



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR**  
**RELATIONS COURT AT MOMBASA**  
**CAUSE NUMBER 642 OF 2015**  
**[CONSOLIDATED WITH CAUSE NUMBER 643 OF 2015]**

**BETWEEN**

**1. LUCY WANJA IRERI**

**2. ZIPORAH MWENI NDAMBUKI ..... CLAIMANTS**

**VERSUS**

**KENYA SUITCASE MANUFACTURERS LIMITED ..... RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*J.A. Abuodha & Company Advocates for the Claimants*

*Federation of Kenya Employers for the Respondent*

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**JUDGMENT**

1. The 2 Claimants filed their respective Statements of Claim, on 28<sup>th</sup> August 2015. The Respondent filed its Statement of Response in each Claim, on the 21<sup>st</sup> October 2015. With the consent of the Parties, the Court gave an order on 22<sup>nd</sup> October 2015, consolidating the Claims, with file Number 642 of 2015 as the mother file. There was a further consent order recorded on the 24<sup>th</sup> June 2016, to have the Claims determined on the strength of the Parties' Pleadings, Documents and Submissions. The matter was last mentioned in Court on the 13<sup>th</sup> September 2016, when the Parties confirmed the filing of their Closing Submissions.

***1st Claimant's Position***

2. Lucy Wanja Ileri states she was employed as a General Labourer by the Respondent Company, between February 2009 and 1<sup>st</sup> June 2015.

3. Her contract was terminated by the Respondent without cause or notice. She was denied terminal dues

and compensation.

4. She considers termination was unfair and unlawful, and prays for the following orders against the Respondent:-

- a. 1 month salary in lieu of notice at Kshs. 10,123.
- b. Annual leave pay for a period of 6 years at 21 days per year, at Kshs. 49,014.
- c. Service pay at 15 days' salary for every year in service at Kshs. 35,010.
- d. 12 months' salary in compensation for unfair termination at Kshs. 121,476

Total..... Kshs. 215,623

- e. Costs and any other suitable reliefs.

5. She submits she worked for 14 years from 2003 to 2015, when her contract was terminated. She was not given reason or reasons for termination. She was not heard before termination. She last earned a monthly salary of Kshs. 10,123. The Respondent did not avail to her substantive and procedural justice, under Section 41, 43 and 45 of the Employment Act 2007. All through, she was placed on contracts which were renewed, one after the other.

6. According to her the issues the Court should resolve are, in her own words: whether there existed a contract of service and/ or contract for service between the Claimant and the Respondent; whether her termination was intended with the law; if she is entitled to the relief sought; whether there was a contract of service [employer-employee relationship] or not [contract for service].

7. The decision by the Respondent has caused great financial and emotional disturbance, and "we urge the Court to find the relationship between the Claimant and the Respondent existed," she submits. The Respondent has not rebutted the overwhelming evidence that termination was unfair.

***2<sup>nd</sup> Claimant's Position***

8. The 2<sup>nd</sup> Claimant states she was employed by the Respondent as a General Labourer from 2003 to 2005. She earned similar amount of salary as her Co-Claimant. Her contract was terminated in circumstances she feels were unfair and unlawful. She seeks the following orders:-

- a. 1 month salary in lieu of notice at Kshs. 10,123.
- b. Annual leave pay for 14 years at 21 days per year, at Kshs. 114,366.
- c. Service pay at 15 days' salary for every completed year of service at Kshs. 81,690.
- d. 12 months' salary in compensation for unfair termination at Kshs. 121,476

Total .....Kshs. 327,655

- e. Costs and any other reliefs.

9. She submits termination was substantively and procedurally unfair. She was not given reason or reasons for termination, and was denied fair hearing. She frames the issues in the same language as framed by her Co- Claimant. She justifies her prayers on similar grounds as her Co-Claimant.

***Respondent's Position***

10. The Response in both Claims is that the Claimants were employed by the Respondent as General Labourers. Their employment was intermittent. They were on fixed term contracts for various periods. The last contracts expired in June 2015. They were not renewed. There was no termination at the instance of the Respondent, but rather, the fixed term contracts matured, and were not renewed. Clause 3 of the contracts stated: ‘‘ after expiry, the contract may be renewed or extended at the sole discretion of the management depending on the availability of work.’’ Upon expiry of the contracts, the Claimants were paid all their terminal dues by the Respondent.

