



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

**CAUSE NO 2074 OF 2012**

**AGATHA BUGOSI SAID .....CLAIMANT**

**VERSUS**

**VEGPRO KENYA LIMITED ..... RESPONDENT**

**JUDGEMENT**

1. ON 12<sup>th</sup> October 2012, the claimant Agatha Bugosi Said filed this claim for unfair termination and non-payment of terminal dues by the respondent, Vegpro Limited. The defence was filed on 23<sup>rd</sup> November 2012 denying the whole claim in toto. At the hearing the claimant gave sworn evidence and the respondent called John Mureithi Mwangi and John Mayanyi to support their defence. Both parties filed written submission at the close of the hearing.

**Claimant's case**

2. In early September 2001 to 29<sup>th</sup> October 2009 the claimant was employed by the respondent at a daily wage of Kshs.300.00 that was paid at the end of each day. On 29<sup>th</sup> October 2009, for unknown reasons, the claimant was told that her services had been terminated and was thus dismissed. She was ordered to hand over any property of the respondent in her possession and to vacate the premises immediately. The claimant was not given any reasons for the termination, no notice was give or payment in lieu and for 6 years she never took leave and at the end her service was not paid and claim Kshs.108, 000.00 as due in this regard. The claimant is also seeking compensation for unfair termination.

3. In evidence to support her case, the claimant stated that she was employed by the respondent some time in 2001 to 29<sup>th</sup> October 2009 in the parking of beans for export. No contract of letter was issued to her as the practice was to go at the gate and one was picked from there. She was issued with an identity card to allow her access into the respondent's but that picked her from the residential statute and gained access to the airport. The bus pass was issued in 2005 with the purpose to show that she was an employee of the respondent and to distinguish her from other employee seeking entry into the airport to work for other companies. The bus was owned by the respondent and since the claimant resided in Kayole, the bus would come round her estate and she used the bus to get access and to her work place. She waited at the bus stage when her shift was due. Each day she was paid Kshs.300.00 paid at the end of her shift. No pay slip was issued.

4. The claimant also stated that no NSSF or NHIF dues were remitted on her behalf as she was taken not to be a permanent employee. She had 2 days off for any days within a week which was not definite, the respondent determined the days of rest. On 29<sup>th</sup> October 2009, the claimant went for lunch and on her way back met the Floor Manager who told her that she was late in getting back to work. Lunch was at 1pm and she was to resume at 2pm. But had left at 1.10pm and returned at 2pm and was thus terminated.

She was not given any warning or a hearing. She had worked for the respondent for 8 years and only missed work when there were no vegetables delivered which was hard to tell as she would turn up for work and only at the gate learn that there was no work to be done and return home her day lost.

5. While at work, the claimant was made to sign a paper every day, which paper and signature would be used to pay her at the end of the day. One person at the head of her table would be called to receive the pay for all the workers and distribute these to the rest using the paper. In 2007 the respondent took all the names of the claimant and her workmates in a register and called them casuals. Her claim is that the termination was unfair and should be compensated.

6. In cross-examination, the claimant stated that she was picked at the gate every morning and worked throughout unless she was given her 2 days off. In 2001 she had no bus pass which was issued in 2005. Her section was called *mathare* and in 2007 she became the head of her table in *mathare* section. Even though she was taken as a *permanent casual*, no other workers were taken at the gate if there were *permanent casuals* available she did not fail to report to work as she had to give notice in case of absence to help the respondent find somebody else. She reported to work as the respondent needed her services. When there was no work she went back home using the respondent's bus. It was a requirement that she reports to work every day.

7. At the work place, there was Edward as the Manager. He had authority to stop any employee. He issued no letter. There was a human resource manager but the claimant did not go to him when she was terminated. She knew the human resource would not help her or believe her story. The practice was that all those terminated by the respondent floor manager were not allowed in by the supervisor. Every day that she reported to work, her name was recorded by the respondent.

