



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 737 OF 2011

ROSE AMANYA KONG'ANI.CLAIMANT

VERSUS

VEGPRO KENYA LIMITED RESPONDENT

JUDGMENT

On 17th May 2011 the Claimant herein ROSA AMANYA KONG'ANI filed a Memorandum of Claim dated 10th May 2011 against the Respondent alleging unlawful termination of her employment and non-payment of terminal benefits. She prays for the following orders;

- i. A declaration that the Respondent's practical summary dismissal or termination of the Claimant's employment was unfair. Unlawful and inhumane and the Claimant is entitled to her due terminal benefits and compensatory damages.
- ii. An order for the Respondent to pay to the Claimant a total sum of kshs.226,050 as tabulated in paragraph 6 & 7 above, plus interest thereon.
- iii. Cost of this suit..

The Respondent filed a Memorandum of Reply on 20th September 2011. The Respondent denies the contents of the Memorandum of Claim and pray that the Claim be dismissed with costs.

The case was heard on 21st June 2013. The Claimant was represented by Mr. Makokha instructed by Namada & Company Advocates while the Respondent was represented by Mr. Maloba instructed by Masire Mogusu & Company Advocates.

The Claimant testified on her behalf and the Respondent called JOHN MURIGI MWANGI, RW1, a Wages Coordinator who testified on behalf of the Respondent.

The Claimant testified that she started working with the Respondent on 21st October 1998. Her Job was packing french beans. She was not given a letter of appointment. She used to record and sign against her name in a register every day. She was issued with a bus pass in 2005. She worked from 8 pm to 4 am 6 to 7 days a week depending on quantity of work. Sometimes she worked overtime. She worked continuously. Her daily wage at the time she started working was Shs.175/= which increased to Shs.275 by the time she left employment. The Respondent provided transport and she could not enter the bus without the bus pass. Her last day of work was 15th July 2008.

On that day she was feeling unwell and informed the Supervisor by the name James who sent her to the HR Manager to apply for sick leave. The HR Manager by the name Anne told her to go home. When she asked if she could report back to work the following day, Anne told her to stay at home until she is

called. She checked every day for one month but was never called. After that she decided not to report at work any more. As a result of the termination of her employment she was not able to pay school fees and her children dropped out of school. She was evicted from her house. She worked for the Respondent for a total of 9 years without any warning. She denied that she failed to report to work on 18th, 20th and 23rd July 2008 as alleged in the Respondent's Reply to the Memorandum of Claim. She did not take leave for the entire period she worked. She was not a member of NSSF. She asked the court to grant her the prayers in the Memorandum of Claim.

Under cross examination the Claimant stated she was unwell on 15th July 2008. She went to see a doctor at Kayole City Council Clinic. There is no time she did not go to work except on 15th July 2008. She was paid daily in cash.

RW1 Mr. JOHN MURIGI testified that he is a Wages Coordinator for the Respondent responsible for payment of casuals and their records. He was employed in 2004. He knew the Claimant who was a casual employee. The company kept records of casuals. He referred to Respondents Appendix "VKL 1" which are attendance records for the Claimant who worked for a maximum of 5 days per week. The records are extracted from records signed by the Claimant upon reporting to work.

Under cross examination RW1 stated that he does not know when the Claimant was recruited, when the records were prepared or how Claimant was terminated.

The parties filed and exchanged submissions after the hearing.

I have considered the pleadings with the exhibits attached thereto, the testimonies of the witnesses and the written submissions.

I will adopt the issues as framed in the Claimants submissions as follows;

1. When the Claimant was employed by the Respondent?
2. Was the Claimant in continuous employment of the Respondent.
3. What is the legal status of the Claimants employment by the Respondent?
4. Was fair procedure applied before dismissing the Claimant?
5. Is the Claimant entitled to the prayers sought?

I will now consider the issues.

1. When the Claimant was employed.

The Claimant alleges that she was employed by the Respondent on 21st October 1998 and was not issued a letter of appointment.

RW1 in his testimony stated that he does not know when the Claimant was employed

In the absence of evidence of the date of employment of the Claimant contrary to the claimant's evidence and this being a matter for which the Respondent is required to keep records and to produce such records in any court proceedings, I hold that the claimant was employed on 21st October 1998 by virtue of Section 10(7) of the Employment Act.

