



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO. 934 (consolidated with cause no. 935/15) OF 2015**

**NANCY SAMBA MATUNDA .....1<sup>ST</sup> CLAIMANT**

**JAMES CHIRO TUNJE.....2<sup>ND</sup> CLAIMANT**

**VERSUS**

**LIGHTEX LIMITED .....RESPONDENT**

**J U D G M E N T**

**I N T R O D U C T I O N**

1. The claimants brought separate suit on 17/12/2015 but they were later consolidated on 27/7/2016. The claimants seek terminal dues plus compensation for unfair and wrongful termination of their employment by the respondent on 31/8/2015. It is the claimants' case that they were dismissed for protesting against the employer's failure to implement the 12% salary increment prescribed by the government through the Wage order published in May 2015.

2. The respondent had admitted that she employed the claimant but has denied unfair and wrongful termination of their contracts of service. It is the defence case that the claimants were employed under fixed term contract which lapsed automatically on 31/8/2015 after affuxtion of time. It is further defence case that she paid the claimants all their benefits and as such no further dues were owing.

3. The suit was heard on 27/7/2016 when the first and second claimant testified as Cw1 and Cw2 respectively while the respondent called her General Manager Mr. Pravin Singh as Rw1. Thereafter both parties filed written submissions.

**CLAIMANTS' CASE**

4. Cw1, Nancy Samba Matunda told the court that she was employed by the respondent from November 2010 as a shop assistant. She worked between 8.30 and 6pm every day except on Sundays when she worked between 9pm and 1pm. She was employed on periodic contracts which were renewed automatically and sometimes she signed the contracts after the term had expired. All the copies of the contracts were kept by the employer after signing. The last contract she signed is dated 4/5/2015 and it was to lapse on 31/8/2015. Her gross salary was ksh.20404 per month.

5. On 31/8/2015, Cw1 worked until evening and the respondent's manager Mr. Vinu told her that the shop was being closed at any time and as such she should return her uniform the following day. She

complained with the managers' directions by returning the uniform and when she demanded her dues Mr. Vinu referred her to the manager of No Maneno Bazaar, who denied the allegation that the respondents shop was closing down. Rw1 however told her to collect her dues which was less than ksh.3000 but she declined. Thereafter she served a demand letter on 4/9/2015 and the respondent responded on 16/9/2015 denying unfair termination and enclosing the fixed term contracts dated 4/5/2015 which she alleged to have lapsed. Hence this suit.

6. CW1 contended that she was not allowed to read the contract before signing it and she was not given a copy. She further contended that the contract was altered by hand but the same was not countersigned. She contended that the payslips never reflected payment of overtime of ksh.3400 except January and July 2015. She admitted that some of the statements made in her testimony in chief were not stated in her written statement filed with the suit.

7. CW2, James Chiro Tunje testified that he was employed by the respondent in 2008 as a security guard before being appointed as a shop assistant in December 2009. He used to work between 8.30 am and 6pm daily except on Sundays when he worked from 9.30am to 1pm. Like CW1, he used to receive the Sunday pay in cash but the rest of the salary amounting to ksh.20404 was paid through the bank. Also like CW1 he stated that he never went for any annual leave during the 6 years of his employment and denied the signatures on the leave records. He was also employed under periodic contracts which he used to sign without being allowed the chance to read it and sometime signing the contracts after the contract had expired. His last contract was to end on 31/8/2015 but he was not given a copy thereof.

8. On 31/8/2015, CW2 attended work as usual and he learned that CW1 had been terminated on allegation that the shop had been sold. He and other employees demanded to know when their dues would be paid. Rw1 was called from No Maneno bazaar by Mr. Vinu. When CW2 enquired the employees' future in the company and details of their contracts he was dismissed together with Mr. Kuloba and Josiah. He demanded his terminal dues but he was told that he will only be paid for the days worked. He was not satisfied and instructed his lawyer who served a demand letter but the respondent replied saying that his contract had expired and enclosed a copy of the contract.

9. CW2 admitted that he was paid overtime of Ksh.3400 in July 2015. He further admitted that he was a regular contributor to NSSF and NHIF. He however contended that he never knew that his contract would end on 31/8/2015 because he never read it before signing.