### **Respondent's case**

8. In defence, the respondent stated that there is no evidence to show the claimant worked for the respondent continuously from 2001 to 2009, she was a casual paid on a daily basis and her contract terminable at the end of day and being as such the claimant cannot claim her termination was to be preceded with a notice or hearing and the claims outlined thus denied as not due.

9. In evidence, John Mureithi Mwangi testified that he is the respondent Wages Coordinator and conversant with the claim. The claimant was a casual and as the wages coordinator, he was not able to have her details as she was not in the records of the respondent. They did not keep records with regard to the casuals. There was no report that the claimant had left. There is a human resource department that had authority to sack an employee and this is not delegated to the floor manager. The claimant failed to report her termination by the unauthorised person. Her case never came to the attention of the respondent.

10. In assessing the evidence of the witness, the court established that the respondent does keep a record of all employees and a daily list of casuals on the floor that is computerised since 2008. Casuals are taken upon availability of work and he checks on casuals only with regard to their payments.

11. The second witness was John Khavesa Matanyi stated that he is the human resource officer of the respondent with duties of hiring and recruitment, termination and discipline at the work place. The claimant was their employee from 2005 according to their records as a casual. The practice at the respondent firm is to look at the available work and when there is more work and need to add to the permanent employees, casuals are picked at the gate and that is how the claimant was hired on a daily basis. She was paid at the end of each day. She had no obligation to come to work at the respondent firm. At the gate, all casuals give out their identity cards, they are shuffled and the lucky ones are picked. As a casual, the claimant would be engaged for 8 hours only as there are other workers available at the gate and when she fails to turn up, others are picked. There is a soft copy indicating the names of casuals and the purpose is to confirm payments only and not an indication that one is permanent. There is the attendance register.

In January 2009, the claimant was at work for 14 days

In February she was at work for 15 days

In March she was at work for 18 days

In March 2009, the claimant was away for the 1<sup>st</sup> week

In April the claimant was at work for 14 days

In May the claimant was at work for 20 days

In June the claimant was at work for 9 days

In July the claimant was at work for 1 day

12. The claimant was not employed as a casual to deal with vegetables when they were in season and when the season is low or there are no export to the UK, production had to stop for some time and at such times, no casuals were taken and could not keep staff doing nothing. Edward is the operational manager and had no authority to hire or fire as this was the preserve of the human resource officer. The records indicate the claimant was at work on 3<sup>rd</sup> July 2009 and was not at work on 29<sup>th</sup> October 2009. Upon termination, the claimant failed to complain as casuals are allowed to come and lodge their complaints where they have a problem with the pay for hours worked. The claimant has no valid claim for damages and the same should be dismissed. Leave is not due as the claimant never worked for 6 continuous days and notice is given to those on contract.

### **Submissions**

13. The claimant is submissions relied on the provisions of section 37 of the Employment Act noting that she was employed continuously and a bus of the respondent picked her from her residence/estate which could not be provided to casuals who had no ascertainable work for the respondent. that he respondent failed to keep wages records contrary to the law as under section 74 of the Act and the termination was therefore unlawful and the claimant should receive compensation. Statutory dues were not remitted and hence service pay is due together with notice pay.

14. The respondent on their part submitted that the claimant remained a casual labourer since 1<sup>st</sup> July 2005 when she was issued with a bus pass and the only record of the claimant in the possession of the respondent is the bus pass to confirm her work with them since 2005. The claimant never worked continuously and that there were always 2 days off in a week. That selection of casuals was done randomly with shuffling of ID and therefore there was no guarantee that one would be accepted for the day. The claimant was employed to handle vegetables that are seasonal and work dependent on season and demand.

15. The respondent also submitted that the person who is alleged to have terminated the claimant had no authority to do so as only the human resource officer had the power to hire and fire. The claimant simply did not report to work as she was not obligated to do so. She had not been terminated by the hiring authority. She is therefore not entitled to notice pay, service pay or any other dues from the respondent. To allow the claimant to have any benefits from the respondent would be unjust enrichment of the claimant.

