



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

**AT NAIROBI**

**CAUSE NO. 1392 OF 2012**

**EUNICE MARY MUTUKU ..... CLAIMANT**

***VERSUS***

**VEGPRO (K) LIMITED ..... RESPONDENT**

**M/S Akhaabi for Claimant**

**Mr. Muturi for Respondent**

**JUDGMENT**

1. The suit was brought by way of a memorandum of claim dated 15<sup>th</sup> August 2012 and filed on the same date.
2. The Claimant seeks compensation for alleged unlawful and unfair termination of employment and terminal benefits tabulated as follows;
  - i. One month salary in lieu of Notice in the sum of Kshs.9,800/=;
  - ii. Payment in lieu of leave not taken for 11 years in the sum of Kshs.107,800/=;
  - iii. Payment of service gratuity calculated at 18 days salary for each completed year of service (11 years) in the sum of Kshs.64,680/=;

The particulars on which the claims are premised may be summarized as follows:

3. That the Claimant was employed in the year 1998 by the Respondent as a packer on a casual basis. She worked for eleven (11) years continuously though she had no written contract of service until the year 2005 when she had her position converted to permanent status.
4. That she worked every day from Monday to Sunday without any off-days and did not go on leave.
5. At the time she worked as a casual her pay was calculated at Kshs.150 per day but was paid forthrightly.
6. At the time of termination her salary was kshs.9,800/=. She told the Court that this happened on 1<sup>st</sup> August 2009 when the Human Resource manager, **Ann** called her to her office and summarily terminated her employment. She told the Court that the reason for termination was because she kept complaining about pain on her hand which was aggravated by working in the cold room where she did packaging. She

was not given a letter of termination. She was asked to sign a document so that she could be paid terminal benefits but she had refused. She was therefore not paid any terminal benefits. She therefore claims, one month salary in lieu of Notice.

### Leave pay

7. She told the Court that she was not granted leave from 1998 up to 2004 when she worked as a casual, but was granted 21 days leave from 2005 when she was employed on permanent basis.

### Gratuity

8. For the period 1998 to 2004, she was not registered with National Social Security Fund and National Hospital Insurance Fund but this was regularized in 2005. She claims gratuity for the period.

### Compensation

9. She told the Court that her employment was unlawfully and unfairly terminated by the Respondent because of complaining that she was hurting working in the cold room as a result of the injury on her hand.

10. She denied that she had resigned from her employment as alleged by the Respondent. A letter dated 27/4/2009 indicated that she had sought early retirement. She denied that the application for early retirement was accepted by the Respondent.

She said she had suffered loss and damage as a result of the unlawful termination of her employment.

11. **John Avesa Matanyi**, a Human Resource Officer, of the Respondent testified in support of the Respondent's case. He told the Court that he started working for the Respondent in the year 2006. That he was conversant with the Claimant's case from the records. He said that the Claimant was employed on 1<sup>st</sup> March 2005 from the records and not January 1998.

12. That, at the time she left the employment of the Respondent she earned a monthly salary of Kshs.9,098/=. That according to the records, she resigned as a result of illness. She gave the Respondent one month Notice. That in terms of the letter requesting for early retirement, she was to leave by 1<sup>st</sup> May 2009.

13. The witness did not produce a letter accepting the request for early retirement. A perusal of the letter does not show that the Claimant resigned from employment as per the testimony of this witness. Clearly the Claimant had requested for early retirement on medical grounds and expected a written answer from the Respondent which was not forthcoming.

14. This witness was unable to refute the evidence by the Claimant that her employment was terminated by one Ann, the Human Resource Officer then.

### The Law

15. In terms of **Section 43(1)** of the **Employment Act, 2007**, the employer is required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of **Section 45**. On the other hand, the employee has the onus of proving that unfair termination of employment took place.

16. In the circumstances of this case, the employer has failed to prove the reason for the termination of the employment of the Claimant. The Claimant has on a balance of probability shown that the termination of her employment was unfair since it was not for a valid reason and the same was not done in terms of a fair procedure.

17. It is apparent that the Respondent kept the Claimant as a casual between 1998 to the year 2005 contrary to the law. As a result the Claimant was denied the benefit of NSSF and NHIF during that period. She was also not granted annual leave during that period because she was categorized as a casual.

18. The claims with respect to gratuity and leave pay were however statute barred as at the time this claim was filed on 15<sup>th</sup> August 2012 because they date between 1998 to 2005. The only valid claims are for Notice Pay and compensation for unfair termination.

19. Accordingly the Court finds in favour of the Claimant with respect to the claim for notice pay and awards her;

- i. One month salary in lieu of Notice in the sum of kshs.9,800/=;
- ii. Furthermore the Court awards the Claimant ten (10) months salary being compensation for unlawful and unfair termination of employment in terms of **Section 49(1)(c)** of the **Employment Act, 2007** in the sum of Kshs.98,000/=.

Total award to the Claimant is Kshs.107,800/=.

iii. The Respondent is to pay interest on the award at Court rates from date of judgment to payment in full.

iv. The Respondent is also to pay costs of the suit.

**Dated and Delivered at Nairobi this 4th day of June, 2014.**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**