



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 437 of 2011**

**ANGELINE MALIA KAMUNZYO.....CLAIMANT**

**VS**

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

**AWARD**

By Memorandum of Claim dated 22nd March 2011, the Claimant sued the Respondent for unfair termination of employment and failure to pay terminal dues. At the trial Mr. Makokha appeared for the Claimant and Mr. Muturi for the Respondent. The Claimant and the Respondent's witness, Vitalis Owino Osogo gave sworn evidence. Counsel for both parties filed written submissions.

The facts of the case are that the Claimant was employed by the Respondent and was assigned duties of packing vegetables. According to the Claimant, she began working on 12<sup>th</sup> March 2000 but was not issued with an appointment letter until March 2005. The Respondent stated in paragraph 3 of its Memorandum of Defence that the Claimant started working for the Respondent in August 2000. The Claimant told the Court that she used to work both day and night shifts. She would work between 6.30 am - 4.00 pm for day shifts and 6.30 pm - 4.00 am for night shifts. The Claimant's monthly salary at the time of her leaving employment was Kshs. 9,098.

The Claimant stated that as a result of very cold working conditions in her place of work, she began experiencing problems with her chest. She claimed that she was not ill when she started working for the Respondent. On cross examination by Counsel for the Respondent, the Claimant stated that the only protective clothing given to her by the Respondent was a dust coat and an apron. The Claimant was attended at Park Road Nursing Home and later admitted in the same Hospital on two occasions in 2008 and 2009 (Discharge summary forms are on pages 8 and 10 of the Claimant's documents).

Upon referral by the Respondent's Company Doctor, the Claimant was attended at Kenyatta National Hospital where the Doctor recommended light duty for the Claimant (the Doctor's recommendation and reminder are on pages 13 and 14 of the Claimant's documents). The Claimant averred that upon presentation of the Doctor's recommendation to the in-house Nurse and the Human Resource Officer the latter told her that he was fed up with her persistent illness. The Claimant was not put on light duty as recommended by the Doctor. Instead, she proceeded on unpaid leave from August 2009. She did not resume work and was not paid her dues.

The Claimant sought the following reliefs:

- a) 1 month's salary in lieu of notice.....Kshs. 9,098

- b) Compensation for unfair termination of employment.....Kshs.109,176
- c) Costs plus interest
- d) Certificate of service

The Claimant's claim for gratuity was withdrawn by her Advocate in the written submissions filed in Court on 22nd October 2012.

The Respondent's case was that the Claimant was in poor health at the time of her employment and that the Respondent's work environment was not harsh. The Respondent denied that the Claimant was not offered light duty, stating that the Claimant absconded duty prompting the Respondent to summarily dismiss her on 1st August 2009. Vitalis Owino Osogo, Human Resource Officer at the Respondent Company (RW1) told the Court that according to the records kept by the Respondent, the Claimant had applied for unpaid leave effective 2nd September 2009 and had not reported back to work since. He however did not produce the leave application form at the trial.

RW1 further stated that he did not have a record of the Claimant's illness prior to her employment by the Respondent. The witness added that the Respondent provided adequate protective clothing to all its employees as a matter of policy. He added that the work of packing vegetables was not a strenuous job. RW1 also told the Court that the Claimant was a member of a Provident Fund as well as the National Social Security Fund (NSSF).

Before going into the substantive issue in this case, I need to dispense with a procedural matter introduced by Counsel for the Respondent in the written submissions filed in Court on 22nd October 2012. Counsel sought to introduce a leave application form ostensibly originated by the Claimant. I take it that the intention was to support RW1's evidence that the Claimant had proceeded on unpaid leave. Counsel for the Claimant objected to admission of this document on the basis that since the parties had already closed their respective cases, the document could not possibly be subjected to examination. I agree and record the Court's concern at the unprocedural manner in which Counsel for the Respondent sought to introduce this document. The said document is therefore rejected and expunged from the record.

