



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NUMBER 1242 OF 2011

BETWEEN

1. CHRISTINE NANJALA SIMIYU.....CLAIMANTS

2. ANNAH JUMA OMONDI

VERSUS

VEGPRO [K] LIMITEDRESPONDENT

Rika J

CC. Edward Kidemi

Ms. Akhaabi and Mr. Makokha Advocates, instructed by Namada & Company Advocates for the Claimant

Mr. Karanja Advocate instructed by Masire Mogusu & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND ULAWFUL TERMINATION

AWARD

1. The two Claimants filed a Joint Statement of Claim on 26th June 2011. They were employed by the Respondent Horticultural Export Company, on diverse dates, as Packers. The 1st Claimant states she was asked by the Respondent to stop working on 16th April 2010. She had worked for 6 years. Her colleague the 2nd Claimant's contract was terminated by the Respondent on 2nd May 2010. She states she had worked for 10 years. Both dispute the validity and fairness of termination. They allege they were not given reasons, hearing or notice preceding termination. They seek 1 month salary in lieu of notice; unpaid leave for the whole period in employment; service pay at 18 days' salary for every year completed in

service; costs; and interest. They also ask the Court to declare termination unlawful and unfair.

2. The Respondent filed a Statement of Response on 30th January 2012. It concedes employing the two Claimants as Packers, but on casual basis. They did not work in continuity. The Respondent exhibited the Attendance Registers to show attendance was intermittent. The Claimants ceased working on their own volition. They are not entitled to the prayers sought.

3. The Claimants gave their evidence, and rested their cases on 27th May 2013. The Respondent's Senior Human Resource Officer Vitalis Osodo gave evidence on 10th March 2014 when the hearing closed. The dispute was last mentioned on 21st July 2014, and the decision of the Court reserved for 17th October 2014. The date for the delivery of the Award has been brought forward because the undersigned Trial Judge has been transferred to Mombasa.

4. The 1st Claimant testified she was employed by the Respondent in November 2003. She was earning Kshs. 265 at the beginning and Kshs. 305 on termination. She was paid daily. There was no letter of employment, but she had been issued a gate pass by the Respondent. Her contract was terminated without reason or notice, on 16th April 2010. Depending on the volume of work, she could work 7 days a week on occasion. She was asked by her Supervisor to cease working. She was told to go home and would be recalled at a later date. She was never recalled. The Respondent did not pay contributions on her account to N.S.S.F. She did not take leave. Her contract was unfairly terminated.

5. The 2nd Claimant joined the Respondent on 5th January 2000. She graded and packed beans for export. She started on a wage of Kshs. 174, and Kshs. 305 per day on termination. She contracted malaria in May 2010. Termination was based on her illness. She asked the Respondent to restore her after she had recovered. The Respondent declined. She never signed the Attendance Register exhibited by the Respondent. She did not see this document before this dispute was presented in Court. Like in the case of the 1st Claimant, the Respondent failed to deduct and remit N.S.S.F contributions for the 2nd Claimant. She did not take annual leave.

6. On cross-examination, the 1st Claimant testified she was not formally trained in grading and packing. She was paid daily. She was a Casual Employee. A Casual Employee is not employed permanently. There were times when the volume of work was low, and she did not report for duty. She was in the Tail and Top departments, which engaged in the cutting of the tails and tops of certain vegetables. It is not true that she was a habitual absentee. All Employees were issued with the Bus Pass. The 2nd Claimant testified on cross-examination that she did not have any training in grading and packing. She had developed ulcers around her mouth, and would not be allowed in the Pack House. She agreed the Company had a reason to keep her out. She still had the ulcers on 2nd May 2010, when her contract was terminated. It is not true that she left employment in 2007. She left on termination in 2010. The Claimants pray the Court to allow their respective claims.

7. Vitalis Osodo testified the Claimants worked as Casual Employees. They were paid daily, at the end of the day. The records showed they worked intermittently. They were shown to be absent on certain occasions. The 1st Claimant last worked on 9th April 2010, the 2nd Claimant on 16th November 2007. There were no dismissal letters; Casuals are not given letters of dismissal.

8. The Witness testified on cross-examination that he joined the Respondent on 1st May 2011, and found the Claimants having left employment. They signed the Register at the gate. The Supervisors marked the Registers. The Claimants had not seen the copies of the Registers which were exhibited in Court. He was not aware whether the Registers were prepared after the case was presented in Court. The Workers were taken in depending on the volume of work. The Respondent packs and exports products throughout the year. They earned about Kshs. 300 daily. He did not have any records to confirm remission of N.S.S.F. They were not entitled to annual leave. He did not know how the Claimants left employment. Bus Passes were to ensure non- Workers did not board the Respondent's Buses. The Passes could issue to Casual Employees. The Respondent asks the Court to dismiss the Claim.

The Court Finds and Awards:-

9. This Claim forms a long chain of cases filed against the Respondent, by several of its one-time Employees, in which the same issues have arisen, and the Industrial Court made similar findings on these issues. Given the large number of decisions involving the same Employer and its former Employees, the Parties should not strain judicial economy by continuing to litigate over the same or similar issues; they should use the decisions of the Court in reaching out-of-court settlement. The Officers of the Respondent and the involved Employees could engage in more productive pursuits, instead of moving round in circles in the corridors of the Industrial Court, asking the Court to determine the same issues over and over again.

