



**Nyambuto & 8 others v Style Industries Limited (Cause 1283 of 2017)  
[2022] KEELRC 13230 (KLR) (10 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13230 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1283 OF 2017  
AN MWAURE, J  
NOVEMBER 10, 2022**

**BETWEEN  
JOSEPHINE MORAGWA NYAMBUTO & 8 OTHERS ..... CLAIMANT  
AND  
STYLE INDUSTRIES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The claimants filed the memorandum of claim on the July 7, 2017 claiming wrongful and unlawful termination of their services and the failure to pay terminal benefits. It is claimed that on or about the year 2013 the respondent employed the 1<sup>st</sup> to 5<sup>th</sup> claimants in its factory based at Lunga Lunga Road, industrial area wherein the claimants were allocated duties in the production department.

**Claimant's Case**

2. The claimant's state that on or about 2015 the respondent employed the 6<sup>th</sup> to 9<sup>th</sup> claimants in its factory based at Lunga Lunga Road, Industrial area wherein the claimants were allocated duties in the production departments. claimant's claimed they served the respondent with loyalty, devotion and diligence until February 28, 2017 when the 6<sup>th</sup> claimant, 7<sup>th</sup> claimant and 9<sup>th</sup> claimant were dismissed from employment and March 31, 2017 when the 1<sup>st</sup> to 5<sup>th</sup> claimants and the 8<sup>th</sup> claimant were without any colour of right terminated from employment allegedly on the grounds that their contracts had expired.
3. The claimants avers that they were not afforded any hearing by the respondent prior to their termination and they are strangers to the contract referred to by the respondent in termination letters. The claimants state that the 1<sup>st</sup> claimant- was paid Kes 14, 019 Kes /= 2<sup>nd</sup> claimant Kes 13,521, 3<sup>rd</sup> claimant Kes 14,620/=, 7<sup>th</sup> claimant Kes – 15,176/=, 8<sup>th</sup> claimant Kes 13,993/= 9<sup>th</sup> claimant Kes 13,531



4. The claimants say that their termination was capricious, malicious and unlawful and contrary to the provisions of the Employment Act 2007. The claimants say that the respondent wrongly calculated the claimant's notice pay payable by basing their calculations on basic pay and not gross pay as stipulated by the law and the claimants' claim the underpaid notice pay together with the terminal benefits as particularized.
5. The claimants pray for the following remedies;
  - a. The terminal benefits particularized in paragraph 8 of the claim totalling the sum of Kes 1,534,852.00
  - b. Interest in (i) above at Court rates from date of filing claim until payment in full.
  - c. Certificate of Service
  - d. Costs of the suit
  - e. Any other relief the Court may deem just.

#### **respondents case**

6. The respondent filed the memorandum of appearance on the July 27, 2017. It then filed the memorandum of defence on the February 23, 2018. The respondent submits that the claimants' employment ended by the effluxion of time and was not terminated and there was therefore no need for hearing and therefore prayed that the suit be dismissed with costs.

#### **The claimant's case**

7. Lilian Kageha Omoke the claimant/witness gave sworn testimony and stated that there were nine of them and she is the 5<sup>th</sup> claimant giving evidence on behalf of the nine claimants. She adopted the witness statement dated the July 4, 2017 as her evidence in chief alongside the memorandum of claim. She adopted the respective statements of other claimants as evidence in the case. She also produced as exhibits 1-3 documents contained in the list of documents dated the July 4, 2017 as exhibits 1-3.
8. She said she was employed on the March 3, 2013 and they were nine of them who were employed together. She testified that on the 31/3/2017 they got to work as usual and at 4 pm an employee came with a list and told them to go to the HR office. They then proceeded to the HR office where they were told their colleagues were there. She said that they were told the work they were told to do had reduced. She stated that they got a termination letter and they signed for the cheque and the said termination letter. The witness said that the letter stated that there was no work and that they were not told the contract had expired though the letters said the contract would not be renewed.
9. She testified that she was not under a contract. The last contract according to her was signed in September 2013 and was for 3 months. She said that they were just continuing to work without a contract and it was not true that her contract had expired. She stated that she had never received any warning letter and had not gone through the disciplinary process.
10. The witness said they had no warning letters and had not seen the contract dated the January 1, 2017 and did not sign it. She said she signed the termination letter but did not sign the declaration letter. She disowned the signatures on the declaration letter and said they did not belong to them. The respondent's advocate did interject and said that the witness cannot identify a signature that does not belong to her and the original documents are not yet in the file. The claimant's advocate then informed



