



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**INDUSTRIAL CAUSE NO. 1335 OF 2012**

**SAMUEL NYAMASI .....CLAIMANT**

**VERSUS**

**VEGPRO KENYA LTD .....RESPONDENT**

**JUDGEMENT**

1. On 3<sup>rd</sup> August 2012, the claimant Samuel Nyamasi filed his claim for unlawful termination and non-payment of terminal dues by the respondent Vegpro Kenya Ltd. On 28<sup>th</sup> September 2012 the respondent filed their defence admitting that the claimant was their former employee but was terminated summarily dismissed for negligence and hence not entitled to his outlined claims. In support of the claim, the claimant gave his sworn evidence while the respondent called Vitalis Osondo as their witness. At the close of hearing both parties filed their written submissions.

**Claimant's case**

2. On 21<sup>st</sup> May 2008, the claimant was employed by the respondent as a Refrigerator Technician but on 29<sup>th</sup> November 2011 he was summarily dismissed on allegations that he had not repaired a particular machine while on duty. That before his termination he was never given a chance to defend himself on the issue of the defective machine and was only paid one months' salary and told to leave the respondent's premises. He was treated inhumanely which was unfair and seek compensation and one months' notice pay.

3. In evidence, the claimant stated that he is currently working in Sudan and Southern Sudan since he left the respondent. He worked for the respondent for 3 years from March 2008 to 29<sup>th</sup> November 2011. He was the Refrigeration Technician but was dismissed on 29<sup>th</sup> November 2011 after being accused of negligence while at work. He was joined accused of negligence with his co-workers Kanyago and Gachoka who were refrigeration technicians like the claimant. On 16<sup>th</sup> November 2011 a machine was brought from Mombasa and the claimant's together with his colleagues were supposed to install it. Another colleague, Peter was on leave. So with Gachoka, the claimant installed one machine. On 20<sup>th</sup> November, a Sunday, the claimant was on off and another machine that shared the same system as the one he had installed was installed by a different contractor who was called in and the other technician Peter was in during the installation.

4. On 21<sup>st</sup> November 2011 when the claimant reported on duty, he checked on the reports and there were no technical problems reported but at 9am the Pack house manager reported that the temperatures were too high and one technician went to check and found the machine installed by the contractor were the source of the high temperature. The claimant went to check and established the machine was faulty.

The compressor fitted was faulty. The installation had not been done well.

All the technicians were called by the General Manager (GM) and accused of burning the new machine. They were not given time to explain, security was called and directed to remove the claimant and his colleague from the premises but Peter was not evicted.

5. The claimant was called in on 22<sup>nd</sup> November 2011 and was kept waiting all day until 2.30pm when the GM and the Legal Officer called them and asked them to write statements on how the machines were installed. The claimant demanded to interview the contractor who installed but was refused. On 23<sup>rd</sup> November 2011 he reported back and was kept waiting until 3pm when he was called to the conference room and was told that he damaged the machine that had cost Kshs.600, 000.00 and since he was one of the technicians he was negligent. He was then suspended.

6. On 27<sup>th</sup> November 2011 he was called for hearing but not given the reasons. The accusation was that the technicians installed a machine and never reported it was faulty. The claimant explained he noted while doing the installation that there was a missing gadget to the machine but the machine could run for 3 days pending a new gadget being installed to replace. He was thus accused that he knew the machine was faulty and never reported. On 21<sup>st</sup> November when the claimant reported to work, Peter checked the machine and found it faulty and before the claimant could establish the cause, he was summoned to the GM office and dismissed. That people who have access to the machine have a key but at this time there were two groups working on the machines and the place was left open.

7. At the hearing meeting the claimant was not allowed to prepare his defence or call anybody to confirm the hearing. The minutes taken do not reflect everything that transpired at the hearing. He seeking the court to find that he was unfairly terminated and award compensation.

### **Respondent's case**

8. In defence the respondent states that the claimant was summarily dismissed for negligence and failure to obey lawful orders and when he was given a chance to defend himself in the presence of management staff representative at his hearing he failed to give a satisfactory explanation. The dismissal was justified as the claimant was also given all his terminal dues and a Certificate of Service and the entire claim has no basis and should be dismissed with costs.

9. In support of the defence, Vitalis Osodo stated that he is the Senior Human Resource officer of the respondent and knew the claimant as the former senior Refrigeration Technician of the respondent whose duties were to maintain refrigeration equipment's and make repairs. The respondent had a machine that was to be installed on 23<sup>rd</sup> November 2011 and this was to be done by the claimant as the person in charge. He installed but after a few days it was discovered that it was not working as the claimant had not done it properly at the compressor. This was the fault of the claimant as when he realised it was not working he failed to report to management. When the fault was discovered the witness called all the technicians to explain in writing what had happened but there was no satisfactory explanation. All the technicians were suspended the claimant included. They were called for hearing in the presence of Winny Soy, the GM, Louis Omuga and the Human Resource officer [the witness]. The claimant was called together with Gachoka a fellow technician.