### **Findings and determination**

What status of employment the claimant enjoyed while at the respondent firm

Whether the claimant is entitled to the remedies sought

16. The Employment Act, 2007 had created a paradigm shift within the labour sector in Kenya especially for the category of workers who were not adequately protected prior to 2007. The Employment Act now

recognises the rights of every individual employee and where any such rights are violated, the same lie directly to the Labour Relations Court as established under Article 162 of the Constitution. This is unlike the previous regime where one had to belong to a union to be able to access justice and in most cases, justice that was restricted in purview and stature. One could only claim for limited rights, that of breach of contract and unpaid dues.

17. That has since changed and section 2 of the Employment Act now define a casual employee as;

*“casual employee” means a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time*

18. The Law goes further at section 37 to expound on how to treat such an employee as;

*37. (1) notwithstanding any provisions of this Act, where a casual employee—*

*(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or*

*(b) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service.*

*(2) In calculating wages and the continuous working days under subsection (1), a casual employee shall be deemed to be entitled to one paid rest day after a continuous six days working period and such rest day or any public holiday which falls during the period under consideration shall be counted as part of continuous working days.*

*(3) An employee whose contract of service has been converted in accordance with subsection (1), and who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to under this Act had he not initially been employed as a casual employee. [Emphasis added].*

19. An employee who commences work as a casual within the definition of section 2 of the Act and continues as such continuously for more than one months or continues to be engaged for work that cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of 3 months or more, the casual employment shall be deemed to be on a contract of service. It is therefore not the pay at the end of the day that is important here anymore, it is the nature of work and the number of days in aggregate for which the casual employee is engaged. In a case where the nature of work requires such an employee to be at the place of work on a daily basis and continues as such for more than a months and beyond that one month the work is not complete or is not reasonably expected to be complete, then the status of such an employee changes and no longer remains a casual employee.

20. In such a scenario, the burden is on the employer as under section 10(6) and (7) of the Employment Act;

*(6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.*

*(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.*

21. Even where section 10 does not apply, section 74 is of relevance;

*74. (1) an employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this Act which shall contain the particulars—*

22. In this case, the claimant cannot recall when she was employed in 2001. Her dates were hazy and could not confirm exactly when she was employed by the respondent. It is however certain that from 1<sup>st</sup> June 2005 the claimant was issued with a Bus pass to access transport in the bus and be at the place of work in the respondent premises. She even was the head of her table in *mathare section* for a period of time. For all her days at work, the claimant signed a paper that was used to pay her dues. Where is this record? For how long did the claimant sign for this pay?

23. These are details that only the respondent has the legal duty to keep. This was not for the claimant as the employee to keep. Work records are the duty of every employer. There is a reasonable expectation that such a record exists, which expectation based on all reasons is legitimate in this case. It was not produced by the respondent. That is to be taken that it possesses evidence that confirms the claimant was not a mere casual but a permanent employee of the respondent. This is the effect of section 37.

24. I will therefore agree with the respondents submissions, only the human resource officer of the respondent had the powers/authority to hire and fire any employee. With this revered duty, it is therefore imperative that any casual, permanent staff on contract or seasonal had to pass through the hands of the human resource officer. This is a senior officer of the respondent tasked with an important mandate to ensure that those who are casuals know their role and time limits as well as those permanent or under contracts. This goes with the necessity of this office to keep records of casual and permanent employees as these are the record envisaged under section 10 and 74 of the Employment Act and also internally for the respondent to follow up with payments for work done by any category of employees, casuals inclusive. That is why there is a wages coordinator to ensure that all casuals receive their due pay at the end of the day.

25. Why was this record or records in acknowledgement of payments not submitted in court? Does the respondent have capacity to ensure the production of such records? The Human Resource officer gave evidence that they have a soft version of the records while the Wages Coordinator said they never kept any records with regard to casuals. Whichever the evidence from the two officers of the respondent, the law is stated in mandatory terms, all employee's record must be kept by an employer. Where employee records are subject of litigation, the duty rests upon an employer to make these available to the court. The only record that was produced is an unsigned record, the author not indicated and not on the letter-name of the respondent. Any computer wizard can seat and produce such a record. This omission is not only important to note in this case but for the other records of employees of the respondent as there are criminal sanctions against an employer who does not keep such records. I will not dwell on this any further.

