



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1123 OF 2017**

(Before Hon. Lady Justice Maureen Onyango)

**SUSAN NYANDUKO GICHABA.....CLAIMANT**

**VERSUS**

**VEGPRO KENYA LIMITED.....RESPONDENT**

**JUDGMENT**

The Claimant was employed by the Respondent as a casual worker in 2000 and confirmed as a permanent and pensionable employee in December 2011. She was summarily dismissed on 4<sup>th</sup> June 2016 after caterpillars were found in the beans she was packaging and after being afforded a hearing. At the time of termination, she was earning a basic monthly salary of Kshs.20,000.00. Aggrieved by the said dismissal, the Claimant instituted this claim on 19<sup>th</sup> June 2017 seeking the following reliefs–

- a. General and exemplary damages for unfair and unlawful termination.
- b. An order compelling the Respondent to issue to the Claimant a certificate of service.
- c. Three months' salary in lieu of notice of Kshs.60,000.00.
- d. Service pay equivalent to one month's salary for every successful year for 3 years of Kshs.720,000.00.
- e. Pay in lieu of leave for 5 years of Kshs.120,000.00.
- f. Salary for the 19 years expected period of service at the rate of Kshs.20,000.00 per month.
- g. Pension fund payment.
- h. Costs of this suit.

The Respondent filed a Statement of Defence in response to the claim and contends that the Claimant was summarily dismissed for deliberately grading beans that had caterpillars, for final stages of processing; a fact she admitted to during the disciplinary hearing held on 30<sup>th</sup> May 2016.

**The Claimant's Case**

The Claimant avers that she was dismissed from employment despite apologizing to management. She further avers that her summary dismissal was unjustified, unlawful and has caused her a lot of mental stress and loss of livelihood, hence she is entitled to general damages.

During trial, the Claimant testified as CW1. She stated that she was unemployed. It was her testimony that she was not entitled to pension. She however testified that she was given a letter showing a 5% contribution she and her employer made each month. She also testified that she received a statement informing her that she was entitled to Kshs.66,000.00. The Claimant told this Court that she was never issued with a certificate of service.

During cross examination, she conceded that she had been trained on hygiene and how to handle food. She stated that the food she handled

was destined for the international market. It was her testimony that she was taken through a disciplinary process and even apologized for what she did.

It was the Claimant's testimony that her dismissal letter had indicated that the production manager had advised employees to be keen during grading.

Upon re-examination she maintained that the caterpillar had not been visible and was discovered before the beans were packaged.

### **The Respondent's Case**

The Respondent avers that by agreeing to the terms of her appointment letter, the Claimant agreed to conform to the hygiene and safety regulations relevant in the food processing plant and had been trained on how to handle products meant for human consumption.

The Respondent avers that the claim for salary for the 19 years expected period of service is unreasonable as the Claimant had breached sections 5, 6 and 7 of the Food, Drugs and Chemical Substances Act hence warranting her summary dismissal by dint of Section 44 (3) and (4) of the Employment Act for negligently performing her duties after being afforded a hearing.

During trial, JOHN MATANYI, RW1 informed this Court that he was the Respondent's Human Resource Manager. His account of events was that the Claimant admitted her mistake after she was issued with a letter to show cause. Thereafter, a disciplinary hearing was scheduled.

He stated the incident occurred after employees had been cautioned on the quality of products that threatened the closure of the Respondent's company and were advised to be vigilant. It was his testimony that the Claimant was dismissed because her action was viewed as being deliberate. He informed this Court that the Respondent incurred a loss because the consignment was discarded and the grading process repeated.

It was his testimony that the Claimant was paid all her terminal dues, the leave days not taken and the days worked hence she was not entitled to any other payment.

Upon cross examination, he testified that the Claimant had never gone to collect her certificate of service. He conceded that no documents had been produced to prove that the Claimant had been paid her dues but maintained that the same was paid.

### **The Claimant's Submissions**

In her written submissions, the Claimant avers that the conduct that led to her summary dismissal did not amount to gross misconduct, that the decision to make the final package did not lie solely with her, that she was answerable to the quality controller and her supervisor. Further, that the Respondent never indicated the number of beans that had been contaminated.

The Claimant submits that she was not given reasonable time to prepare her defence, make submissions at her hearing or have a fellow colleague present. Further, the Respondent lacked a reason to summarily dismiss her. As such, the termination of her employment was unfair and unlawful, contrary to Section 41 and 45 (2) of the Employment Act. She relies on the case of **Patrick Osano Ogeto v IVCRL Limited [2018] eKLR** to support her position.

It is submitted that the Claimant is entitled to general damages as she has suffered opportunity cost, mental stress, anxiety and perilous loss of livelihood. She submits that she is entitled to a certificate of service by dint of section 51 of the Employment Act and urges that the same will enable her get pension benefits.

The Claimant submits that she is entitled to three months' salary in lieu of notice as the same was provided for in her contract of employment. She further submits that she is entitled to salary in lieu of leave as she never took leave during the pendency of her employment.

It is submitted that the Claimant is entitled to salary for the 19 years expected period of service as she is unable to get another job due to her age and the fact that her employment was permanent. That she had expected to serve the Respondent until her retirement.

