



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1606 OF 2017**

**STELLA MUKWANA SIBOKO.....1<sup>ST</sup> CLAIMANT**

**ROSE WAMBUI KIMANI.....2<sup>ND</sup> CLAIMANT**

**-VERSUS-**

**STYLE INDUSTRIES LIMITED.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. Through a memorandum of claim dated 14<sup>th</sup> August 2017, the Claimants herein sued the Respondent alleging that they were employees of the Respondent from 9<sup>th</sup> October 2012, and 12<sup>th</sup> February 2013 till 31<sup>st</sup> May 2017 and 28<sup>th</sup> February 2017, when their employment was terminated. Holding that the termination was unfair, in the said memorandum, the Claimants have sought for various reliefs against the Respondent namely:

- i. Terminal benefits amounting to Kshs. 368,138.00 as particularised in paragraph 8 thereof.
- ii. Interest at court rates from the date of judgment until payment in full.
- iii. Certificate of service.
- iv. Costs of this suit.
- v. Any other relief as the court may deem just.

2. Upon being served with summons to enter appearance, the respondent entered appearance and filed a statement of response dated 24<sup>th</sup> June 2018. It denied the Claimants' claim in toto and entitlement to the reliefs sought. At the close of pleadings, the matter got destined for hearing on merit.

3. The matter came up for hearing of the Claimants' and Respondent's cases on 18<sup>th</sup> October 2021 and 1<sup>st</sup> December 2021, respectively.

4. The Court directed the parties to file their written submissions but at the time of preparation of this judgment, none of them had. Consequently, this judgment is without the benefit of consideration of the parties' submissions.

**The 1<sup>st</sup> Claimant's case**

5. The 1<sup>st</sup> Claimant testified in court adopting the contents of their respective witness statements that were filed side by side with the memorandum of claim as their evidence in chief. She also tendered the documents that had been filed under the list of documents filed on 16<sup>th</sup> August 2017 as their documentary evidence. The Respondent did not object. They were produced as Claimants' exhibit 1 – 4. They were their pay slips, NSSF statements, termination letters dated 28<sup>th</sup> February 2017 and 31<sup>st</sup> May 2017 and a demand letter dated 18<sup>th</sup> July 2017 and a certificate of postage.

6. The 1<sup>st</sup> Claimant stated that on or about the 9<sup>th</sup> October 2012, the Respondent employed her at its factory at Lunga Lunga Road as a

general worker. She was stationed at its New weave department.

7. She asserted that she served the Respondent with loyalty, devotion and diligence until the 31<sup>st</sup> May 2017, when her employment was terminated. At the time of termination, her salary was Kshs. 16,166.

8. According to her, the employment was terminated irregularly without notice allegedly because her contract had expired. She was not under any contract of employment that would expire. She was therefore a stranger to what was mentioned in the termination letter dated 31<sup>st</sup> May 2017.

9. The only contract of employment that she remembered signing was that which she signed in October 2012 when she joined the Respondent's workforce. At its expiry, she never signed any other contract.

10. Referred to the Respondent's bundle of documents and more specifically the alleged employment contract dated 28<sup>th</sup> February 2017, the 1<sup>st</sup> Claimant denied knowledge of the document, and asserted that the signature thereon purported to be hers, is not. She invited the court to compare the signature with those appearing on her verifying affidavit and witness statement to prove her right.

11. The Claimant asserted that the termination of her employment was in nature a summary dismissal. Before the dismissal she was not accorded a hearing. There was no just and good cause for the termination.

12. She prayed for judgment for:

- a. Underpaid notice pay due to wrongful computation based on basic pay, instead of her last gross pay, therefore Kshs. 2,667.00
- b. Compensation for wrongful and unfair termination of employment calculated at twelve months gross pay, Kshs. 196,669.00

13. Under cross examination by Ms. Obonyo for the Respondent, the Claimant stated that she had worked continuously for the Respondent before the termination.