2. Was the Claimant in continuous employment of the Respondent?

The Claimant alleges she was in continuous employment while the Respondent has filed an extract of the attendance records of the Claimant from 2004 to 2008 which show that she was in intermittent employment over the period. RW1 testified he is not the one who extracted the information from the attendance records signed by the Claimant. He did not know when the extraction was done but thought it was after the claim was filed. The extracts are not signed and do not show who made the extraction. The

Respondent did not explain why they did an extract when they had the original documents signed by the Claimant which they could produce in court. There was no record for the period 1998 to 2003. Section 10 of the Employment Act requires employers to keep among other records, particulars of date of commencement of employment, the form and duration of the contract. Section 10 (7) provides that where the employer fails to produce the particulars in any legal proceedings the burden of proving or disproving an alleged term shall be on the employer.

I find that the Respondent has not discharged that burden leaving the court with the option to presume that the allegation by the Claimant which is uncontroverted by credible evidence from the Respondent is the true position.

I therefore find that the Claimant was in continuous employment of the Respondent from 21st October 1998 to 15th July 2008.

3. What is the Legal status of the Claimants employment by the Respondent

The Respondent alleges that the Claimant was a casual employee. The bus pass which is annexed by the Claimant to her Memorandum of Claim as Appendix 2 describes her as a casual employee. The Claimant testified that she was paid daily in cash.

Section 37 of the Employment Act provides for conversion of casual employment to term contract where an employee has worked continuously for 1 month or intermittently for 3 months.

This was the holding of the court in the two cases cited in the Claimant's submissions that this **Wilfred Bukachi Opwaka V Ready Consultancy cause No. 909 of 2011 and Margaret Anyanga V Vegpro Kenya Limited, cause No. 658 of 2012**. There is no dispute that the Claimant worked for the Respondent as a "casual" for more than 3 months.

As held in the above cases, I find that the Claimant's casual employment had converted to a monthly contract of service by operation of the law as provided in section 37 of the Employment Act.

4. Was Fair Procedure applied before dismissing the Claimant?

The Claimant alleges that she was feeling unwell on 15th July 2008 and asked for sick off but was told by Anne the Human Resource Manager to go home and wait until she is called back. However in spite of reporting to the place of work daily for one month, she was never recalled to work. The Respondent alleges in both the Memorandum of Reply and in the submissions that the Claimant absconded duty. RW1 in his testimony stated that he does not know how the employment of the Claimant was terminated.

The fact that the Respondent did not submit any evidence to prove that the Claimant absconded duty leaves the testimony of the Claimant, to the effect that she was terminated because she sought permission to take sick leave, uncontroverted.

Section 41 of the Employment Act provides for the procedure of termination of employment. Section 46(b) provides that going on leave by an employee or the proposal of an employee to take any leave to which the employee is entitled under the law or a contract does not constitute a fair reason for dismissal or imposition of disciplinary penalty.

The termination of the Claimant's employment for applying for sick leave is therefore unfair and I find accordingly.

5. Is the Claimant entitled to the prayers sought?

The Claimant has prayed for the following.

i. A declaration that the Respondents practical dismissal or termination of the Claimant's

employment was unfair, unlawful and inhumane.

I have already found above that the termination of the Claimant's employment was unfair.

ii. Kshs.226,050 on account of notice, annual leave and service gratuity.

Section 37(3) of the Act provides that where the services of a casual employee has been converted in accordance with subsection (1) employee is entitled to such terms and conditions of service as he would have been entitled to under the Act had he not been initially employed as a casual employee.

For these reasons I find that the Claimant is entitled to 1 month's notice, annual leave and service gratuity as provided in sections 28, 35 and 36 of the Act.

I therefore, award the Claimant 28 days salary in lieu of notice at Kshs.7,700 based on her last daily wage of Kshs.275/=.

I also award her annual leave from November 1998 to June 2008, a period of 116 months at the rate of 1.75 days per month which adds up to kshs.55,825.

The Claimant not having been a member of NSSF or other retirement benefit or gratuity scheme is also entitled to service gratuity which I award her at 15 days pay per completed year of service. This work out to Kshs.37,125.

The Claimant also claims compensatory damages. Having found that the termination of her employment was unfair, she is entitled to damages. Taking into account all factors enumerated in Section 49(4) of the Employment Act, it is my opinion that compensation of 9 months' salary would be reasonable. I award her the same at kshs.74,250.

In summary, Judgment is entered for the Claimant against the Respondent in the sum of Kshs.174,900. The Claimant will also have costs of the suit.

Orders accordingly.

Read in open Court this 3rd day of October 2013

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

MS. AKAABI _____ for Claimants

M. NYAIDHO H/B for MR. MOGUSU _____ for Respondent