



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

**CAUSE NO 1043 OF 2010**

*(Before: D.K.N.Marete)*

**FLORENCE SYOKAUMULI**

**ELIZABETH NDUNGEMULI.....CLAIMANTS**

versus

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

**JUDGEMENT**

By a memorandum of claim dated 27th June, 2011 and filed on 30th instant this matter came to court. The issues in dispute are cited as;

- a. **Unfair termination/dismissal**
- b. **No payment of terminal dues and compensatory damages**

The Respondent on 23rd February, 2012 filed a memorandum of reply to the 1st claimant’s claim and denying the claim and prays that the same be dismissed with costs.

The claimants’ cases are that at all material times to this claim, and particularly from March 1994 to May, 2008, and from August 1996 to June, 2009, they were employed by the Respondent and worked continuously to the satisfaction of the Respondent. They further state that on or about May, 2008 and June, 2009 respectively, they had their services terminated without notice on the verbal statements of their supervisors that their services were no longer required and that they should not report to work any more. They further state that despite promises of payment of terminal benefits, these have not been paid to date.

The claimants aver that the respondents’ action to terminate their employment was unlawful, unfair and inhuman and this is aggravated by non-payment of terminal benefits as follows;

- a. A declaration that the Respondent’s dismissal or termination of the Claimant employment was arbitrary, unfair, unlawful and inhuman and the Claimants are entitled to payment of their due terminal benefits and compensatory damages.
- b. An order for the Respondent to pay the Claimants their terminal dues and compensatory damages:-

Florence SyokauMuli 1st Claimant.....Ksh.334,485/=

Elizabeth NdungeMuli 2nd Claimant.....Ksh.282,225/=

- c. Costs of this case plus interest thereon.
- d. An order for the Respondent to issue a certificate of service to the Claimant.

The Respondent on the other hand denies that the 1st claimant was employed as alleged in paragraph 3 and avers that she was engaged as a casual and *onad hoc* basis and not as alleged. The Respondent was under no obligation to look for the claimant upon failing to report to work for engagements. His further contention is that the claimant absconded duty and therefore termination does not arise. He is not liable to the claim as brought out. He prays that the 1st claimant's case be dismissed with costs.

The matter came for hearing on 21st May, 2013 when the claimant (Florence) in her examination in chief testified that she was employed by the respondent as a scaling officer. She was involved in the scaling (weighing) of vegetables and worked on the night shift between 1900 and 600 hours. She was not issued with a letter of employment but an identity card. She worked continuously and always enlisted and signed. She was terminated in May, 2008.

She further submits that in May, 2008, there was a change in management and shifts. She was put on the day shift which was problematic because of waking up early and the consequential security risk. This was referred to her supervisor one, Millicent who in turn referred her to Joseph. Joseph chased the claimant from employment. At the time of termination she earned Ksh.315.00 a day.

Elizabeth Ndunge the other claimant testified that she was employed in August 1996 in arranging vegetables and scaling. She worked in the kitchen as a tea girl at the time of termination. She worked from 1900 to 500 hours, six days a week. No letter of employment was issued but in 2005 they were issued with bus passes to legitimize use of company transport. She worked on the night shift and was terminated when she got sickly. She was paid Ksh.4,575.00 which was not explained.

In re-examination, CW2 states that she skipped work for two months due to sickness and it is why they took away her place in the night shift.

DW1- John MuriithiMwangi duly sworn testified that he worked with the Respondent as a wages coordinator and this involved payment of workers since 2004. He knew the claimants who worked with the Respondent as a cook and in the park house respectively. They were casual employees and not duty bound to report work on a daily basis. The Respondent had attendance sheets and the claimants did not work daily. The company had a five day working week when there was work. On cross examination he said he was in charge and marked the attendance register when they reported. They also signed a payment register.

The issues for determination therefore are;

1. Were the claimants employed by the Respondent?
2. Were the claimants in continuous employment of the respondent?
3. Was the termination of the claimants employment wrongful, unfair and unlawful?
4. Are the claimants entitled to the relief sought?
5. Who bears the costs of this cause?

The first issue for determination is whether the claimants were employees of the respondent or otherwise. The claimant testified that they were employed in March, 1994 for Florence and August, 1996 for Elizabeth respectively. This is not disputed by the Respondent and his witness confirms their employment. I therefore find that the claimants were indeed employees of the respondent as such. This answers the 1st issue.

The second issue for determination is cardinal and disputed. This is the position as to whether the claimants were in continuous employment of the respondent. The respondent's contention is that the claimants were casual employees who were paid on a daily basis. The claimants on the other hand

testified that from their time of employment, they worked for six days a week on a night shift between 1900 hours to 500 hours, a period of about 10 hours a day. They would sign attendance registers. This was not disapproved by the respondent's witness or at all.

It was the duty of the respondent to keep and maintain employment records. The Respondent did not produce any documents or records to rebut the evidence of the claimants. It is the duty of the employer to keep records as expressed under S.10 and 74 of the Employment Act, 2007. In the absence of any evidence to the contrary, it is my finding that the claimants were in continuous employment of the respondent.

