



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

SUIT NO. 352 OF 2014

STELLA MOTUGUTWA.....CLAIMANT

VERSUS

VEGPRO KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant filed her suit on 7th March 2014 seeking resolution of two issues :-

- (a) Unfair termination/dismissal
- (b) Non-payment of terminal dues & compensation.

The Claimant averred that she was employed by the Respondent from September 2005 as a general labourer and was engaged in the sorting, grading and packing of products earning Kshs. 415/- payable daily at the time of her dismissal. She averred that she was summoned by her supervisor Pamela on 14th December 2012 and informed that her services were no longer required and that she should exit the premises immediately. She averred that she was not given any explanation as to why she was required to leave and was instead chased from the premises. She averred that arising from her unlawful/wrongful dismissal she is entitled to terminal benefits which she tabulated as one month's salary Kshs. 12,450/-, unpaid leave for the entire duration of service Kshs. 124,500/-, service/gratuity Kshs. 62,250/-, compensation at the full statutory extent Kshs. 149,400/-, proper certificate of service and costs of the suit plus interest thereon. The Respondent filed a memorandum of response on 30th April 2014. In the response, the Respondent averred that the Claimant was a former worker who was engaged intermittently on casual basis subject to availability of work during the year 2009 till 2012 and was paid daily wages at the end of each day. The Respondent averred that by her own design and liking, the Claimant's attendance was so poor to the extent that it was impossible to hire her on a term contract. The Respondent averred that in the year 2009 the Claimant worked for only 144 days, in 2010 she worked for 78 days and in 2011 she worked for 175 days while in 2012 she worked for 149 days. The Respondent averred that on 28th December 2012 without justifiable cause and without any reasons whatsoever, the Claimant stopped reporting for duty at the Respondent's premises. The Respondent averred that the Claimant was not terminated or dismissed as alleged and that any dismissal would require the involvement of the welfare committee. The Respondent averred that given the intermittent service over the years, it was not conscionable, or founded in law for the Claimant to claim leave at all. The Respondent averred that the Claimant could not have suffered trauma as she left the employ of the Respondent on her own volition and never reported any dispute to the Minister for Labour in the form of a complaint. The Respondent thus urged the dismissal of the claim with costs.

2. The Claimant testified on 23rd October 2017. She stated that she was employed in September 2002 and earned 415/= per day paid daily. She testified that she was employed in 2002 and in 2005 she obtained a bus pass which was exhibited. She stated that it was false to suggest she was not employed in 2002. She stated that the register exhibited by the Respondent was not factual but fake. She stated that the staff used to indicate their names, then there would be indication of performance, notification if target was met then they would be paid. She testified that she had never seen the document produced by the Respondent. She stated that on 14th December, 2012 she reported to work as usual and her supervisor Pamela told her to remove her dust coat as her services were not needed. She testified that she sat at the Canteen seeking to know why she was not required and the security officers came and escorted her out and she did not to know why she was dismissed. She stated that she knew Regina Mukii who began working as a casual like her then later was employed as permanent. She testified that Regina was a member of welfare in charge of permanent staff and they had sought another employee to represent casuals. She stated that she would have reported to the casual employee representative and not Regina. She stated that she was not given notice and did not go on leave, and no National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF) dues were paid. She testified that she was not dismissed lawfully and should be given compensation. She stated that the bus pass had her number on it.

3. In cross-examination, she testified that she started working in 2002 and in the claim it was stated as 2002. She was referred to paragraph 3 of the claim and confirmed that it states September, 2005. She stated that she had signed it and didn't read. She was referred to the bus pass and she testified that it was issued on 1st July, 2005 and that she did not read. She stated that she worked daily and there wasn't any day she

did not work. She stated that those who performed well always got work. She confirmed that the register from the Respondent shows there were days she was absent. She testified that she was hired by Mr. Muya Senior Supervisor and was fired by Pamela her supervisor. She stated that the person who was in charge of welfare is the one she sent to the supervisor and that there were many people who witnessed the dismissal. She confirmed that she had not called any of them. She stated that she worked till 14th December, 2012 and didn't work till 28th December, 2012.

4. In re-examination, she stated that she did not know why there is a date discrepancy. She testified that the bus pass was issued in July, 2005 on the 1st. She stated that there was no break and she worked throughout. She stated that she was dismissed by Pamela and that she did not have an avenue to channel her questions or complaint on dismissal. She testified that she was not issued with any letter seeking an explanation before her dismissal.

5. The Respondent called Pamela Lago who had worked for the Respondent for 18 years. She stated that she had no authority to dismiss anyone and that it is the duty of Human Resource office to dismiss or hire. She testified that there was evidence the Claimant started working in 2009.

6. In cross-examination she testified that she was a supervisor and that some staff are permanent and others casual but she supervised all. She stated that she was hired in 2004. She testified that the Respondent hires casuals and permanent staff and casuals are not given contracts but permanent staff get contract. She stated that she not involved in the hiring or dismissal of staff, that there was a register they marked and the entire record is at Human Resource office. She stated that the Claimant was a casual from 2009 till 2012. She stated that the register shows the attendance and X denotes days the Claimant attended work and O indicates absence. She testified that the Claimant was engaged in January, 2009 and worked for 13 days in January. She stated that one works on the days they attend and are paid. She testified that the Claimant just stopped coming to work and since the Claimant was a casual, she asked the Claimant's friends and they told her the Claimant had started some business and she did not inquire further. She was referred to the bus pass from the Respondent and stated that the number on it is the serial number of the bus pass. The card was given since it was a company bus to allow the staff to board. She testified that the Claimant was hired in 2009. She stated that she did not have authority to dismiss staff and that dismissal is dependent on faults of staff. She denied the suggestion that the register was prepared for the case and stated that it was the register she marked. She testified that she started working in 2004 and the Claimant was hired in 2009 and left in 2012.