14. She reiterated that the only contract she signed was that in October 2012, a contract which was for 3 months. She admitted she was paid for the last month worked.

15. Under her evidence in re-examination, she stated that after the 3 months contractual period lapsed, she continued working for the Respondent without any written employment contract, until the time her employment was terminated.

### **The 2<sup>nd</sup> Claimant's case**

16. The 2<sup>nd</sup> Claimant testified that she was employed on the 12<sup>th</sup> March 2013 by the Respondent in its factory and attached to the New weave department.

17. She stated that on the 28<sup>th</sup> February 2017, she reported for duty as usual and worked up to around 3.00 p.m. when she was notified that her contract of employment had expired. She was given a termination letter.

18. According to her, it was not right for the Respondent to assert that her contract had expired, since she was not working under a fixed term contract. The only fixed term contract that she executed was that which she executed when she joined the Respondent, a contract that was for 3 months. At the lapse of those 3 months, she never executed any other contract, though she continued working for the Respondent.

19. She denied knowledge of the contract dated 30<sup>th</sup> November 2016, (the Respondent's 1st Document). She denied the signature thereon, too. She asserted that the signature is radically different from that appearing on the verifying affidavit and her witness statement.

20. The 2<sup>nd</sup> Claimant prayed for:

- i. Underpaid notice pay due to wrongful compensation, Kshs. 2677.00.
- ii. Compensation for wrongful and unfair termination, computed at 12 months' gross pay, Kshs. 168,792.00.

21. Cross examined by counsel for the Respondent, the 2<sup>nd</sup> Claimant admitted that at the termination of her employment she received notice pay, she stated that she filed suit against the Respondent because she was aggrieved by the termination.

### **The Respondent's case**

22. The Respondent presented one Dancan Lumati its Industrial Relations Officer to testify against the Claimant's case and in fortification of the Respondent's defence.

23. The witness stated that the Claimant's contract came to an end by effluxion of time and that the Respondent didn't have any other work to assign them. Therefore, their contracts could not be renewed.

24. The witness produced the termination letters dated 30<sup>th</sup> May, 2017 and 28<sup>th</sup> February 2017, that were addressed to the 1<sup>st</sup> and 2<sup>nd</sup> Claimants, respectively, as the Respondent's exhibit 1 and 2.

25. Cross examined by counsel for the Claimants, the witness stated that when the alleged fixed term contracts were executed, he had not joined the Respondent company. The contracts were executed in the presence of the then Human Resource manager, Ms. Margaret Yano.

26. Referred to the statement of claim, the witness admitted that in the same there was an express denial that the Claimants were working under a fixed term contract. Further that though the Claimants have denied the signatures on the alleged contracts as being theirs, the Respondent did not avail the author of the agreement to testify.

27. In his evidence under re-examination the witness stated that Margaret was no longer with the Respondent. The fact that she was not availed to testify, does not in any manner negate the fact that there was a contract between the Claimants and the Respondent.

### **Determination**

28. From the material placed before this court by the parties, I distil the following issues as issues for determination in this matter:

- i. What was the nature of the contract of employment between the Claimants and the Respondent at the time the same were being terminated.
- ii. Were the Claimants' contracts of employment wrongfully and unfairly terminated?
- iii. What are the reliefs if any available to the Claimants?
- iv. Who should bear the costs of this suit?

### **Of the nature of the contracts of employment.**

29. On this matter the combatants herein have taken positions that are diametrically opposite. The Respondent contended that the contracts were fixed term contracts, that lapsed by effluxion of time. The Claimants on the other hand took a position that they were not under any fixed term contract that would expire as was alleged by the Respondent.