S. 37 of the Employment Act, 2007 is authoritative on the issue of casual or term contract;

S. 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.*

The contract of service of the casual employee shall be deemed to be one where, wages are paid monthly and section 35(1) © shall apply to that contract of service.

In such circumstances, a contract of service converts from casual to contract employment by effluxion of the law. This was observed by Onyango J. on the case of **Wilfred Bukachi Opwaka Vs Ready Consultancy Co. Ltd, Industrial Cause No. 671 of 2012** where she said as follows;

*“The law relating to casual employment is contained in section 37 of the Employment Act. An employee on casual terms who works continuously for one month is deemed to be converted to monthly terms of contract terms at the expiry of one month. Having worked for more than 1 month continuously, the claimant was no longer a casual employee but employed on monthly contract. He was therefore entitled to annual leave and termination notice as provided in section 37 of the Act.”*

Again in **Margaret Anyango Vs Vegpro Kenya Limited, Industrial Cause No. 658 of 2012**, this court affirmed the position;

*“The law regards employees who serve for a continuous period of more than one month to be deemed permanent employees even in the absence of formal recognition of the same.”*

There is nothing in the present suit that makes a departure from the two cited authorities on the subject. I therefore find that the claimants were term contract as opposed to casual employees of the respondent. Issue number 2 is thus concluded.

The other fundamental issue for determination is whether the termination of the employment of the claimants was wrongful, unfair and unlawful. The respondent submits that there was no fault with the termination whereas the claimants vouch otherwise.

The 1st claimant's evidence is that she was dismissed on requesting that she be considered and transferred back to the night shift, the day shift having been a challenge due to observance of timeliness for boarding the transport facility that was insecure in her circumstances and environment. She was discontinued from work by the floor manager and told not to appear at work for good. She was not paid a farthing.

Ironically, and in contrast, the 2nd claimant wanted a shift from the night to the day shift due to continued health challenges occasioned by night duty and kitchen duties both of which escalated her bronchial health issues. She therefore requested for transfer to the day shift but met the same fate as the 1st claimant. The respondent contends that the claimants were casual and not in continuous employment and they cannot claim permanency in their employment. Two, they were not dismissed but absconded duty. These submissions were not in any way substantiated or supported by evidence and therefore hang in the air. They are not of any substantial probity to this case. Moreover, as Ndolo J observed in the case of **David Getare Nyangau Vs Houseman General Contractors Ltd Industrial Cause No. 1459 of 2012**, S.47(s) of the Employment Act, 2007 is explicit on the issue of burden of proof in those matters:-

Section 47(5) of the Employment Act, 2007 provides that:

*(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.*

The learned Judge further made observations on the subject as follows;

*A party seeking relief from the Court must prove that they are entitled to the relief sought. In the case of Stephen Wasike & Another Vs Express Ltd Mugo J (as she then was) held that:*

*A party seeking justice must place before the court all material evidence and facts which considered in light of the law would enable the court to arrive at a decision as to whether the relief sought is available. Hence the legal dictum that 'he who alleges must prove.'*

In the instant case, the claimants did their case and the respondent was disabled in controverting the same. I therefore find that the termination of the claimants was wrongful, unfair and unlawful in the circumstances.

The 4th issue is whether the claimants are entitled to the relief sought. They are. If their contract of employment was wrongfully, unfairly and unlawfully terminated as established, it would follow that they are entitled to the relief sought. However, it is notable that in cross-examination, the claimant, Florence Syokau Muli testified that she had been out of employment for three (3) years as a consequence of having been involved in a motor vehicle accident with effect from December, 2000. This period should be discounted from the period of service. I find that she therefore put in eleven (11) years of service.

I therefore allow these claims and find for the claimants in the following terms;

#### 1. Florence Syokau Muli

- One month's salary in lieu of notice Ksh.315 x 30 days  
= Ksh.9,405.00
- Payment in lieu of untaken leave for the entire period of service  
(11 years) = Ksh.103,455.00
- Service gratuity at 18 days for every completed year of service  
=  $18/30 \times 9,405 \times 11$  years = Ksh.50,747.50
- 8 months compensation for unlawful termination  
Ksh.9,405.00 x 8 = Ksh.75,240.00

**Total**

**Ksh.238,847.50**

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**2. Elizabeth NdunguMuli**

- One month's salary in lieu of notice Ksh.300.00 x 30 days

= Ksh.9,000.00

- Payment in lieu of untaken leave for the entire duration of service

=Ksh.9,000.00x12

= Ksh.108,000.00

- Service gratuity for 12 years

= Ksh.9,000x18/30x12 year

=Ksh.64,000.00

- 8 months compensation for unlawful termination

= Ksh.9,000.00 x 8 months

= Ksh.72,000.00

**TOTAL**

**= Ksh.253,000.00**

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- 3. The cost of this cause shall be borne by the respondent.

**Dated, delivered and signed the 2nd day of July, 2013.**

**D.K.NjagiMarete**

**JUDGE**

**Appearances:**

**1.Mr. M.S. Akhaab instructed by Namada & Company Advocates for the claimant.**

**2.Mr. Maloba instructed by Masire & Mogusu Advocates for the respondent.**