



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS

Cause 109 of 2005

IN THE INDUSTRIAL COURT OF KENYA
AT NAIROBI.

(Coram: Charles P. Chemmutut, J.,

O.A. Wafula & J.M. Kilonzo, Members.)

CAUSE NO. 109 OF 2005.

KENYA SHOE & LEATHER WORKERS' UNION.....Claimants.

v.

LEATHER INDUSTRIES OF KENYA LTD.Respondents.

Issue in Dispute:-

“Working Hours for watchmen”(hereinafter called the grievants).

Joseph Bolo, Secretary General, for the Claimants (hereinafter called the Union.)

Geoff A. Orao-Obura, Advocate, of M/S. Obura Mbeche & Co., Advocates, for the Respondents (hereinafter called the Company.)

A W A R D.

The Notification of Dispute, Form ‘A’, dated 22nd June, 2005, together with the statutory certificate from the Labour Commissioner under Section 14(7) and (9)(e) of the Trade Disputes Act, Cap. 234, Laws of Kenya, (which is hereinafter referred to as the Act), were received by the Court on 22nd August, 2005, and the dispute was then listed for mention on 16th September, 2005. On this occasion, Messrs. Moses Oyugi and Harrison O. Okeche, who appeared for the parties respectively, were directed to submit or file their respective written memoranda or statements on or before 7th and 28th October, 2005, and the dispute was fixed for hearing on 12th January, 2006. Mr. Bolo submitted his memorandum, on behalf of the Union, on 8th October, 2005, while the learned counsel, Mr. Orao-Obura, belatedly filed his reply statement, on behalf of the Company, on 10th April, 2006. During the intervening period, between January and October, 2006, the case suffered some adjournments on the application of the parties to enable them attempt an amicable compromise out of Court, but all in vain. The matter was,

therefore, heard on 26th October, 2006 and 15th March, 2007.

The Union is registered as such under Section 11 of the Trade Unions Act, Cap. 233, Laws of Kenya, to represent unionisable employees in the shoe and leather sector; while the Company is a limited liability concern, incorporated in Kenya under the Companies Act, Cap. 486, Laws of Kenya, and it engages in tanning of hides and skins. The parties in this case have a valid recognition agreement and have also negotiated and entered into or signed several collective agreements since 1986, which govern and regulate the terms and conditions of service of the unionisable employees in the Company's establishment.

This dispute concerns the following 22 grievants, who were night watchmen:-

1. Mr. Gangesia Dabalen.
2. Mr. Nyamicha Maringo.
3. Mr. Ogicho Dogo.
4. Mr. Satim Haldere.
5. Mr. Thulelle Galgesa.
6. Mr. Isaiah Luderan Lerapo.
7. Mr. Dibo Wambile.
8. Mr. Kmakar Malable.
9. Mr. Ilgotoi Dabalen.
10. Mr. Peter Galmalo.
11. Mr. Patrick Lerapo.
12. Mr. Banayo Dabalen.
13. Mr. Longer Baltor.
14. Mr. Kawis Wambile.
15. Mr. Caleb Otieno.
16. Mr. Dida Galma.
17. Mr. Bechava Gallgidelle.
18. Mr. Lesurum Luhlomele.
19. Mr. Syngure Kalai.
20. Mr. Orle Isakh.
21. Mr. Dararo Wambile.
22. Mr. Galgalo Boru.

Mr. Bolo submitted in a nutshell that a standard provision in the letters of appointment issued to the grievants by the Company since 1993 required them to work for 45 hours per week; but, on the contrary, the Company took work from the grievants of 60 hours per week. The said standard provision reads as follows:-

“WORKING HOURS.

Your working hours will be 45 per week. The time of reporting to and departure from work will depend on the Company's operational needs.”

