



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1653 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 3rd October, 2018)

TIMOTHY KAMURA WAIRIMU CLAIMANT

VERSUS

VEGPRO KENYA LIMITED RESPONDENT

JUDGEMENT

1. The Claimant filed their Memorandum of Claim in this case on 14.10.2013 through the firm of M/S Igeria Ngugi Advocates claiming unlawful/unfair termination from employment and refusal/failure by the Respondent to pay terminal dues and benefits to the Claimant.
2. The Claimant's case is that he was employed by the Respondent since 8th April 2010 to 2012 October. The Claimant was initially employed on a 6 month contract at a basic salary of Kshs.12,000/= per month. Later the Claimant was confirmed in employment and his salary increased to 14,389/=.
3. The Claimant averred that sometime in November 2012, he fell ill and had to undergo a spine surgery which condition forced him to take sick leave from work. The surgery was successful and Claimant recuperated and he was recommended by the doctor back to work.
4. The Claimant was unfortunately turned away by the Respondent's officials who indicated that there was no position/work for him to carry out.
5. The Respondent had promised to call him back later but that never happened.
6. The Claimant avers that the Respondent not only barred him from going back to work but also refused to pay his salary since November 2012. The Claimant avers that he was constructively terminated unlawfully. He seeks payment of his terminal dues being:-

1) 1 months salary in lieu of notice = 14,389/=

2) Unpaid November 2012 to October 2013 salary = 158,279/=

3) Service pay for 4 years.

4) Annual leave for years 2012/2013 = 28,778/=

5) Compensation for unlawful termination of 12 months' salary = 12 x 14,389 = 172,668

Total = 417,281/=

7. In cross-examination the Claimant stated that he was a member of the Union and according to the CBA when one was sick, he could be paid full salary for 48 days and there after ½ salary. He admitted that he was a member of NSSF and Provident Fund and therefore not entitled to service pay.

8. The Respondent on their part denied this claim. They filed their Memorandum of Defence on 10/11/2013 through the firm of Musa Juma and Company Advocates. They also called 1 witness who stated that they employed the Claimant as stated and he fell sick in May 2012.

9. He started to take sick leave to attend to his illnesses. Claimant was attended to at Respondent's in house clinic at diverse dates and on 12/11/2012 was the last day of attendance. He had exhausted his sick leave of 45 days with pay and a further sick leave of 40 days with half pay. He was paid upto May 2013.

10. The Respondents aver that the Claimant is still their employee but has never been terminated. As far as Respondent is concerned, the Claimant is on unpaid leave and a review of his suitability to work was to be done in October 2013 but he never turned up.

11. The Respondent asked the Court to dismiss this claim. In cross-examination the RW1 stated that they paid the Claimant last in May 2013. This was for final dues including notice pay.

12. I have examined all the evidence and submissions from both parties. I note that the Claimant was employed by the Respondent as admitted by both parties. It is also true that he fell sick at one point necessitating his absence to attend to treatment.

13. As a unionisable employee, he was governed by the Union's Collective Bargaining Agreement, which allowed sick pay of upto 45 days with full pay and 40 days of ½ pay.

14. The Claimant became sick on 14.3.2013 and was given 20 days off. On 18/12/2012 he was on 11 days sick off and on 11.12.2012 he had been on 27 days off, on 27/7/2012 he had been given 3 days and on 31/5/2012 1 day off (Appendix 8).

15. It is evident he had been sick and admitted at Kijabe hospital in 2012 where he was off duty for about 62 days. However, in 2013, there is evidence he was on sick off for only 20 days from 14/3/2013.

16. The Respondent avers that he never came back to work. It is not clear why the Respondent discontinued his salary in 2013. The only explanation given is that he had exhausted the leave days due. This is however not true. The stoppage of salary was not necessary as he had not been away for the 85 days envisaged in the Collective Bargaining Agreement. This can only be considered as constructive termination, which I found was the position.

17. This is against the law because he was never served with a notice of termination on account of absence or exhaustion of his leave days. He was not informed he had exhausted his leave days and was now placed on unpaid leave pending recovery.

18. My finding is that he was unfairly terminated. I therefore award Claimant the following:-

1. 1 month salary in lieu of notice = 14,389/=.

2. Annual leave pay for 2012 to 2013 = 14,389/=.

3. I also award him 12 months' salary as damages for unfair termination = 12 x 14,389= 172,668/=.

TOTAL = 201,446/=

4. The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 3rd day of October, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Omambia for Respondent – Present

Claimant – Absent