10. The broad issue which, has arisen in a succession of Vegpro Industrial Court Cases, is whether its Employees, serving at its Export Processing Factory in Nairobi, worked as Casuals or were to be treated as Regular Employees, to whom the benefits due to Regular Employee under the Employment Act 2007, were to be made available. In most of these cases, these are Employees who had worked for many years, albeit intermittently.

11. In ***Industrial Court of Kenya Cause No. 658 of 2012 between Margaret Anyango v. Vegpro Kenya Limited; Cause No. 1043 of 2010 between Florence Muli & Another v. Vegpro Limited; and Agatha Bugosi Saidi v. Vegpro Kenya Limited [2014] e-KLR*** among others, different Judges have explained the law relating to Casual Employment. It has been the undivided view of the Court that where an Employee is shown to have worked continuously for more than 1 month, the Employee ceases to be a Casual Employee. The employment is converted into a regular employment relationship, where the full benefits due to regular Employees under the Employment Act 2007 are available to the Employee. There is catena of Judicial Precedents on the subject, available to the Respondent and its Employees, and it is helpful, if they could look at these as the bases for settling future Claims.

12. The Industrial Court has explained the principles of conversion under Section 37 of the Employment Act 2007. It is not relevant how the Parties characterize the relationship. It is not important that the 2nd Claimant for example, conceded that she worked as a Casual Employee on cross-examination. The Industrial Court has the discretion in evaluating the relationship under Section 37, and treat an Employee characterized as Casual, to be a Regular Employee, with all the statutory rights, obligations, protections, privileges and guarantees.

13. In most of the cases relating to Vegpro, the same Attendance Registers and Bus Passes have been availed to the Trial Courts with the same outcome. The same Witnesses have testified for the Respondent, repeating the same arguments in answer to similar Claims. The Claimants herein, as in the case of the other Claimants in the other cases, had worked for many years, not months, and were paid a daily rate. Even considering their intermittent attendance during any given week, they had worked cumulatively for years on end. The Respondent works throughout the year, processing and exporting horticultural products round the year. Whenever there is a lull in production, the Employees would be given a break, but recalled when there was a peak. In all cases, they were in service cumulatively for years. Their contracts should have been converted, and transitioned into the full coverage of the Employment Act 2007.

14. Their rights and duties should have followed the minimum standards set under Part V of the Employment Act 2007, and termination followed Part VI on termination and dismissal. In sum, they should have been heard before termination, and valid and fair reason given. They were entitled to annual leave or annual leave pay during employment; service pay under Section 35; and notice or notice pay under Section 35 and 36 of the Employment Act 2007.

15. The Respondent did not show valid and fair reason in terminating the Claimants' contracts. It did not carry out the termination fairly under Section 41 and 45 of the Employment Act 2007. The Claimants were not subscribed to the N.S.S.F or any other Social Security Plan and merit service pay under Section 35. They did not take annual leave and were not paid in lieu of annual leave. They are entitled to annual leave pay. Termination was without notice, and although the Respondent alleges the Claimants deserted, did not provide the Court with sufficient evidence of desertion. Osodo was in fact employed after the Claimants had left, and could only rely on records he found in the Human Resources Section of the

Respondent. These records did not indicate, anywhere, that the Claimants deserted. The Respondent appears to have asserted the 2nd Claimant's illness as a valid termination ground, and it would be difficult to reconcile this with the second explanation that both Claimants deserted. Compensation for unfair termination is merited.

16. In awarding annual leave pay, the Court has taken into account that the Claimants were not in employment for the years stated on aggregate. There were days when they would be off duty, depending on the volume of work. The Court shall therefore allow their claims for annual leave pay and service pay, but at three-quarters of the respective years claimed. This is done with the knowledge that the law requires complete years of service as the qualifying periods, and the three-quarters formula may not reflect complete years. The formula is adopted specifically to sustain fairness, and not as a principle or requirement of the law. In determining the number of days' salary to adopt in payment of service pay under Section 35, the Court has taken into account the changing minimum wage. The cost of living indices, and the rates of inflation, have not remained the same, as they were, when the minimum 15 days' salary, payable under the redundancy provision, became Law. The purchasing power of the Employees has been severely eroded, that to keep adopting the 15 days given for redundancy under Section 40 of the Employment Act 2007, in redressing claims for service pay, is unrealistic. IT IS ORDERED:-

- a. *It is declared the 1st and 2nd Claimants were in regular employment and their contracts were terminated unfairly;*
- b. *The Respondent shall pay to the Claimants within 30 days of the delivery of this Award, the following-*

Christine Nanzala Simiyu

- 1 month in lieu of notice at Kshs. 9,150
- 18 days' salary for 4.5 years of service at Kshs. 28,505
- 94.5 days of annual leave at Kshs. 33,256
- 6 months' salary in compensation for unfair termination at **Kshs. 54,900**

Total.....Kshs. 125,811

Annah Juma Omondi

- 1 month salary in lieu of notice at Kshs. 9,150
- 18 days' salary for 7.5 years of service at Kshs. 45,509
- 157.5 days of annual leave at Kshs.55,427
- 6 months' salary in compensation for unfair termination at **Kshs. 54,900**

Total.....Kshs. 164,986

- c) No order on the costs and interest.

Dated and delivered at Nairobi this 17th day of September 2014

James Rika

Judge

