



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 685 OF 2015

ANGELINE MUSALI MUTUA.....CLAIMANT

VERSUS

VEGPRO (K) LTD.....RESPONDENT

JUDGMENT

1. The Claimant brought this suit on 30/09/2015, contending that she was continuously employed by the respondent as a casual employee from 2001 until 10/12/2014 when she was verbally dismissed. She therefore sought the following reliefs: -

- a) A declaration that she was wrongfully and unfairly dismissed from her employment
- b) Unpaid dues totalling Ksh 242,450
- c) Notice period of one month Ksh 9500
- d) 12 month salary as compensation for wrongful and unfair termination (Ksh 9500 x 12 = Ksh 114000)
- e) Punitive and aggravated damages for breach of the claimant's constitutional rights.
- f) Costs and incidentals of this suit

2. The Respondent filed defence on 3/10/2017 admitting that she employed the claimant as a casual employee, but denied that she worked continuously. She averred that the claimant like other employees worked intermittently depending on the need for casual labour and their wages were paid daily. She denied the alleged wrongful dismissal of the claimant and averred that the claimant deserted work from 10/12/2014 without any justifiable cause and without giving any reason. Therefore, she prayed for the dismissal of the suit with costs.

3. The suit was heard on 2/10/2019 when both parties tendered evidence and thereafter filed written submissions.

Claimants Case

4. The claimant testified as CW1. She stated that she joined the respondent as a casual employee in 2001 earning Ksh 180 daily and continued working for the respondent till December 2014 when she was dismissed. By then, her daily pay had been reviewed to Ksh 475 and she was being paid at the end of the week. She used to work for 6 days per week and her assignment was at "High Care Packing".

5. She further testified that on 10/12/2014, she was transferred to the "cold room" to do "Labelling of Export Goods". However, she found the place too cold for her and when she complained, she was told to go away if she did not want to work there and that was it. She was not paid her salary for December 2014 among other benefits. She therefore prayed for the unpaid salary, leave for 14 years, service pay and compensation for unjustified dismissal.

6. From cross-examination, she insisted that she did the packing duties for 14 years continuously. However, she admitted that on September 2011, she only worked for nine (9) days but denied the accuracy of the attendance records produced by the respondent. She contended that there was an original hard copy attendance register which, like other staff members, she had signed manually. She denied the alleged intermittent employment and contended that she worked continuously 6 days per week.

Defence Case

7. The respondent's HR Manager, Mr John Matanyi, testified as RW1. He confirmed that the claimant was a casual employee who was

intermittently picked at the respondent's gate on need basis. He contended that the respondent's work is seasonal and casual labour is required when there are new orders received from abroad. He produced the claimant's attendance records to prove that she was not working continuously and that she left the company on 10/12/2014 and never reported back to work. He therefore, prayed for the dismissal of the suit because it was malicious and meant to extort money from the respondent.

8. Upon cross-examination RW1 admitted that the attendance records he produced did not bear a letter head for the respondent or a stamp to prove that they are from the respondent. He reiterated that the claimant never attended work regularly, and her wages were paid daily. However, he did not tender any records to prove that the claimant was being paid at the end of each day.

9. He admitted that the respondent did not remit NSSF contributions for the claimant individually, but contended that it was remitted as a group for all the casuals. He denied that the claimant was entitled to annual leave contending that the claimant was a casual labourer. Finally, he denied receipt of any demand letter from the claimant.

Claimant's Submissions

10. The claimant submitted that her continuous employment on casual basis converted to regular employment by dint of section 37 of the Employment Act and urged the court to declare that. She further urged that having converted to regular terms employee, she was protected by the law from unfair dismissal. She denied the alleged desertion from work and averred that she was ready to continue with her normal duties, but she was turned away. She contended that the respondent had not proven that she deserted work, and that she accorded her hearing in accordance with section 41 of the Act, before the dismissal.

11. Accordingly, she prayed for the reliefs sought because: she was not served with notice under section 35 of the Act before the termination; she never went for leave for 14 years, and her claim has not been rebutted by leave records; and because NSSF contributions were never remitted for her benefit. She relied on **Joab Ashitiba Hashon v Samaritan Medical Services [2017] eKLR**, where the court held that it is the duty of the employer to ensure that statutory deductions are made and remitted as required and in default he is liable to remit service pay.

12. Finally, she urged the court to award 12 months' salary as compensation for unfair termination under section 49(1) (c) of the Employment Act.

Respondent's Submissions

13. The respondent submitted that the claimant was a casual employee within the meaning of section 2 of the Employment Act, that is, a person employed for payment at the end of each day and is not engaged for more than 24 hours at any time. She further submitted that the claimant had not proven by evidence that she worked continuously for more than one month and contended that her casual employment never converted to regular term employment. She contended that the burden of proof of continuous service lay with the employee who alleges that his/her casual employment converted to regular terms contract of service under section 37.