He pointed out that prior to 1999, the grievants were not paid-up members of the Union and, therefore, they should have been paid overtime for any hours worked over and above 45 hours in a week in terms of the aforesaid standard provision in their letters of appointment. In the circumstances, Mr. Bolo stated that the Union has no claim against the Company in respect of post-1999 period, but prayed that the grievants be paid overtime for the period prior to 1999, i.e. between 1993 and 1999, before they joined the Union and started paying union dues. He calculated the total demand or claim of each grievant as follows:-

1. Mr. Gangesia Dabalen.	Shs. 58,968/=.
2. Mr. Nyamicha Maringo.	” 65,574/=.
3. Mr. Ogicho Dogo.	” 58,968/=.
4. Mr. Satim Haldere.	” 209,682/=.
5. Mr. Thulelle Galgesa.	” 31,371/=.
6. Mr. Isaiah Luderan Lerapo.	” 140,351/=.
7. Mr. Dibo Wambile.	” 193,288/=.
8. Mr. Kmakar Malable.	” 61,101/=.
9. Mr. Ilgotoi Dabalen.	” 61,101/=.
10. Mr. Peter Galmalo.	” 143,679/=.
11. Mr. Patrick Lerapo.	” 217,936/=.
12. Mr. Banayo Dabalen.	” 99,062/=.
13. Mr. Longer Baltor.	” 138,687/=.
14. Mr. Kawis Wambile.	” 237,749/=.

15.	Mr. Caleb Otieno.	”	158,499/=.
16.	Mr. Dida Galma.	”	158,499/=.
17.	Mr. Bechava Gallgidelle.	”	198,124/=.
18.	Mr. Lesurum Luhlomele.	”	178,312/=.
19.	Mr. Syngure Kalai.	”	99,060/=.
20.	Mr. Orle Isakh.	”	118,874/=.
21.	Mr. Dararo Wambile.	”	158,499/=.
22.	Mr. Galgalo Boru.	”	138,687/=.

The learned counsel for the Company, Mr. Orao-Obura, strongly opposed the demand on the ground that in all the collective agreements between the parties since 1988, the grievants have been graded in Job Group “C” and their salaries were negotiated and paid for under the clause on wages. He pointed out that under Clause 10 of the parties’ collective agreement since 1988, the grievants were required to work for 60 hours per week. The said clause provides as hereunder:-

“The normal working hours shall be 45 hours spread over 6 days of the week. Watchmen will work for 60 hours per week.”

Mr. Orao-Obura contended that not all the 22 grievants were issued with letters of employment as majority of them were engaged on casual bases without letters of employment. As regards those grievants with letters of appointment, the learned counsel conceded that the working hours might have been indicated to be 45 hours; but during negotiations between the parties, leading to the conclusion of the collective agreements, they (parties) appreciated that it was impracticable to have the grievants work for 45 hours since they had to perform a 12 hour shift in one day for 5 days. Therefore, the agreement of 60 hours was entered into with that understanding in mind, thereby amending or varying the clause on the working hours in the individual letters of employment. Mr. Orao-Obura stated that all the collective agreements entered into between the parties since 1988 applied to all the unionisable employees, including the grievants, and this was done with full knowledge and participation of the Union with a view to ensuring that the collective agreements amended or varied the letters of appointment, and it is for this reason that the Union has made no claim for the period after 1999. He averred that the demand by the Union for overtime payment for pre-1999 period was misplaced and self-defeating because the grievants were not paid-up members of the Union, and as such they were not covered by the collective agreement in force at the material time. After all, the demand is devoid of particulars and is also barred by the Limitation of Actions Act, Cap. 22, Laws of Kenya. Mr. Orao-Obura eventually produced summaries of schedule sheets which showed that all of the grievants were overpaid, except the following five (5) grievants, serial Nos. 1,3,5,8, and 9, who are owed by the Company the amounts against their names, and the Company has undertaken to pay them:-

1.	Mr. Gangesia Dabalen.	Kshs.	6,358/=.
2.	Mr. Ogicho Dogo.	”	6,798/=.
3.	Mr. Thullele Galgesa.	”	2,894/=.
4.	Mr. Kmakar Malable.	”	7,315/=.
5.	Mr. Ilgotoi Dabalen.	”	1,312/=.

