the daily wage/pay/allowances without looking at the totality of the written words that in one way or the other affect the figures in the final analysis. This cannot be attributed to a lapse on the part of the employer as both parties had a chance and occasion to sign their part of the bargain. Whatever error of judgement went into the final document, however much the Court is sympathetic, the CBA terms reigns supreme unless there is evidence of fraud, forgery or misrepresentation which is not the case here.

53. In this case therefore, the claimants have not laid the basis of seeking for more pay for work based on goodwill of each other on the grounds that there was no relieve system. Where meal/lunch breaks were

required, the employees took such break. When the same employee was at work, they did their 9 hours per day as required. Where such an employee went overtime, such time was adequately compensated for. There was no evidence that the goodwill applied amongst the employees was formally recognised under the CBA or any other form of understanding sanctioned by the claimant. I find no plausible explanation or evidence to thus suggest that there was no relieve system in place.

54. The claim is therefore speculative. There is no stated employee in the rotation or relieve chart submitted by the claimants who is stated to have worked 30 minutes extra and over and above the 9 hours daily schedule that required extra pay or compensation. Paragraph 27 (d) of the claim states;

This ad hoc informal and unplanned arrangement by employees mean that at the end of each day, the employees affected will have worked for an extra thirty (30) minutes each day without any form of compensation.

55. Who then can be said to have been eligible to earn such compensation? Those on the production lines? Those at the cleaning space? All employees or all unionised employees who were covered by the CBA?

56. This is well demonstrated by George Juma in his evidence-in-chief where he states;

... Staffs depend on the goodwill of others to cover for them to go for lunch as there is no set time for meal break. When workers volunteer to cover others and in case one fails to do this it leads to a disciplinary case.

This is our own arrangement internally with fellow workers without the involvement of the respondent. ...

57. These averments and the entire evidence of the witness do not demonstrate the affected employees who had to work double roles as a goodwill making them to work for over 9 hours or for double roles that necessitated such an employee or employees to claim for compensation as such. The evidence leave no doubt to the Court that no employee could effectively work double roles whether in production or warehouse beyond what an ordinary employee could work for other than the agreed upon 9 hours and where such hours were exceeded such an employee was paid for such overtime.

58. Is it then the quality of work that is in question here or the quality of time put into the work? This is best demonstrated by George Juma in his evidence when he testified that;

... Each team leader prepares a matrix. Employees report at 7.30am and there is a diary to record hours and the line.

There are 4 stations and one has 2 to 3 stations to move in rotation. The example of Mudoki is that he reports at 7.30am and ends his shift at 7.45am at full goods station when the product is at fill up and has to check if the product can proceed to the market. He then moves to the table and has to stay there from 7.45am to 8.15am for 30 minutes. He then moves to empty station to inspect cleared and empty glasses and then has to move back to the table to do casing from 8.30 to 9.00am. He then moves back to full good at 9.00 to 9.15am, back to the table at 9.15 to 9.45am.

This rotation has to go on until 1930 hours [7.45pm] but in between he is stuck in a group. He does not have a lunch break provision... Where the next group is in the warehouse, they have to proceed to stuck-in department but cannot report to where Mudaki is depending of the hours. ... The roles are different and without a relieving system, one group cannot automatically replace the other.

59. In cross-examination, the witness, George Juma confirmed that;

... The matrix is done by the team leader. The Respondent is able to monitor each employee. It is

a system where each employee has a tea break of 15 minutes and lunch break of 30 minutes which is clearly monitored by the respondent.

60. This then is an affirmation by the claimant's witness that indeed the Respondent had a system in place that ensured that each employee had a 15 minutes tea break, a 30 minutes lunch break and such breaks were closely monitored by the Respondent through team leaders. In this scenario therefore, an employer such as the Respondent operating a business such as they do, had the responsibility to ensure that each employee served their 9 hours as agreed in the CBA and that once production commenced at 7.30am, there was no stoppage or disruption by ensuring that each line was covered at all times. Such required a schedule that was functional. The duty rested on the Respondent to ensure this schedules were effective. In the absence of evidence by the Claimant that specific employees, unionised or otherwise worked beyond the 9 allocated hours a day and clause 9 of the CBA was not applied to them or the overtime due not paid, I find no evidence on the violation of clause 8(b) of the CBA.

61. I take note that the parties have since addressed the problematic Clause 8(b) in subsequent negotiations. It is not lost to the Court that such negotiations are meant to maintain a healthy work environment and good employment and labour relations and this continued peace should be encouraged by the court. Costs shall not be awarded.

I therefore find there was no violation of the CBA at clause 8(b) as claimed. On this finding the question of the extra pay/ overtime accruing to affected employees is equally addressed. The suit is therefore dismissed.

Note - I will not close without special mention to Mr Niemba for the claimants for his meticulous work and effort put in these proceedings and the detailed submissions made. It was exceptional. Ms Oyombe for the Respondent (FKE), though came into the proceedings midway, she was able to take over and ensure the Court was appraised of all matters necessary. The court, despite being given the task of arbitration is also a superior Court of record and without appropriate materials from parties; this task would be tedious and impossible on the face of all matters that have to be dealt with on a daily schedule. Special thank you to both Mr Nyumba and Ms Oyombe are deserved.

Delivered in open Court dated and signed in Nairobi on this 25th day of May 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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