26. Another issue that arose at the hearing was with regard to the claimant being given 2 days of rest after work for 6 days. Ordinarily casual employees, due to the nature of their work, short term and for short engagement tasks do not as of necessity enjoy the benefit of leave, off days or rest days unless the work they are engaged for is of the nature that reasonably cannot be expected to be completed within a short period. The claimant therefore continued to enjoy 2 rest days and then resume work. Every time she was required at work, a bus was sent to her residence and using her pass, gained access and remained at work for the day. The system of giving the casuals 2 days off is further proof that the respondent had a system in place to deal with employees they considered casuals. The investment in a bus to go all over the city estates collecting casuals is another indicator that indeed the services rendered by the claimant were important to the respondent business and was not reasonably expected to end in a short period. The long service as a casual was converted to permanent as under section 37(5) of the Employment Act. This was the holding of this court in **Cosmas Kawelu versus Kabuito Contractors, Cause No 1991 of 2011**. Further to this decision the court also made an analysis of the effect of non-compliance with section 37 as read together with section 2 of the Employment Act with regard to who a casual is in the case of **Samuel Waweru Maina versus The Trustees of Sisters of Mary Immaculate, Kenya/the proprietors of Mary**

**Immaculate Secondary School, Cause No 942 of 2010.**

27. The Duty to ensure whatever method is used in sourcing for casual employee meets fair labour standards vested in the respondent. If work is seasonal, there are seasonal contract and where work is erratic and dependent on factors that are unpredictable, there are piecework contracts. To leave the claimant as a casual from 2005 when she got her bus pass to 2009 when she left employment is no defence that can justify the non-issuance of appropriate terms of engagement. This I find left the claimant exposed as to her status and open to abuse by officers who still took her employment as casual and therefore causally treated her services. In these circumstances the claimant took the casual notice of termination seriously and failed to report to work as directed. This the effect of the respondent actions of keeping casual for long periods, it affects not only the concerned employees but also the officers responsible over the supposed casual where they feel they have powers to give directions without due process. This is for the respondent to control and I find this as an unfair labour practice contrary to Article 41 of the Constitution and section 45 of the Employment Act.

**Remedies**

29. On the finding that the claimants employment status was converted from casual to permanent, the statutory notice is as under section 35 of the Employment Act, that of one month notice. The claimant was earning Kshs.300.00 per day and is awarded at kshs.9, 000.00.

30. The claim for leave days not taken was based on the reasons that the claimant was employed in 2001 to 2009 however, the claimant failed to articulate as to exactly when she got employed. The year 2005 was more certain as the respondent also confirmed that on 1<sup>st</sup> June 2005 the claimant was issued with a bus pass. From 1<sup>st</sup> June 2005 to 29<sup>th</sup> October 2009 these are 4 years where leave was due for 21 days which amounts to Kshs.6,300 per year for the 4 yours being Kshs. 25,200.00. This will be awarded.

31. Service is due where an employer is found to have failed to pay statutory dues to NSSF and NHIF. There was no evidence by the respondent to contradict these facts. Service pay is due at 15 days for every complete year served which in this case is 3 complete years. This amounts to Kshs.13, 500.00 and is as awarded to the claimant.

32. For the unfair termination, the claimant is awarded one months' pay. This amounts to kshs.9, 000.00.

**In conclusion, judgement is entered herein for the claimant against the respondent in the following terms:**

- a. **A declaration that the claimant was unfairly terminated;**
- b. **And award for unfair termination at khs.9, 000.00;**
- c. **Notice pay at kshs.9, 000.00;**
- d. **Accrued leave days at Kshs. 25,200.00;**
- e. **Service pay at kshs.13, 500.00;**

**Delivered in open Court at Nairobi and dated this 27<sup>th</sup> Day of May 2014**

Mbaru

**JUDGE**

In the presence of

Court Assistant:

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