

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1006 OF 2014

CONSOLATGA ANYANGO ODIPO.....CLAIMANT

- VERSUS -

VEGPRO KENYA LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 2nd November, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 18.06.2014 through Namada & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that the respondent's dismissal from employment was unfair and unlawful and the claimant is entitled to payment of her terminal dues and compensatory damages as pleaded.
- b. The respondent to pay the claimant's terminal and compensatory dues in the sum of Kshs.296, 379.00 (Being a month pay in lieu of notice Kshs.10, 950.00; pay in lieu of 4 annual leaves Kshs. 43, 800.00; prorata leave for 01.02.2011 to 12.07.2011 Kshs. 4, 562.00; service pay at 15 days' pay for each of 4 years' service Kshs. 83, 767.00; and, 12 months compensation Kshs. 131, 400.00)
- c. Interest from the date of filing the suit till full payment.
- d. The costs of the suit.

The memorandum of response was filed on 04.08.2014 through Musa Juma & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

The **1st issue** for determination is whether the claimant worked intermittently or she worked initially as a casual worker from 01.02.2007 without a break so that the casual employment converted to employment subject to minimum terms under the Employment Act, 2007 per section 37 thereof.

The claimant testified that she worked for the respondent from 2007 to 12.07.2011. She worked 5 days in a week and was paid a daily wage of Kshs.365.00. She testified that she never signed any attendance register and she was always at work. She further testified, and in a contradictory manner, that there were days she would report at work and find that there was no product delivered so that she had to go back home for such a day without working. She testified that on such days she reported at work and there was no product delivered they were not paid. However, on such occasions, transport back home was provided by the respondent on the company bus.

The respondent's witness (RW) testified that the claimant was a casual employee and worked only when work was available and she was paid on a daily basis for 8 hours of work; the claimant served as a casual from 21.01.2009 to March 2011; and she was called whenever work was available. Further, RW testified that the respondent provided a bus to pick the casual workers from the bus stops in their residential areas.

The Court has considered the evidence. Taking the evidence by the claimant that sometimes she did not work when the product had not been delivered, the Court returns that she was a casual employee serving intermittently only when work was available. Her contract of service was on daily basis ending at the close of each day. The Court returns that in such circumstances, the claims and prayer for unfair termination will fail.

To answer the **2nd issue** for determination the Court returns that the remedies as prayed for were premised on a finding that the claimant's casual service had converted to permanent service but the Court has found otherwise. The claims and prayers will therefore collapse. The Court has considered all circumstances of the case including that the daily pay could accumulate and be paid at end month thereby misleading the claimant to believe that she was in some permanent job. Accordingly each party will bear own costs of the case.

In conclusion judgment is hereby entered for the respondent against the claimant for dismissal of the claimant's suit with orders each party to bear own costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 2nd November, 2018.**

BYRAM ONGAYA

JUDGE