I now turn to the issue of termination of the Claimant's employment. The Respondent, in its Memorandum of Reply stated that the Claimant was summarily dismissed on 1<sup>st</sup> August 2009 on the ground of desertion of duty. RW1 in his sworn evidence departed from this position stating that the Claimant had proceeded on unpaid leave on 2nd September 2009 and had not resumed duty since. The Respondent, through the evidence of RW1 and the written submissions filed by the Respondent's Advocate tried to explain this discrepancy. However, parties are bound by their pleadings which may be amended at any time before closure. In this case, the Respondent attempted to amend their pleadings at the witness stand and at final submission, with the result of introducing material inconsistency and contradiction in the Respondent's evidence.

In the case of **Abudi Ali Mahadhi Vs. Ramadhani Saidi & Another (Civil Appeal No. 212 of 1998)** the Court of Appeal held that evidence that is inconsistent and contradictory is to be rejected. I have therefore rejected the Respondent's evidence in as far it relates to how and when the Claimant left the Respondent's employment.

It is not in dispute that between 2008 and 2009, the Claimant experienced poor health prompting her Doctor at Kenyatta National Hospital to recommend "less strenuous duties." In a subsequent medical certificate, the Doctor recommended light duties or retirement on medical grounds. There was no evidence of any response by the Respondent to the Doctor's recommendations.

Section 43 (1) of the Employment Act, 2007 provides that:

***(43)(1) In any claim arising out of termination of a contract, the employer shall be 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***

Section 45 (2) of the Act provides that:

***(2) A termination of employment by an employer is unfair if the employer fails to prove-***

***(a) that the reason for the termination is valid;***

***(b) that the reason for the termination is a fair reason -***

***(i) related to the employee's conduct, capacity or compatibility; or***

***(ii) based on the operational requirements of the employer;***

***and***

***(c) That the employment was terminated in accordance with fair procedure***

In the case of **Mumende Vs Nyali Golf and Country Club (Civil Appeal No. 16 of 1989)** the Court held that:

***It is an implied term of employment that an employer will make the conditions of employment to his employees absolutely safe and will not expose his employees to any danger.***

The Court further stated that:

***Just because an employee accepts to do a job which happens to be inherently dangerous is no warrant or excuse for the employer to neglect to carry out his side of the bargain and ensure the existence of minimum reasonable measures of protection.***

The Respondent averred that the Claimant was already in poor health at the time of her employment. RW1 however admitted on cross examination that the Respondent had no record of the Claimant's illness prior to her employment by the Respondent.

The Claimant's claim in this case is not for compensation for occupational illness and no expert evidence was adduced to confirm a nexus between the Claimant's illness and her work environment. What is in issue is whether the Claimant's departure from the Respondent's employment was fair. From the medical certificates issued at Kenyatta National Hospital (pages 13 and 14 of the Claimant's documents), the Claimant was too ill to continue with the duties assigned to her at the time. The Doctor gave the Respondent the option of assigning her alternative duties or retiring her on medical grounds. The Respondent took neither option and consequently forced the Claimant out of employment. To my mind, this was a case of constructive dismissal. The least the Respondent could have done was to retire the Claimant on medical grounds. I therefore find that the Respondent's inaction amounted to unfair termination of the Claimant's employment within the meaning of Section 45 of the Employment Act.

I consequently award the Claimant the following reliefs:

- a) 1 month's salary in lieu of notice.....Kshs. 9,098
- b) The equivalent of 12 salary as compensation for unfair termination.....Kshs.109,176
- c) Certificate of Service

In making this award, I have taken into account the inhumane manner in which the Respondent treated the Claimant at a time when she was most vulnerable. I have also considered the fact that the Respondent kept the Claimant in casual employment from the year 2000 to 2005. Additionally, in view of the

Claimant's poor health it will be difficult for her to find alternative employment.

The costs of this case are to the Claimant.

**DELIVERED IN OPEN COURT ATNAIROBI THIS 16<sup>TH</sup> DAY OF NOVEMBER 2012**

**LINNET NDOLO  
JUDGE**

**In the Presence of:**

.....**Claimant**

.....**Respondent**