10. At this meeting, Louis Omuga was the staff representative and the hearing was done on 28<sup>th</sup> November 2011 and minutes were taken. At the hearing the conduct of the claimant was addressed and established that he failed to follow laid down procedures while undertaking his duties as a technician. There are procedures and where a machine was to be installed the room had to remain locked and those who picked the key had to sign and when the claimant took the key he never locked the machine room to indicate he return the key or locked the place and therefore left the place open where anybody could access and damage the machines. The reasons for termination were explained to the claimant and all terminal dues calculated and issued to him together with the Certificate of Service. That this was a case for summary dismissal and thus not entitled to compensation.

## Submissions

11. In support of the claimant's case there was submission that section 43 of the Employment Act was not followed in his summary dismissal as the respondent failed to prove the reason or reasons for termination as there was no valid reason. The accusation that the claimant has spoiled a machine required proof by written indication as to how this arose that related to the claimant and thus the dismissal was unfair. That the claimant was accused of admitting that the machine was faulty but this evidence was never produced to court. Further that the procedure applied in the termination was unfair as there was no prior notification of the accusations and when the claimant sought an explanation for the charges, he was not given time or the explanation. The alleged meeting of 28<sup>th</sup> November 2011 was never meant to be a hearing but an enquiry as to how the fault to the machine arose and the outcome to terminate the claimant was unfair. This was contrary to section 45 of the Employment Act the claimant should be compensated.

13. The respondent on their part submitted that under section 44 of the Employment Act, an employer has the right to terminate an employee without notice or with less notice than the employee is entitled to. The claimant was a refrigeration technician who failed to install a machine properly and when this was discovered by the claimant, he failed to report which caused damage to the property of the respondent and financial loss due to the negligence of the claimant and was subject to summary dismissal. Despite the circumstances of negligence, the claimant was given a hearing after filing his explanation on what had transpired but failed to give a satisfactory explanation. Section 41 was followed as following the hearing; the claimant was terminated and given his terminal dues. The claim is therefore misguided and should be dismissed.

## Findings and determination

14. It is now mandatory for an employer who wishes to terminate an employee for both misconduct or gross misconduct to give such an employee a fair hearing as outlined under section 41 of the Employment Act;

*41. (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*

*(2) Notwithstanding any other provision of this Part an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.*

15. The impact of this is to ensure fairness and a reasonable application of the rules of natural justice even in a case of gross and serious misconduct. Such an employee must be heard in the presence of a union representative or a fellow employee of their own choice. The union representative applies to unionised employees where a shop steward or shop floor representative is to be notified and called to ensure a fair hearing is accorded to the employee. Where an employee is not unionised the alternative is to have a fellow employee of his choice. This provision cannot be replaced by any other mechanism where an employer appoints an employee's representative as a standing person to attend at any hearing. Section 41 envisages that the affected employee should be given a chance to choose a fellow employee of his choice to avoid bias or having a selected person who is to side with the employer.

16. In this case, the respondent upon discovery that there was a machine fault suspended the claimant. This record of suspension and the reasons for the same and the duration or purpose is not shared in court. However upon the suspension, the claimant was summoned back to work to give his statement on the circumstances of the faulty machine but this record is not submitted as well. This notwithstanding, the claimant was subjected to what the respondent states to be the hearing of his case where management was represented and one Omuga the staff representative was present.

17. This court has held in **Kenya Union of Commercial Food and Allied Workers versus Meru North Farmers Sacco Ltd, Cause No. 74 of 2013** that the purpose of an employee being placed on suspension is to enable an employer investigate a matter that has come to their notice and wishes to conduct fact-finding in the absence of the affected employee to avoid any interference. Once the investigation is complete, then the employer can have a basis to discipline the employee or where there is no basis, return the employee back to work. This was also reiterated in the case of **Frederick Owegi versus CFC Life Assurance Ltd, Cause No. 1001 of 2012**. A suspension is a time that allows an employer to interrogate and investigate and upon completion, the employee must be give notice of any subsequent disciplinary action resultant from the investigations to enable the employee defend himself.

18. Did the respondent follow these procedural requirements? Did the respondent have the capacity to follow these requirements? I find the respondent failed to comply with section 41 of the Employment Act as after suspending the claimant, he was never given written notice of the charges against him to enable him effectively respond. At the hearing, the claimants should have been adviced to his right to choose a representative of his own choice where he was not unionised. Mr Omuga is not said to be a union representative but a staff representative. This was not indicated to have been the person chosen by the claimant. These procedural flaws affected the ultimate finding of the respondent where they summarily dismissed the claimant as with the flaws, such a decision was unfair.

19. The claim is for notice pay, compensation and costs only. The claimant earned a gross salary of kshs.37, 000.00 at the time of termination and has since moved on to another job. On the finding that the dismissal of the claimant was procedurally unfair, this court will award notice pay of one months and two (2) months compensation.

**Judgement is hereby entered for the claimant against the respondent in the following terms;**

- a. **The summary dismissal of the claimant was procedurally unfair;**
- b. **An award of two (2) months' salary in compensation at Kshs.74,000.00;**
- c. **Notice pay at Kshs.37,000.00; and**
- d. **Each party to pay their own costs.**

Delivered in open Court at Nairobi and dated this 27th Day of May 2014

**Mbaru**

**JUDGE**

In the presence of

Court Assistant.....

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