14. She relied on **Rapid Kate Services Limited V John Mutisya & 2 Others [2018] eKLR**, where the Court of Appeal held that before conversion of casual employment to a contract of service, the employee must prove that he/she was employed by the employer, and after that he/she worked for the employer for more than a month.

15. In addition, the respondent submitted that the court lacks jurisdiction to grant the prayers sought because the claimant has not prayed for conversion of her casual employment to regular terms contract of service. She urged that granting the prayers sought would be tantamount to conversion of the claimant's employment status from casual to regular terms contract of service without supporting pleading. She relied on **Abdul Shakoor Sheik v Abdul Majied Sheikh and 2 others LLR No.2219(CAK)**, where the court held that a plaintiff is not entitled to reliefs which he has not specified in his statement of claim. She further relied on **Captain Harry Grandy v Caspar Air Charters Limited Civil Appeal [1956] 23EACA139**, where the court held that pleadings play the role of informing the parties the issue in controversy and that as a general rule, a relief not founded on pleadings ought not be given.

16. As regards the claim for unfair termination, the respondent submitted that under section 35(1) (a) of the Employment Act, the claimant's casual employment was terminable by, either partly at the close of the day without notice. She, therefore, contended that wrongful termination did not arise in the circumstances of this case and prayed for dismissal of the claim for compensation, salary in lieu of notice and service pay, since the claimant was only a casual employee.

Issues for Determination

17. There is no dispute that the claimant was employed by the respondent as a casual employee on diverse dates between 2001 and 10/12/2014. The issues for determination arising from the pleadings, evidence and submissions are: -

- a) Whether the claimant's casual employment converted to regular terms contract of service.
- b) Whether the claimant voluntarily deserted work or she was unlawfully and wrongfully dismissed.
- c) Whether the claimant is entitled to the reliefs sought.

Conversion of Casual Employment to Regular Terms Contract of Service

18. The jurisdiction of this court to convert casual employment to a regular terms contract of service, otherwise called as permanent employment is recognised under section 37 of the Employment Act. The said jurisdiction is exercisable if the employee proves that he

worked for the employer continuously for more than one month. In **Rapid Kate Services Limited v John Mutisya & 2 others [2018] eKLR**, the Court of Appeal held that:

“our reading of section 37 of the Employment Act reveals that before the court can convert a contract of service thereunder, the claimant ought to establish first, that he/she has been employed by the employer in question on casual basis and second, he/she has worked for the said employee for a period aggregated to more than one month.”

19. In this case like in the said precedent, the claimant has failed to prove by evidence that he worked for the respondent on casual basis continuously for an aggregate period of more than one month. Consequently, the court cannot convert her casual employment to permanent employment.

20. On the other hand, I agree with the respondent that the claimant did not invite the court to make such conversion in her statement of claim. Although, the court exists to do justice, pleadings are pivotal in civil litigations and the court cannot fish outside the perimeter wall constructed by the parties' pleadings. The foregoing view is fortified by **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR**, where the Court of Appeal held that:

“as parties are adversaries, it is left to each on to formulate his case in his own way, subject to the basic rules of pleading... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party that knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves... indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties.”

21. The foregoing binding precedent resonates with precedents cited above by the respondent. Consequently, I find that even if the claimant had proved the requisites for conversion of his casual employment to regular contract of service under the Act, the court declines to order the conversion because that prayer was not pleaded.

Desertion v Wrongful Dismissal

22. In view of the finding above that the claimant was a casual employee, the alleged wrongful dismissal did not arise. As appreciated above, section 35(1) (a) of the Employment Act, permits termination of employment by either party without notice at the end of each day. The respondent contended that the claimant deserted work from 10/12/2014, while the claimant alleged that she attended work on 10/04/2014, but she was told that if she cannot work in the cold room, she should go away.

23. The burden of proof is upon the claimant to prove by evidence that she indeed attended work on 10/12/2014 and the respondent dismissed her verbally. She has not adduced any such evidence, for instance, calling a fellow employee who witnessed her dismissal or who saw her reporting to work that day. Without such evidence, I must agree with the respondent that the claimant deserted work from 10/12/2014.

Reliefs Sought

24. In view of the finding that the claimant was a casual employee, I return that she is not entitled to the reliefs sought because they are benefits available only to employees serving continuously under regular contract of service. She has also not proved the alleged violation of constitutional rights. Consequently, I dismiss the suit with costs.

Dated, signed and delivered in open court at Nairobi this 29th day of April, 2020.

ONESMUS N. MAKAU

JUDGE