



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO. 206 OF 2013**

**KENYA PLANTATION & AGRICULTURAL**

**WORKERS UNION**

**CLAIMANT**

**v**

**MARIDADI FLOWERS LTD**

**RESPONDENT**

**consolidated with**

**CAUSE NO. 53 OF 2014**

**KENYA PLANTATION & AGRICULTURAL**

**WORKERS UNION**

**CLAIMANT**

**v**

**MARIDADI FLOWERS LTD**

**RESPONDENT**

**JUDGMENT**

1. The Kenya Plantation & Agricultural Workers Union (the Union) commenced legal proceedings against Maridadi Flowers Ltd (Respondent) on 4 July 2013, and the issue in dispute was stated as *unlawful termination of services and payment of housing allowance* to some 11 named employees.
2. The Respondent filed a Memorandum of Response on 8 August 2013.
3. On 9 December 2013, the parties entered consent in respect of the *termination of employment claims* and the question of housing allowance was reserved for hearing and determination of the Court.
4. On 12 March 2015, the parties agreed that the Cause should be determined on the basis of the record and submissions and the Court directed the parties to file written submissions to be highlighted on 27 April 2015.
5. When the Cause was called for the highlighting of submissions, the Union had not filed submissions as directed. It instead sought to file an Amended Claim and submissions.
6. The Respondent did not oppose the application and the Court directed the Union to file and serve an Amended Memorandum of Claim and submissions before 5 May 2015, and the Respondent was allowed up to 13 May 2015 to file its Amended Response if necessary.
7. On 4 May 2015, the Union filed an Amended Memorandum of Claim in which a 12<sup>th</sup> Claimant was added, and its submissions. The Respondent filed its submissions on 13 May 2015.
8. In the submissions, the Union indicated that this Cause had been consolidated with Cause No. 53 of 2013, which fact had not been brought to the attention of the Court.

9. The Court therefore summoned the parties and called up for Cause No. 53 of 2013 on 3 June 2015, and confirmed that a consolidation order had been made by Ongaya J on 6 May 2014.
10. The Court therefore directed the parties to file supplementary submissions before 5 June 2015. The Union duly filed its supplementary submissions.
11. The question for determination, as already stated is whether the Union's members remuneration included housing allowance.
12. The Respondent issued the Union's members with individual contracts of employment.
13. The Union annexed to its pleadings two different sets of contracts.
14. According to the contracts produced by the Union, the 1<sup>st</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Grievants were initially issued with appointment letters which had a distinct element of house allowance ranging from Kshs 630/- to Kshs 1,800/-.
15. The other set of contracts produced by the Union in respect of the 2<sup>nd</sup>, 5<sup>th</sup>, 8<sup>th</sup> and 11<sup>th</sup> Grievants provided that

Your monthly remuneration shall be based on the number of flowers bunches you shall make per day at the rate indicated on the attached copy of task contract and your leave and off days shall be paid at the rate of Kshs 200 per day.

16. According to the Union, Agricultural Employers Association (of which the Respondent was/is a member) signed a Collective Bargaining Agreement with it effective 1 August 2011 to 31 July 2013, and the agreement provided for payment of house allowance of Kshs 1,800/- to the Grievants.
17. The Union contended that on 22 October 2012, the Respondent forced the Grievants to sign contracts which provided for payment of housing allowance *based on the number of bunches made daily* and this was illegal.
18. The Union made reference to clause 12(a) of the Collective Bargaining Agreement and section 31 of the Employment Act, 2007. The Union submitted that house allowance could not be pegged on the work done.
19. The Respondent's case was that the remuneration paid to the Grievants was inclusive of house allowance and that this was part of the contractual terms.
20. The Respondent produced a set of contracts which had a generic provision on housing and it was in the following terms

wage will be paid at a rate of Kshs 146 (shillings one hundred and forty six only) which is inclusive of Kshs 1,000/- (one thousand only) house allowance, exclusive of overtime worked in excess of normal hours in any day based on five days working week (calculated in accordance with labour laws of Kenya).

### **Statutory scheme on house allowance**

21. The primary statutory provision on house allowance is section 31 of the Employment Act, 2007. It provides that

31(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employees such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

(2) This section shall not apply to an employee whose contract of service-

(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b) Is the subject matter of or is otherwise covered by the collective agreement

which provides consolidation of wages as provided under paragraph (a).