11. The Respondent underscores in its Submissions, that the Claimants were employed on fixed term contracts. Each contract was independent of the other. The last contracts were for 1 month beginning 1<sup>st</sup> May 2015, lapsing on 1<sup>st</sup> June 2015. There was no legitimate expectation that the contracts would be renewed. The Respondent urges the Court to find persuasion in the ***Court’s Cause Number 946 of 2015 between Mombasa Apparels [EPZ] Limited v. Tailors & Textiles Workers Union***, where it was concluded that continuity of a fixed term contract depended on the Parties’ mutual agreement. There was no agreement between the Parties in the instant Claims for renewal.

12. The Respondent frames the issues for determination to comprise: whether the Claimants’ [contracts] were terminated; and whether the Claimants are entitled to the remedies sought. The first question is answered through the submissions on the effect of expiry of fixed term contracts.

13. The contracts having expired, the prayer for notice pay has no basis. The Claimants were paid all their outstanding annual leave. They were subscribed to the N.S.S.F and ineligible for service pay. Compensation is not payable, the fixed term contracts having lapsed. The Respondent prays the Claims be dismissed with costs to the Respondent.

#### ***The Court Finds:-***

14. The Claimants’ Pleadings and Submissions are not in clear language. The framing of the issues in their Submissions is incoherent. There are inconsistencies such as in the case of the 1<sup>st</sup> Claimant, whose Statement of Claim paragraph 4 indicates she was employed in February 2009, and left on 1<sup>st</sup> June 2015, while her Submissions page 1, states she worked for 14 years, from 2003 to 2015.

15. They do not explain the circumstances of their contracts’ termination sufficiently, so as to establish unfair termination took place. Section 47 [5] of the Employment Act 2007 states:

*‘‘For any complaint of unfair termination or wrongful dismissal, the burden of proving that unfair termination of employment, or wrongful dismissal has occurred shall rest on the Employee, while the burden of justifying the ground of termination of employment, shall rest on the Employer.’’*

16. All the Claimants have pleaded and submitted on, is that their contracts were terminated without cause or notice. They cite various laws on fair termination, without providing evidence why termination was unfair. They do not give the Court any assistance in dealing with the fixed term contracts which they had signed, and which were expiring on 1<sup>st</sup> June 2015. They do not argue a case for legitimate expectation of renewal; they merely state the termination of the contracts ending 1<sup>st</sup> June 2015 was unfair. Their contracts had a lapse date, and would not require notice of termination is issued before that date. They do not challenge management’s sole discretion on renewal, expressed under clause 3 of the contracts which expired 1<sup>st</sup> June 2015. They do not challenge the assertion by the Respondent that each contract was independent of the other.

17. The Court is not able to find that the Respondent terminated the Claimants’ contracts. The Claimants did not discharge their burden of persuasion under Section 47 [5] of the Employment Act 2007. The Respondent cannot be called upon to justify lapse of the fixed term contracts, or justify its decision not to renew these contracts. Consequently, there is no merit in the prayers for compensation and notice pay. These prayers are rejected.

18. The pay slips attached to the Statement of Response as appendix 2, show the Claimants were subscribed to the N.S.S.F. They are not eligible for additional social security payments under Section 35 [6] of the Employment Act. The prayers for service pay are rejected.

19. They pray for annual leave pay for the entire years worked. The pay slips show they were paid for annual leave days for the May 2015, on pro-rata basis. The schedule of Contract Workers' Leave Days attached to the Statement of Response as appendix 3, supports the Respondent's assertion that annual leave was, like other benefits dealt with under the separate contracts. It is difficult to accept the Claimants' position that they did not take annual leave for the years worked, and that they were not compensated in lieu of leave. They should at the very least, have made some submission with regard to Annexure 2 and 3 of the Statement of Response, in advancing the prayers for annual leave pay.

20. In all the Court finds the Claimants have failed to establish their respective Claims. ***The Claims are dismissed with no order on the costs.***

**Dated and delivered at Mombasa this 25th day of November 2016**

**James Rika**

**Judge**