



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NYERI
CAUSE NO. 50 OF 2015
KENYA GAME HUNTING & SAFARI WORKERS UNION.....CLAIMANT
VERSUS
LEWA WILDLIFE CONSERVANCY.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 13th November, 2015)

RULING

The court delivered the judgment in the present suit on Friday 31.07.2015 for:

1. 6% wage increase for 1st year effective 1.01.2014, and for the 2nd year effective 1.01.2015, 4% wage increase for all unionisable workers.
2. Overtime to all workers to be paid at the fixed rate of 40% and the parties will not renegotiate this item unless after 31.12.2019.
3. Each party to bear own costs of the suit.

In making order 2 on overtime, the court rendered itself as follows:

“For the overtime the court finds that the respondent’s position that uniform pay to all workers would be a good labour practice as it will enhance motivation of the staff across the cadres. The respondent had agreed to pay 38% to all workers as a fixed rate every month whether the employees are on leave or they have not in fact performed the overtime. The court has considered that some of the employees namely the gatemen are already earning 40% and a downward drift would demoralise the workers already at 40% fixed rate for overtime. In furtherance of uniformity as a good labour practice, considering the 38 % the respondent had agreed upon and in view of the 40 % already paid to the gatemen, the court returns that overtime to all workers will be paid at the fixed rate of 40% and the parties will not renegotiate this unless after 31.12.2019. While making this decision the court has taken into account the respondent’s legitimate position that all workers should be treated equally as envisaged in Article 41 of the Constitution as a good practice.”

The respondent was dissatisfied with the order on overtime as made in the judgment. The respondent filed the application for review on 23.09.2015 and prayed that order 2 in the judgment be set aside and substituted with the order that only fencers, gatemen and general security were entitled to 40% fixed overtime. During submissions Mr. Ambenge for the respondent added the armed security to that list

because they were already earning 37.5% as per clause 5 of the lapsed collective agreement signed on 24.02.2012.

To support the review it was submitted that at the meeting between the parties held on 06.11.2014 it was agreed that the issue in dispute was overtime for fencers, gatemen and general security; that was the issue that went to conciliation and then the certificate of disagreement dated 4.03.2015 which constituted the reference to the court in the present suit. Thus there was an error on the face of the record because the court had gone beyond the dispute as referred to the court and a review was proper to meet ends of justice.

Mr. Ndolo for the claimant submitted that the court's order on overtime was based on the economist's report and therefore there was no error on record. Further, it was submitted for the claimant that the application for review was incurably defective because the form as prescribed in the rules of the court had not been strictly complied with in filing the application. Mr. Ndolo further submitted, and Mr. Ambenje agreed, that the staff in armed security performed overtime continuously and it would be unjustified to lock them out of the 40% fixed monthly overtime pay.

The court has considered the rival submissions and makes findings as follows:

- a. The respondent in filing the application substantially included all the salient requirements prescribed in the form under the rules of the court and the application was therefore not deficient as to be found incurably defective. The court has been guided by section 72 of the Interpretation and General Provisions Act, Cap.2 that save as otherwise expressly provided in written law, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead.
- b. It is established for the respondent that the dispute that was referred to the court was about the overtime for fencers, gatemen and general security; and by agreement of the parties in their submissions, armed security is to be added to that list. In the circumstances the court finds that the parties are bound by their agreement about the dispute they referred to the court and to the extent that the findings and the order by the court went beyond that agreement, the respondent is entitled to review as prayed for and on account of an error on face of the record.

In conclusion, the judgment is hereby reviewed and consequential to that review, the final orders in the judgment shall be as follows:

- a. Orders No. 1 and No.3 in the judgment shall remain as set out in the judgment.
- b. Order No. 2 in the judgment is hereby set aside and substituted with the order thus, **“Overtime for fencers, gatemen, armed security and general security to be paid at monthly fixed rate of 40% of basic pay.”**
- c. Each party shall bear own costs of the application for review.

Signed, dated and delivered in court at Nyeri this **Friday, 13th November, 2015.**

BYRAM ONGAYA

JUDGE