### **The Respondent's Submissions**

The Respondent submits that at her disciplinary hearing, the Claimant accepted liability for her conduct which resulted into her summary dismissal as the Respondent viewed her act as malicious having worked in the company for four years. The Respondent denies the allegation of discrimination and submits that the Claimant was summarily dismissed on account of her own admission and in light of the fact that the beans were for human consumption. The Respondent therefore submits that it had valid reasons to summarily dismiss the Claimant and relies on the case of **Kenfreight (E.A.) Limited v Benson K. Nguti [2016] eKLR**, to fortify this position.

It is submitted that the claimant was subjected to a disciplinary hearing as anticipated in section 41 of the Employment Act and relied on the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] Eklr**. That this was admitted by the Claimant during trial.

The Respondent submits that the Claimant is not entitled to an award for damages or three months' salary in lieu of notice, as her summary dismissal was substantively and procedurally fair. The Respondent concedes that the Claimant is entitled to a certificate of service.

The Respondent submits that the Claimant is not entitled to payment in lieu of leave as she has not adduced any evidence to prove that she is entitled to the same. Finally, the Respondent submits that the Claimant is not entitled to an award for salary for 19 years expected period of

service as this Court lacks the jurisdiction to award damages beyond 12 months.

### **Determination**

I have carefully considered the pleadings filed, the evidence adduced before this Court and the parties' submissions. The issues for determination before this Court are –

- a. Whether the Claimant's summary dismissal was lawful and for a justifiable cause.
- b. Whether the Claimant is entitled to the reliefs sought.

### **Termination**

Section 45(1) – (4) of the Employment Act provides that–

#### **45. Unfair termination**

**1. No employer shall terminate the employment of an employee unfairly.**

**2. A termination of employment by an employer is unfair if the employer fails to prove—**

- a. that the reason for the termination is valid;**
- b. that the reason for the termination is a fair reason—**
  - i. related to the employee's conduct, capacity or compatibility; or**
  - ii. based on the operational requirements of the employer; and**
- c. that the employment was terminated in accordance with fair procedure.**

**3. An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.**

**4. A termination of employment shall be unfair for the purposes of this Part where—**

- a. the termination is for one of the reasons specified in section 46; or**
- b. it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.**

It is not in contention that the Claimant was summarily dismissed for grading beans that had caterpillars. During trial, she admitted that the beans had a hole and conceded that a hole was one of the indicators that the beans had a caterpillar. The RW1 testified that 20% of the beans were found to have holes in them and were already in pullets, packed and ready to be shipped, that the Claimant was the last one to handle them and even admitted the same. This evidence was not controverted by the Claimant who in fact conceded that caterpillars had indeed been found in the beans she had handled.

Section 44(4) of the Employment Act, allows an employer to summarily dismiss an employee who wilfully neglects to perform any work which was their duty to perform or if they carelessly and improperly perform any work which, from its nature, was their duty under contract to have performed carefully and properly. Thus, the Respondent had a valid reason for summarily dismissing the Claimant for grading beans that had caterpillars as it was in breach of sections 5, 6 and 7 of the Food, Drugs and Chemical Substances Act, which required those dealing in food to sell food that was of high standard and quality, and prohibited the sale of food in insanitary conditions.

The Claimant admitted that she was subjected to disciplinary proceedings but failed to provide evidence to prove that the process had been unfair as required by Section 47(5) of the Employment Act. She made no reference to the conduct of the disciplinary proceedings in her demand letter or Memorandum of Claim. The only qualms she had with the procedure as outlined in her claim, was the Respondent's failure to consider her apology and summarily dismissing her instead.

It is therefore my view that the Respondent adhered to procedure as outlined in section 41 of the Employment Act and had valid and justified reasons for summarily dismissing the Claimant hence the same was fair.

### **Reliefs**

The Claimant sought three months' salary in lieu of notice. Having been summarily dismissed she is not entitled to the same.

This Court declines to award the Claimant general and exemplary damages for unlawful termination having found that the Claimant failed to

prove that the termination was unfair, on a balance of probabilities.

The claim for service pay equivalent to one months' salary for every successful year for 3 years, fails. The Claimant has not provided a contractual basis for the same. Further, from the pay slips adduced by the Claimant, Kshs.200.00 was deducted each month as NSSF payments. As such, the Claimant is exempted from payment of service pay by dint of Section 35(6)(d) of the Employment Act.

The claim for 19 years expected period of service fails as the same lacks basis in law and in contract. The claim for payment in lieu of leave for 5 years fails as the Claimant failed particularize and specifically prove the same to show exactly how many untaken leave days were accruing to her.

The claim for pension fund payment is declined as this Court lacks the jurisdiction to determine matters concerning pension schemes and trustees thereof, and is referred to the Retirement Benefit Authority. (See the Court of Appeal case of **Staff Pension Fund and Kenya Commercial Bank Retirement Benefit Scheme (2006) & Another v Ann Wangui Ngingi & 524 Other [2018] eKLR**)

The claim for annual leave was never mentioned by the claimant in her testimony or witness statement. The same was thus not proved. The Respondent is directed to issue the Claimant with a certificate of service whose particulars is in line with Section 51(2) of the Employment Act. **Other than this the claim is dismissed.**

Each party shall bear their own costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24<sup>TH</sup> DAY OF JULY 2020**

**MAUREEN ONYANGO**

**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, the court has 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 the 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.

**MAUREEN ONYANGO**

**JUDGE**