the court that as the originals are not in court these documents can be expunged from the case following of which the Court gave an order to expunge the said documents.

11. Josephine Moragwa continued the testimony on behalf of the other witnesses and said that the declaration forms from the employer are not signed by herself. She said that there is a person identified in the documents as her witness and his name is not given.
12. On cross-examination, she said that she was employed in 3/3/2013 and used to get a payslip. She said that she had brought a payslips of March 2017, December and February 2017 but added there is a payslip for November which she had not carried. On re-examination she said that she was employed on the 3/3/2013 and was employed together with other claimants.

### **respondent's Case**

13. Duncan Lumati the respondent witness gave sworn testimony and said that he is the assistant HR Manager with the respondent. He adopted the witness statement dated the 6/10/2021 as part of his evidence in the case. He also adopted the documents in the list of his exhibits in the case which was objected to by the claimant's advocate saying production of the originals is required. The declaration form and the contract documents were expunged from the records and the case proceeded with the payslips and the termination letter. The witness further testified that in the termination letter sent to one of the claimants' dated 31/03/2017 and was one letter of 9 claimants' and paragraph 2 specified the payments to be paid to the claimants. He said that in the list of documents, the payslips to the claimants running from January 2017 to March 2017, that is 3 months, which indicates employees were paid salary of Kes 10,956/=, being annual leave paid Kes 243/= and arrears Kes 4, 199/= and notice pay all totalling Kes 10,956/=. That is payslip for March and was the last payslip given for the final dues. Leave pay according to him was paid; notice pay was also paid to all the claimants.
14. The witness said that the 'manual' leave is the same as annual leave and there were no outstanding payments. On cross examination he said that the 9 claimants with exception of the 6<sup>th</sup> claimant were on a fixed term contracts of 3 months from 1/1/2017 to 31/3/2017. That the sixth claimant was employed from 1/12/2016 to 28/2/2017 and he was also on a fixed term contract.
15. The witness stated that they did have the records of these employees and they issue payslips to the employees. The witness said that the reasons for termination was non- renewal of the contract which had expired on the 31/3/2017 whilst the 6<sup>th</sup> claimant expired on the 28/2/2017. He said that the matter did not relate to disciplinary proceedings and that he did not invent a non-existence contract in order to send employees home.
16. On re-examination the respondent said 7<sup>th</sup> claimant's staff number was St 11294 in December 2016. He says the staff number of Getrude Nyandiko was ST A1219 in 2013 December. The staff numbers changed as per products.

### **claimant's submissions**

17. The claimants submitted that the claimants were not under contracts and that they are strangers to the contracts referred to in the letter of termination. The claimants relied on the case of [\*Stella Mukwana Siboko & another v Style Industries Ltd\*](#) (2022) eKLR where court said that

“On this matter the combatants herein have taken positions that are diametrically opposed. 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. .... In



situations like these there is in the 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 the contract of employment is the date when it is to end, where the employment is not intended for indefinite period. The respondent failed to produce written contracts of employment to demonstrate the nature of employment.