22. The statute, in my view through the cited provision requires as a minimum that the employer should provide housing accommodation to the employee. Where the employer cannot provide housing, then the employer is under an obligation to pay to the employee, house allowance to enable the employee to access reasonable housing. Provision of housing or in lieu thereof therefore is a basic minimum right of the employee and there is a correlative duty upon the employer to provide housing or pay housing allowance.
23. The Employment Act, 2007 however envisages different types of contracts. These are piece work (section 2 of the Act), indefinite contracts and fixed term/term contract (sections 9, 10(1)(e) and 37 of the Act).
24. And in recognition of the different types of contract, the Labour Institutions Act has outlined minimum monthly wages without house allowance, and daily and hourly rates which are inclusive of housing allowance.
25. The Court has looked at the contracts produced by the parties. The seasonal employment agreements produced by the Respondent did not specify whether the Grievants were on piece work.
26. The Grievants were also on permanent employment agreements. For instance, the 2<sup>nd</sup>, 5<sup>th</sup>, 8<sup>th</sup> and 11<sup>th</sup> Grievants contracts dated 30 September 2010, 30 November 2011, 30 May 2011 and 30 March 2010 respectively provided for a daily rate of Kshs 240/-. These were way below the prescribed daily rate of Kshs 298/15 through Legal Notice No. 98 of 2010.
27. In this regard it would be hollow to assume that the Respondent had engaged the Grievants on piece work at a daily rate which included an element to compensate for housing.

#### **The parties contractual provisions on housing**

28. The parties have both admitted the validity of a collective bargaining agreement effective 1 August 2011.
29. The agreement expressly provided that where the employer did not provide housing, a house allowance was to be paid. In respect of the Grievants, the allowance was agreed at Kshs 1,800/-.
30. The provisions of the contract provided for each employee either to be housed or paid an allowance in lieu. The provision was more generous than the statutory minimum.
31. The Court finds that the provisions of the Collective Bargaining Agreement prevail over the statutory minimums and the individual contracts.
32. The Respondent has not explained why it adopted such a complicated and not easy to understand system for paying house allowance. The Court does not wish to speculate but it appears there is more than meets the eye to the formula/approach.
33. Where an employee is on a fixed term/term contract or monthly contract, the basic salary should remain constant save for lawful deductions. The same would apply to house allowance.
34. Where an employer wishes to engage employees on piece work, the same should be clearly and unambiguously stated. The contracts herein were ambiguous and it is the Respondent who can explain such, though no explanation was tendered.
35. The Court is also of the view that Clause 12 of the Collective Bargaining Agreement superseded the individual contracts provision on housing allowance.
36. The Court finds that the wages paid to the Grievants did not include an element to cover for house allowance and awards each Grievant and orders the Respondent to pay them as hereunder

(a) Mary Wanjiru Njoki	Kshs 27,000/-
(b) Evans Nyakondo Nyakwema	Kshs 30,600/-
(c) Rose Bwari Omonyi	Kshs 32,400/-
(e) Rolyne Namarone Sarai	Kshs 30,600/-
(f) Wilkister N. Motuanga	Kshs 32,400/-

(g) Hyline Moraa Otieno	Kshs 28,800/-
(i) Alphine N. Lucas	Kshs 27,000/-
(j) Peter Wandera Juma	Kshs 21,600/-
(k) Lucy Wanjiku Thama	Kshs 30,600/-
(l) Periah Kemunto	Kshs 37,800/-
(m) Beth N. Ontita	Kshs 18,600/-

37. The Union in its submissions stated that Mary Wanjiru Njoroge separated with the Respondent on 12 April 2012. This is contrary to para 2.6 of the Memorandum of Claim where it was pleaded that her employment was terminated on 12 April 2011.

38. Similar submissions were made in respect of Robi Davies Chacha. According to the pleadings she was terminated on 12 April 2011. These 2 cannot benefit from the provisions of a collective bargaining agreement which came into effect after they left employment.

39. The Court also notes that Wilkister N. Motuanga's effective date of separation was 20 January 2013.

40. Each party to bear own costs.

**Delivered, dated and signed in Nakuru on this 26<sup>th</sup> day of June 2015.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Muli instructed by Kenya Plantation & Agricultural Workers Union

For Respondent Mr. Kinyanjui instructed by Agricultural Employers Association

Court Assistant Nixon