30. It is not in contention that the employee-employer relationship between the Respondent and the Claimants subsisted for more than three months. Section 9 (1) of the Employment Act, 2007 provides:

**“A contract of service –**

**a. for a period or a number of working days which amount in the aggregate to the equivalent of three months or more; or**

**b. which provides for the performance of any specified work which could not reasonably be expected to be completed with a period or a number of working days amounting in aggregate to the equivalent of three months, shall be in writing.”**

31. The responsibility to cause the contract of service to be drawn up, is a responsibility bestowed upon the employer.

32. In situations like there is in the instant matter, where the nature of the contract of employment that were between the Respondent and the Claimant is in contestation, it was a burden on the Respondent to produce a written contract from which the true nature would be discerned. I say this conscious of the fact that among the particulars that an employer is obliged to incorporate in a written contract of employment is the date when it is to end, where the employment is not intended to be for an indefinite period. The Respondent failed to produce written contracts of employment to demonstrate the nature of the employment.

33. The Respondent pleaded at paragraph 5 of its statement of response that the Claimants were on fixed term contracts, which contracts came to an end on the 31<sup>st</sup> May 29017. In a rejoinder, the 1<sup>st</sup> Claimant in the memorandum of response at paragraph 3 and 4 stated:

**“The 1<sup>st</sup> Claimant further avers as follows:**

**a. That the 1<sup>st</sup> Claimant did not sign the purported employment contract dated 28<sup>th</sup> February 2017 and the same is an outright forgery. The 1<sup>st</sup> Claimant hereby puts the Respondent on notice that it shall at the hearing require production of the original employment contract and the maker thereof.**

**b. That the said employment contract dated 28<sup>th</sup> February 2017 does not bear the 1<sup>st</sup> Claimant's signature.**

**c. That the 1<sup>st</sup> Claimant only signed an employment contract in October 2012 which contract was valid for 3 (three) months and lapsed in December 2012.**

d. That thereafter the 1<sup>st</sup> Claimant continued to work for the Respondent but not under contract.

e. It is apparent that the said contract is a mere afterthought prepared belatedly to sanitize the 1<sup>st</sup> Claimant's wrongful and unfair termination.

4. The 2<sup>nd</sup> Claimant also avers as follows: -

a. That the 2<sup>nd</sup> Claimant did not sign by affixing her names to the purported employment contract dated 31<sup>st</sup> November 2016, and the same is an outright forgery. The 2<sup>nd</sup> Claimant hereby puts the Respondent on notice that it shall at the hearing require production of the original employment contract and the matter thereof.

b. That the 2<sup>nd</sup> Claimant has a signature and does not sign contracts by affixing her name to the same.

c. That the handwriting on the said employment contract does not belong to the 2<sup>nd</sup> Claimant.

d. That since her employment, 2<sup>nd</sup> Claimant only signed 2 employment contracts and valid for three (3) months in the year 2014 and 2015 which lapsed a long time ago but the 2<sup>nd</sup> Claimant continued to work for the Respondent under contract.

e. It is apparent that the said contract is a mere afterthought prepared belatedly to sanitize the 2<sup>nd</sup> Claimant's wrongful and unfair termination."

34. The Respondent had evinced an intention to produce the alleged contracts as exhibits and put reliance on them to prove its proposition that the Claimants were under fixed term contracts.

35. No doubt, by reason of the foregoing premises, the Respondent was at the earliest point put on notice that the documents were being challenged, and that at the hearing of the matter production of the originals thereof could be required.

36. At the first hearing of this matter on the 18<sup>th</sup> October 2021, Counsel Njuru, objected to counsel for the Respondent's reference to the copies of the contracts when cross examining the Claimants, contending that reference and cross examination could only be on originals thereof as notice had been given for their production, but the Respondent had failed to produce the same.

37. Counsel for the Respondent in a rejoinder stated that it was taking the Respondent time to retrieve the documents from its archives, it needed more time.

38. Weighing the two rival positions, and considering the wider interest of justice the court directed the cross examination to continue, and the original contract documents be produced at the defence hearing.

39. When the matter came up for hearing of the Respondent's case, the Respondent's witness sought to produce copies of the contracts of employment as part of the Respondent's documentary evidence. This bid met a vehement opposition from Counsel for the Claimant, on basis of the notice that had been put forth in the Claimants' pleadings and the court's direction of 18<sup>th</sup> October 2021. The objection was sustained. The copies of the alleged agreements/contracts were ordered expunged from the record.