18. The claimant further submitted that the action of filing forgeries in order to justify a wrongful termination was in blatant disregard of the sanctity of the court and ought to be sanctioned by court by an award of punitive damages in order to teach them a lesson. Exemplary damages may be awarded in such a situation where there is need to vindicate the sanctity and strength of the law. The claimant says an award of exemplary damages may be awarded under prayer (v) of the claim.
19. The claimant argued that the termination of the claimants was unfair under section 43 and 45 of the [Employment Act, 2007](#) saying that the respondent merely imagined and fabricated the existence of fixed term contracts as pretext for terminating the claimants' employment and the respondent was not willing to comply with the procedure for termination of employment or redundancy if indeed there was no more work.
20. The claimant urged the Court to be guided by the case of [Peter Mbugua Kanoi & 5 others v Coffee Board of Kenya](#) [2014] eKLR where the claimant says the court held that section 49 (1) of the [Employment Act](#) provides that payment is based on gross monthly wage on salary and in addition also prayed for the costs and interests.
21. The respondent did not file any submissions.
22. Having looked at the pleadings, the evidence and submissions in this case, the Court frames the following issues as falling for determination from what the respective parties state;
  - a. Whether the claimants were on fixed term contract or employment was for an indefinite period.
  - b. Whether the termination of the claimants was lawful and fair
  - c. The remedies, if any, the claimant is entitled to.

### **Determination**

23. As can be seen from the previous decisions of this court and the Court of Appeal, sections 41, 43, 45 and 47(5) of the [Employment Act](#) 2007 provides for the rules of law on termination of employment, and in particular what must be done and proved for the termination to be considered lawful and fair. A termination must be both substantively and procedurally fair. See the case of [Walter Ogal Anuro v Teachers Service Commission](#) 2013 eKLR.
24. The Court of Appeal in [Francis Chire Chachi v Amatsi Water Services Company Limited](#) 2012 eKLR stated in a matter where an issue of fixed term contract arose that

“This Court has recently stated that employers are not under any obligation to give employees reasons for non-renewal of fixed term contracts, unless there is such an obligation created in the expiring contract’.



In the *Registered Church of East Africa & another v Ruth Gathoni Ngotbo Kariuki* [2017] eKLR the Court said that:

“bearing the foregoing in mind, we note that fixed term contracts carry no rights, obligations, or expectations beyond the date of expiry. Accordingly, any claim based after the expiry of the respondent’s contracts ought not have been maintained. This is in relation to the salary for the months of April up to May, 2010. Similarly, since the respondent’s contract came to an end by effluxion of time and any claim for wrongful termination could not be maintained.

25. In the claim before court, the alleged contract of employment having not been availed to the Court, the Court has to make sense of the claim based only on the pleadings, oral evidence led in court, the payslips attached and the letter of the termination. In the evidence of CW 1 Lilian Omoke, she says that the last contract was last signed in September 2013 and was for 3 months and they were therefore continuing without a contract henceforth.

26. It is worth mentioning that under section 47(5) of the *Employment Act* 2007, the burden of proving that a termination is unfair is upon the employee. Whereas the burden of justifying the grounds for termination of employment or wrongful dismissal shall rest on the employer. The respondent in this case has to show that the claimants were employed on fixed term contracts which lapsed as contended in the termination letters of the March 31, 2017.

27. In my view, the statement on oath given by CW1, Lilian Omoke that the last contract was on the September 2013 and ran for 3 months after which they continued working until termination demonstrates that there was indeed a fixed term contract at some point with the respondent but it was not renewed or even if it was renewed there was no evidence produced to demonstrate there was a fixed contract. The claimants then remained regular employees devoid of fixed contracts until termination.

28. It is trite law that he who alleges should prove. Section 107 of *Evidence Act* provides that whoever desires any Court to give judgment as any legal right to liability dependant on the existence of facts which he asserts must prove those facts exists. Exactly the respondent should prove the existence of contracts.

29. Similarly section 10(1) of the *Employment Act* provides:

“A written contract of service specified in Section 9 shall state particulars of employment which may, subject to sub Section(3) be given in instalments and shall be given not later than two months after the beginning of the employment

30. In the case of *Stella Mukwana Siboli & another v Style Industries Limited* (2022) eKLR the Court held as follows:

“On this matter the combatants herein have taken positions that are diametrically opposite. The respondent contend that the contrast 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. 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:-

9. A contract of service— (a) for a period or a number of working days
- (1) 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 within a period or a number of working days amounting in the aggregate to the equivalent of three months; shall be in writing.

