



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1757 OF 2014

FELIX KIPKIRUI CHERUIYOT.....CLAIMANT

- VERSUS -

VEGPRO KENYA LTD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 26th October, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 08.10.2014 through Namada & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the claimant's dismissal from employment was unlawful and unfair.
- b) A declaration that the claimant is entitled to payment of his terminal dues and compensatory damages as pleaded.
- c) An order for the respondent to pay the claimant his due terminal benefits and compensatory damages totalling to Kshs. 440,000.00.
- d) Interest on (c) above from the date of filing suit till payment in full.
- e) Cost of this suit plus interest thereon.

The claimant's case as pleaded is as follows:

- a) The claimant was employed by the respondent from 01.06.2005 as a labelling operator and the last pay was Kshs.30, 000.00 per month.
- b) On 17.03.2014 the claimant reported on duty as usual and the human resource manager one Vitalis Osodo summoned and informed him to go home and come back on 20.03.2014.No reason was given. The claimant complied and 20.03.2014 the claimant reported at work and the human resource manager ordered him to go away and come back the following day.
- c) On 21.03.2014 the claimant reported at work and he was given the letter of summary dismissal on account of printing M.S Box end labels with EIRE instead of pure line by failing to put a second re-issue; the claimant having confirmed that he did not follow the right procedure; and the claimant knew the consequences to the customer in view of his experience. Further the letter stated that in December 2013 there were two incidences on different dates in which the claimant printed wrong

due dates on labels, leading to rejections and losses to the respondent after which the claimant was served with a second and then a final warning. The letter stated that the poor work performance amounted to negligence contrary to Employment Act, 2007 and the claimant was therefore dismissed from employment effective 20.03.2014 and subject to clearance he would be paid days worked up to 20.03.2014; leave days earned up to 20.03.2013; holidays and off days worked and not compensated; and a certificate of service.

d) The claimant's case was that the summary dismissal was unfair because no show-cause notice was served; the claimant had done nothing that was wrong; no disciplinary hearing took place; for over 8 years the claimant had served with a clean record and the dismissal was very harsh.

The memorandum of response was filed on 17.11.2014 through Musa Juma & Company Advocates. The respondent prayed that the suit be dismissed with costs as the claimant was not entitled to the remedies as prayed for. The respondent's case was pleaded as follows:

a) The respondent employed the claimant effective 01.06.2005. He was enrolled for NSSF and from 01.05.2006 enrolled into the respondent's retirement benefits scheme. He also benefited from staff medical cover.

b) Prior to his dismissal the claimant had 5 warning letters on his record of service related to his performance as a labelling operator. At dismissal he earned Kshs.25, 300.00 per month.

c) On 17.03.2014 the respondent's human resources manager received reports that the claimant had on 13.03.2014 breached printing procedures and printed incorrect product labels and issued them out for use.

d) On 18.08.2014 the claimant was summoned by the human resource manager to explain the report and the claimant replied that he had given a written explanation to his line manager. The Court has perused the written reply of 15.03.2014 and the claimant wrote that he accepted that he did not follow the right procedure and he promised that the same will not happen again. The claimant had received several previous warnings about his performance.

e) The respondent's case was that it considered the claimant's admission and the previous warnings and decided to dismiss the claimant from employment.

The Court has considered the pleading, the evidence, and the submissions on record. The Court makes findings on the matters in dispute as follows.

First, the Court finds that the respondent substantially complied with the requirement for fair procedure in termination. The claimant knew the allegations against him and on 15.03.2014 he wrote admitting the same as put to him by the line manager or immediate supervisor. In the opinion of the Court, once the claimant admitted the allegations in writing, it was superfluous for the respondent to engage in serving a show cause notice and an elaborate disciplinary hearing as provided for in section 41 of the Employment Act, 2007. Further, in view of the exhibited admission of 15.03.2014, the Court returns that the respondent has established that as at the time of termination the respondent had a valid or genuine reason to dismiss the claimant as provided for in section 43 of the Act. The Court finds that the termination was not unfair in substance and procedure and the claimant is not entitled to compensation for unfair termination and as prayed for.

Second, the Court makes the following findings on the other remedies as prayed for:

a) Since the summary dismissal has been found to have not been unfair, the Court returns that the respondent was entitled to dismiss with a shorter notice than was agreed or provided under section 35 of the Act as read with section 44 of the Act. As submitted for the respondent, in **Linus Barasa Odhiambo –Versus- Wells Fargo Limited [2012]eKLR**, this Court held that under section 44(3) of the Act, summary dismissal is tenable where the employee has by his conduct indicated that he

has fundamentally breached his obligations arising under the contract of service. Such a fundamental breach was established in the present case and the termination was lawful even with a shorter notice than was agreed or provided for in the Act. The claimant is therefore not entitled to pay in lieu of the termination notice.

b) The claimant is awarded pay for 20 days worked making **Kshs. 16, 866.70**. He is awarded annual leave pay **Kshs. 22,000.00**.

c) As the respondent had offered to pay what has been awarded, each party to bear own costs of the suit.

In conclusion judgment is hereby entered for the parties for:

1) Payment of **Kshs.38, 866.70** by 01.12.2018 failing interest to be payable thereon at Court rates from the date of termination 20.03.2014 until full payment.

2) Each party to bear own costs of the suit.

Signed, dated and delivered in court at Nairobi this Friday 26th October, 2018.

BYRAM ONGAYA

JUDGE