40. Section 10 (1) of the Employment Act provides:

**"If in any legal proceedings an employer fails to produce a written contract or written particulars in subsection (1) the burden of proving or disapproving an alleged term of employment stipulated in the contract shall be on the employer."**

41. The provision places twin alternative burdens on an employer, whenever a term of an employment contract is in controversy. First to produce a written contract or written particulars contemplated in subsection 1, second in the defaulting, a burden to prove or disapprove the alleged term.

42. From the premises foregoing, it is not difficult to conclude that the Respondent failed to discharge any of its burdens under section 10 (1) of the Act. It failed to prove that the Claimants were working under fixed term contracts which lapsed at their appointed dates. It failed to disapprove the Claimants' contention that after their initial fixed term contracts, that expired at their appointed dates, there were no further fixed contracts between them and the Respondents.

43. In the upshot, the court does not agree with the Respondent that at the time of termination of the Claimant's employment, the latter had been working under respective fixed term contracts, which lapsed at their appointed dates, hence the termination. However, I am prepared to agree with the Claimants that after their initial fixed term contracts herein before mentioned that lapsed after expiry of their lifespans, they were not placed under any other fixed term contracts, but they continued to work for the Respondent.

44. As a consequence, I hold that the employee-employer relationship that was between the Respondent and the Claimants was a month to month employment contract terminable as stipulated under section 35 (1)(c) of the Employment Act.

**Whether the termination of the Claimants' employment was wrongful and unfair.**

45. Section 44 of the Employment Act, provides, when summary dismissal occurs;

**“1. Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.”**

I have hereinabove stated that the contracts of service that were between the Respondent and the Claimants were in nature that required a termination notice under section 35 (c) of the Act. There was none issued to the Claimants. The termination letters that were issued to them were to take effect and took effect on the dates of the letters, therefore immediately. Consequently, the Court agrees with the Claimants that they were summarily dismissed.

46. Having stated this, the next question then is, was the dismissal procedurally fair? The answer is in the negative upon the premises hereinafter. In the case of **Lydia Moraa Obara vs. Tusker Mattresses [2021]** this Court stated;

**“31. Section 45 of the Employment Act dictates that no employer shall terminate the employment of an employee unfairly. Section 45 (2) (c) provides the foundation for insistence on engagement of a fair procedure, if a termination of employment were to be considered fair.”**

47. In the case of **Davias Kiseu Mwamburi -vs- Cooperative Bank of Kenya Limited (2021) eKLR**, the Court stated that:

**“64. Section 41 of the Employment Act, 2007 supplies the structure of procedural fairness, it provides:**

**“1. Subject to section 42 (1),**

**An employer shall, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity explain to the employee in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during explanation.**

**2. Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”**

48. The facts of this matter are obvious, they leave no doubt that the statutory procedure under section 41 of the Act was not adhered to. In fact, the Respondent did not make even the slightest effort to attempt demonstrate that it was alive of the procedure and that it followed it. I find that the termination was procedurally unfair.

49. Next is, was the termination substantively fair? Section 43 of the Act places a burden upon the employer to prove the reason or reasons for the termination, whenever there is a claim as the one herein arising out of a termination. In default the termination becomes unfair in terms of section 45 of the Employment Act. In the case of **Prof. Macha Isunde -vs- Lavington Security Guards Limited [2017] eKLR**, the Court of Appeal echoing this provision stated;

**“There can be no doubt that the Act, which was enacted 2007, places a heavy legal obligation on the employer in matters summary dismissal for breach of statutory law. The employer must prove the reasons for terminating (section 43) – prove the reasons are valid and fair (section 45) – prove that the grounds are justified (section 47 (5), among the other provisions .....**”

50. The Respondent in response to the Claimants’ respective claims, contended that the termination of their employment was as a result of a lapse of a contractual period(s). Having found that there was no fixed term contract(s), between the Respondent and the Claimants, whose lapse dates were set as the dates that were put forth in the termination letters, I come to a conclusion that therefore the Respondent failed to prove the reason for the termination. That the reason it advanced was not valid in terms of section 43 and justified under section 47 (5), of the Act.