#### DEFENCE CASE

10. RW1 is the General Manager for the respondent and No Maneno Ltd. He admitted that the claimants were employed by the respondent under renewable short term contracts earning ksh.20404 per month inclusive of house allowance and overtime until 31/8/2015 when their last contract lapsed automatically. He therefore denied the claim for compensation.

11. RW1 further contended that his shop opens at 8.30am and closes at 6pm but with a lunch break of one hour. According to him, the claimants worked for 26 days a month and 26 hours overtime. For which they were paid ksh.3400 as overtime monthly based on their basic pay plus house allowance. He therefore denied the claim for overtime as prayed in the suit.

12, He also denied the claim for leave on ground that the claimant used to earn 7 leave days under a contract of 4 months which were paid for or utilized. He produced leave records as exhibits to substantiate the foregoing allegation. He produced records to show that cw1 was absent for 3½ days which was treated as leave and then she was paid for cash for the remaining 3½ days. Likewise, CW2 was absent for 9 days between the same period of September and December 2014 out of which 7 days were treated as leave days and 2 days' pay deducted from his salary. He maintained that the signatures on the leave records belonged to the claimants.

#### ANALYSIS AND DETERMINATION

13. There is no dispute that the claimants were employed by the respondent under periodic contracts which were renewed until 31.8.2015. The issues for determination are:-

a) Whether failure to renew the contracts on 31.8.2015 amounted to wrongful and unfair termination.

b) Whether the claimants are entitled to the reliefs sought.

#### WRONGFUL AND UNFAIR TERMINATION

14. I have carefully considered the evidence and the submissions presented by the two sides. There is no doubt that the claimants were employed under fixed term contracts of four months. There is also no doubt that the last contract for each claimant was between May and August 2015 and it was not renewed. Although the claimants contended that they never read the contract before signing it and for that reason they did not know the expiry date, this court can do nothing about it because the claimants were okay with the way the employer treated them until the contract expired and was not renewed as usual. In my view, the protest against the contract by the claimants through this suit is an afterthought. Had the contract been renewed, the claimants would never have registered any protest that they were never allowed to read it before signing. Consequently, I find and hold that the contracts signed by the parties herein were valid and binding upon them and the court can only enforce the rights of the parties as stipulated in the said contracts.

15. The parties having agreed to bind themselves under the contract up to 31.8.2015, the court cannot declare wrong or unfair the employer's failure to renew it. The court's jurisdiction in contracts between parties is to understand the intention of the contracting parties and to enforce that intention. In this case the intentions of the parties was to remain bound for a finite span of time unless the time was extended by a mutual agreement. Although the claimants were willing to continue, the respondent did not wish to do so and she was within her managerial prerogative not to renew it. I will therefore neither condemn her for her decision not to renew the contract nor will I force her to renew the expired contracts.

#### RELIEFS

16. In view of my finding above that the contracts of employment were not wrongfully and unfairly terminated by the respondent, but that they lapsed after effluxion of time, the claimants' prayer for salary in lieu of notice and compensation for unfair termination are dismissed. Likewise the Claim for overtime is dismissed because the claimants were paid the same as part of their gross pay as demonstrated by the RW1 in evidence. Each claimant was receiving an automatic Kshs. 3400 as overtime every month as demonstrated by the pay slips filed by both parties. The claims for leave outstanding and Gratuity are also dismissed for lack of evidence. No evidence was adduced by the claimants to rebut the evidence of leave records produced by the RW1 which demonstrated that the claimants utilized part of their leave days and thereafter they encashed the unutilized leave days. On the other hand no evidence was adduced to prove that the claimants were entitled to gratuity. Indeed CW1 disowned the claim for gratuity during his testimony.

#### DISPOSITION

17. For the reasons that the termination of the claimants' contracts of service was lawful and that no accrued benefits have been proved, I dismiss the Suit with no order as to cost.

Signed, Dated and Delivered at Mombasa 28<sup>th</sup> April 2017

O.N. Makau

Judge