7. In re-examination she testified that the attendance register has company stamp and the bus pass given could be from another passenger. She stated that from the documents, the Claimant was hired in 2009.

8. The second defence witness was Regina Mukii who testified that she worked for Respondent as a general worker. She stated that in welfare, they would try and resolve issues for the staff and if there is a problem there is procedure to follow. She stated that for instance, if employee has disagreement with supervisor they try to resolve it and then if they cannot they refer it to the management. She testified that the Claimant was not dismissed and that welfare could not just stand by as they have the responsibility to protect staff. She stated that only Human Resource has authority to dismiss staff and no other person has power to dismiss.

9. In cross-examination she testified that she was a welfare Committee Member and their duties and responsibilities are the welfare of staff members. She stated that they try to ensure staff are treated well and the relationship between the staff and the management is good. Once new staff is hired they ensure the new staff is properly kitted and can work well. We ensure they do not mistreat staff. She testified that she joined the Respondent in 2000 and joined Welfare in 2002 and that they serve all employees. She stated that she knew the Claimant as fellow worker in 2009 when the Claimant was brought in as staff member. She stated that employees are hired and their names are forwarded from Human Resource to the supervisor and details of staff are at Human Resource office. She stated that each department has welfare committee and Welfare is for all staff and welfare officers are selected by staff. She testified that the Claimant was a casual from 2009 till 2012 and was paid on daily basis but if one does not show up no one would look for the absent staff. She stated that the Claimant would come once and disappear. She stated that casuals can go and find better pay elsewhere and if one is absent they could only ask those who may know the absent staff.

10. In re-examination she stated that the Claimant joined in 2009 per documents in court and that the Claimant would be absent for long and the register shows it. That marked the close of the defence case and the end of oral testimony.

11. The parties opted to file submissions and the Respondent filed submissions on 4th December 2017 and the Claimant filed her submissions on 5th December 2017. In her submissions, the Claimant submitted that the evidence pointed to the unfair dismissal of the Claimant by her supervisor Pamela Lago. It was submitted that the Claimant's dismissal was without reason and the Respondent never bothered to call the Claimant if at all the Claimant had absconded work as alleged. The Claimant submitted that the Respondent had not availed records of salary earned among other records. The Claimant relied on the provisions of Section 45 of the Employment Act and submitted that the Respondent had to prove the reason for termination was in accordance with fair procedure. Reliance was placed on the case of **Kenya Union of Domestic, Hotels, Educational Institutions & Hospitals Workers v Mombasa Sports Club [2014] eKLR** where my brother Radido J. dealt with unfair termination of employment. The Claimant also relied on the case of **Jacob Joseph Onyango v John Ndungu Mureithi & Another [2015] eKLR** on the issue of damages under Section 49 of the Employment Act.

12. The Respondent submitted that the Claimant absconded from work and was not terminated or dismissed as alleged. The Respondent submitted that the evidence adduced by its witnesses Pamela Lago and Regina Mukii was that the Claimant unjustifiably stopped reporting for duty. The Respondent submitted that it was impossible for the Claimant to have been dismissed as no claim was forwarded to the welfare committee. The Respondent relied on the cases of **Alexander Mutua v Haggai Multi-Cargo Handling Services Limited [2014] eKLR** and **Bernard Zakaria v Dr. Subhash M. Shah [2014] eKLR** for the proposition that the Claimant had failed to prove her case and it was thus fit for dismissal. The Respondent submitted that the Claimant sought leave pay which was not payable as she was a casual employee whose contract of service was daily terminable at the end of the day without notice or payment in lieu thereof. Reliance was placed on the case of **Tabitha Masibo & Another v Vegpro (K) Limited [2015] eKLR** where Abuodha J. held that the claim for pay in lieu of leave is a continuing injury and should have been sued for within twelve months after cessation thereof.

13. In the case before me, the Claimant averred that she was employed in 2005 while in her testimony she stated that she was employed in 2002 and issued with a bus pass. The bus pass was issued on 1st July 2005. She testified that when she was dismissed she sat in the canteen seeking to know why she was dismissed by Pamela the first defence witness. The Respondent averred that the Claimant absconded work from 28th December 2012. The second defence witness testified that she was in the welfare committee and the Claimant never raised an issue about dismissal and that on enquiry was told that the Claimant had started some business. The Employment Act places a burden on the parties to an employment contract to prove the unfairness or fairness of a dismissal. Section 47(5) of the Employment Act provides as follows:-

47. (5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

The Claimant indicated that she was paid Kshs. 415/- daily at the end of the day. The nature of her employment was casual. The Claimant did not call any employee to confirm that indeed she was dismissed by Pamela her supervisor on 14th December 2012. The records produced by the Respondent though not comprehensive showed that the Claimant was not consistent in her service. The Claimant failed to discharge her burden under Section 47(5) as she did not prove she was dismissed and that the dismissal was unfair. The cases cited in support of this limb are sound expositions of the law. The Claimant was dishonest before Court with different dates being touted as her commencement date. She relied on a bus pass and indicated that it was issued to her in 2002 while in fact the bus pass was issued on 1st July 2005. She perhaps thought that by lying she would be able to convince the court of her *bona fides*. That effort results in the dismissal of her case. Each party will however bear their own costs.

It is so ordered.

Dated at Nairobi this 20th day of December 2017

Nzioki wa Makau

JUDGE

Delivered at Nairobi this 15th day of January 2018

Radido Stephen

JUDGE