51. A summary dismissal is only attracted against an employee if it shows that he or she was guilty of a conduct that fundamentally breached his obligations under the contract. There was no allegation or demonstration that the Claimants were guilty of any misconduct in the character or magnitude contemplated in section 44 of the Employment Act. For this reason, I hold further that there was no valid, fair and just reason for the termination of their employment in the manner it happened.

52. In the upshot, I find that the termination of the Claimant’s employment was not substantively fair.

### **Of the reliefs**

53. Having found that the termination of the Claimants’ employment was neither procedurally or substantively fair, I now turn to the reliefs sought by the Claimants.

54. The Claimants have *inter alia* sought for a compensatory relief pursuant to section 49 of the Employment Act. The provision provides for an expansive range of remedies that a court can award in favour of a successful employee litigant in a matter where there is a claim

arising from a termination of his or her employment. A twelve months' gross salary or wages or a lesser extent, compensation is one of them.

55. An award of the compensatory relief, is a discretionary award. It depends on the peculiar circumstances of each case. Whether the court can award the maximum extent contemplated under the section 49 (1) (c) or a lesser one, will normally be attracted by the circumstance of the case, weighed together with the factors enumerated in subsection 4. I have considered the fact that the Respondent did not have a valid, fair and just reason to terminate the Claimants' employment, the Claimants did not cause or contribute to the termination; the length of service of the Claimants with the Respondent, and come to a conclusion that the Claimants are entitled to the compensatory relief, and to the extent of their eight months' gross salary, each. Therefore, 1<sup>st</sup> Claimant Kshs. 123,640 and second Claimant, Kshs. 104,783.

56. Both the claimants sought for a further sum of Kshs. 2,677.00 terming it underpaid notice pay. The 1<sup>st</sup> Claimant contended that she was earning Kshs. 16,166 as at the time of the termination. That when she was paid her final dues, she was paid a less figure owing to the fact that her salary [Kshs. 16,166] was not applied. I have considered the pay slips presented by the claimant as evidence, what emerges therefrom is the fact that the 1<sup>st</sup> Claimant was earning a basic salary of Kshs. 13,439 and a house allowance of Kshs. 2,016.00 as at May 2017. I am unable to see where the underpayment alleged flows from. The 1<sup>st</sup> Claimant did not place any evidence before this court to demonstrate this and actually prove what she had pleaded.

57. It is same situation obtaining as regards the 2<sup>nd</sup> Claimant's claim for the alleged underpaid sum. Consequently, the claim for Kshs. 2,677.00 by both of them is declined.

58. As costs follow the event not unless there is good reason to constrain the court depart from this general principle. As there is none here, the Claimants shall have the costs of this suit.

59. In the upshot, judgment is hereby entered in favour of the Claimants as hereunder:

- a. A declaration that the termination of their employment was procedurally and substantively unfair.
- b. Compensation pursuant to the provisions of section 49 (1) (c) of the Employment Act for the 1<sup>st</sup> Claimant, Kshs. 123,640, that is eight months' gross salary at Kshs. 15,455 per a month.
- c. Compensation pursuant to the provisions of section 49 (1) (c) of the Employment Act for the 2<sup>nd</sup> Claimant, Kshs. 104,783. (eight months' gross salary, computed at Kshs. 13,097 per a month).
- d. Interest at court rates from the date of this judgment, till full payment.
- e. Costs of the suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 10<sup>TH</sup> DAY OF JANUARY, 2022**

**OCHARO KEBIRA**

**JUDGE**

In Presence of:

Mr. Njuru for the Claimant.

Ms Obonyo for the Respondent.