31. The employer has responsibility to keep written records of all employees employed by him with whom he has entered into a contract under this Act which shall contain the particulars specified in sections 74 of the Employment Act 2007.
32. The respondent had the superior burden to prove that there were fixed contracts for each of the claimants and to confirm the said employment therefore terminated by effluxion of time. The respondent filed their response and annexed letters of termination and copies of contracts on February 27, 2020. Since then the respondents could not produce the original contract documents and the claimant opposed the production of copies claiming they were not genuine. The Court therefore gave respondent time to produce the original but they were not able to produce.
33. In essence therefore there is no evidence that the claimant had fixed contracts since the respondent did not produce even one original contract to confirm the same were authentic. Under the circumstances the court finds the respondent has failed to establish its case on the balance of probability. Therefore court further finds there was no valid ground to terminate the claimant's employment since the same is not soundly found to have been terminated automatically due to effluxion of time. The claimant vehemently denied they had contracts and also that they signed discharge vouchers.
34. The Court therefore finds in the absence of the original documents the claimant's employment cannot be proved to have terminated by effluxion of time. The respondents are therefore found to have been terminated without a valid reason contrary to sections 45 of the Employment Act 2007. Also the rightful procedure was not followed as mandated in section 41 of the said Employment Act. Judgment is therefore entered in favour of the claimant.

## Remedies

- a. The claim for underpayment of salary for the nine claimants is not proved and is declined for all nine of them.
- b. As for the compensation for general damages they are given 3 months each equivalent of their salary as follows:-
  - 1<sup>st</sup> claimant - Josephine Moragwa Nyambuto ,  
Compensation for wrongful and unfair termination of employment calculated at three months of last gross pay.....Kes 42,072/05
  - 2<sup>nd</sup> claimant – Annah Mbithe Mwololo  
Compensation for wrongful and unfair termination of employment calculated at three months of last gross pay..... Kes 40,563/-
  - 3<sup>rd</sup> claimant- Jackline Kwamboka Makoli  
Compensation for wrongful and unfair termination of employment calculated at three months of last gross pay..... Kes 42,198/-
  - 4<sup>th</sup> claimant - Joyce Kerubo Nyambuto  
Compensation for wrongful and unfair termination of employment calculated at three months of last gross pay..... Kes 40,593/-



5<sup>TH</sup> claimant- Lilian Kageha Omoke

Compensation for wrongful and unfair termination of employment calculated at three months of last gross pay..... Kes 42,057/-

6<sup>TH</sup> Claimant- Rose Kerubo Nyang'au

Compensation for wrongful and unfair termination of employment calculated at three months of last gross pay..... Kes 43,860/-

7<sup>TH</sup> claimant -getrude Nyanduko Nyamweya

Compensation for wrongful and unfair termination of employment calculated at three months of last gross pay..... Kes 45,528/-

8<sup>TH</sup> claimant -jeditor Cherotich

Compensation for wrongful and unfair termination of employment calculated at three months of last gross pay..... Kes 41,979/-

9<sup>TH</sup> claimant -shalivah Kemunto Nyarandi

Compensation for wrongful and unfair termination of employment calculated at three months of last gross pay..... Kes 40,593/-

- c. Plus interest at Court rates from date of judgment till full payment.
- d. Costs re also awarded to the claimant.
- e. Each one to be given certificate of service within 30 days from today's date.

**Orders accordingly.**

**DELIVERED, DATED AND SIGNED IN NAIROBI THIS 10<sup>TH</sup> NOVEMBER, 2022.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of the **Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**ANNA NGIBUINI MWAURE**

**JUDGE**

CAUE NO 1283 OF 2017 JUDGMENT Page 7 of 7