However, he said, the Company will not demand any refund or restitution of the overpayment from the grievants who were overpaid.

In the circumstances, Mr. Orao-Obura prayed that the demand be rejected, save for the entitlements of the aforementioned grievants.

The case for the Union is that between 1993 and 1999, the Company took work from the grievants of 60 hours spread over 6 days a week, contrary to 45 hours in a week as stipulated in their letters of appointment; and in the circumstances, the grievants were entitled to overtime payment for any hours worked over and above the said 45 hours in a week. On the other hand, the Company opposed the demand mainly on the ground that under Clause 10 of the successive collective agreements between the parties since 1988 watchmen, including the grievants, worked and still work for 60 hours spread over 6 days per week. Therefore, the grievants are not entitled to any overtime allowance or payment, except as above. Overtime allowance is granted for extra work done, and not to serve as a source of additional income. In this case the Company maintained that it was legally entitled, under Clause 10 of the parties’ collective agreements since 1988, to take work from the grievants up to a maximum of 60 hours, without paying overtime allowance. Section 5 of the Regulation of Wages (General) Order under the Regulation of Wages and Conditions of Employment Act, Cap. 229, Laws of Kenya, provides thus:-

“5. Hours of work.

- (1) The normal working week shall consist of not more than fifty-two hours of work spread over six days of the week.
- (2) Notwithstanding subsection (1) the normal working week of a person employed on night work shall consist of not more than sixty hours of work per week.
- (3)”Sections 2 and 6 of the Regulation of Wages (Protective Security Services) Order, 1998, of the said Act also provide, *inter alia*, as follows:-

“2. Application.

This Order shall apply to all persons employed directly or

indirectly by an undertaking or part of an undertaking which is involved in the carrying on of any of the following activities:-

- (a)
- (b) guarding of industrial plants, banks, warehouses, shops, private homes or any other property or establishment against theft, illegal entry or fire...
- (c)
.....”

“6. Hours of work.

The normal working week of all employees including day and night guards shall be fifty-two hours of work spread over six days of the week.”

There is no dispute that the grievants were not ordinary employees of the Company, but watchmen employed on night work, and the Company was under the law entitled to enforce the working schedule for them in any manner it liked, provided that it did not offend against the provisions of the law as enunciated hereinabove. Even if there was a term in their appointment letters to work for 45 hours and not 60 hours in a week, the said term was no doubt invalid and contrary to the statutory provisions of the law and the parties’ collective agreement in force at the material time. Subsection (2) of Section 5 of the Regulation of Wages (General) Order and Clause 10 of the parties’ collective agreement fixed maximum hours of work for a person employed at night at 60 hours of work spread over six days of the week, and under Section 6 of the Regulation of Wages (Protective Security Services) Order, 1998, the normal working week of all employees, including day and night guards, are fifty-two hours per week. The working hours for the grievants did not exceed 60 hours per week in any case, and were within the limits prescribed by the law. So they cannot be called excessive by any stretch of imagination and were strictly speaking not over-worked. Therefore, the grievants cannot claim any overtime allowance on the basis of their self-imposed 45 hours of work, spread over 6 days of the week, which are contrary to the provisions of the law.

In the light of what is stated hereinabove, we are of the considered opinion that the demand is not justified and the same is accordingly rejected. The Company is, however, **ORDERED** to pay the five grievants their admittedly outstanding dues or entitlements as shown at page 8 hereinabove.

DATED and delivered at Nairobi this 18th day of October, 2007.

Charles P. Chemmutut, MBS.,
JUDGE.

O.A. Wafula,
MEMBER.

J.M. Kilonzo.
MEMBER.