



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 192 OF 2017**

***(Before Hon. Justice Mathews N. Nduma)***

**LAWRENCE OJWANG ATHIAMBO.....CLAIMANT**

**VERSUS**

**RAFIKI WA MAENDELEO TRUST.....RESPONDENT**

**JUDGMENT**

1. The claimant filed suit on 8<sup>th</sup> May 2017 praying for a declaration that the termination of his employment was unlawful and unfair and that he be awarded:

- (a) One month salary in lieu of notice.
- (b) House allowance for the five (5) months period served
- (c) Maximum compensation for the termination and
- (d) Costs of the suit.

2. CW1 testified that he was employed by the respondent in the position of project manager – WASH on 1<sup>st</sup> July 2016. The claimant was given a written contract dated 28<sup>th</sup> June 2016 for a two year fixed term due to expire on 30<sup>th</sup> June 2018.

3. In terms of the contract of employment, the claimant was placed on six months probation period after which the performance of the claimant would be assessed for confirmation. In terms of clause 3 of the contract, during the probation period, either party may terminate the contract of employment by giving two (2) weeks notice or two weeks salary in lieu of notice. The claimant earned a consolidated salary of Kshs. 82,677. The gross salary was inclusive of basic pay and housing allowance and other benefits in terms of clause 5 of the contract.

4. CW1 testified that on 7<sup>th</sup> November 2016, the claimant attended a general meeting in the course of duty in which the claimant gave a progress report of the project. Subsequently the claimant was called to another meeting by the management team at the library where the claimant was informed that he was not working properly and that his contract was terminated. The claimant got a letter of termination dated 10<sup>th</sup> November 2016 written by the Executive Director and founder of the respondent Michele Osterleng.

5. Upon clearance, the claimant was paid salary for days worked; two weeks salary in lieu of notice; payment in lieu of accumulated leave days for the five (5) months served in the sum of Kshs. 61,745.00.

6. The claimant signed a letter dated 30<sup>th</sup> November 2016 acknowledging receipt of the final dues. The claimant was given a certificate of service dated 5<sup>th</sup> December 2016. These documents were produced by the respondent as exhibits.

7. The claimant admitted that he had not completed the period of probation provided in the contract of service.

8. RW1, Mitchel Osterleng testified that the claimant was employed on 1<sup>st</sup> July 2016 on a two year fixed contract.

9. That the claimant worked until the 8<sup>th</sup> November 2016 and his employment was terminated for poor work performance whilst the claimant had not completed the six months probation period provided in the contract of service.

10. That the claimant worked as a project manager. That the claimant was well supported including going through orientation but his performance was below expectation and was thus not confirmed to his position. That the understanding before employment was that the claimant was qualified for the job but it turned out that he had challenges in multitasking and prioritizing on the various programmes he handled. That the claimant did not improve despite attention he was given to support his work.

11. That the claimant was paid his final dues and the suit lacks merit and it be dismissed with costs.

12. RW2 Josephine Yongo testified that she was the Operations Manager of the respondent and is the one who issued the claimant with the contract of employment. That the claimant was supported to do his work as Project Manager. That the claimant did his orientation but did not complete some parts of the scheduled orientation activities. That the claimant juggled between two projects and the overall organization. That he did not keep all the appointments. That initially the claimant started well but began to face challenges in delivering the set objectives. That the claimant was not up to task. He attended meetings late and there were complains on his work. That the employment of the claimant was terminated before the claimant completed his probation period due to underperformance. That the suit lacks merit and it be dismissed.

### **Determination**

13. The issues for determination are:

(a) Whether the claimant has any recourse, his employment having been terminated before completion of probation period.

(b) Whether the claimant is entitled to the reliefs sought.

14. In answer to issue (a) above, *Section 42 of the Employment Act, No 11 of 2007* provides:

“1. *The provisions of Section 41 shall not apply where a termination of employment terminates a probationary contract.*

2. *A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee.*

3. ....

4. *A party to a contract for a probationary period may terminate the contract by giving not less than seven days notice of termination of the contract or by payment by the employer to the employee of seven days wages in lieu of notice”.*

15. From the facts not in dispute, the claimant was still under probation when the contract of his employment was terminated by the respondent. In fact, the claimant served only five (5) months of the six (6) months probationary period.

16. The respondent has demonstrated that it paid the claimant in lieu of two weeks notice upon termination of the probationary contract.

17. The findings by the court is that the suit by the claimant lacks merit in that the provisions of *Section 41 of the employment Act, 2007* did not apply to him. The claimant was not entitled to any notice to show cause nor a disciplinary hearing of any nature before the probationary period was terminated.

18. Therefore the claim by the claimant that he was not given notice, notice to show cause or a hearing is misconceived, lacks merit and the court finds that the termination of the probationary contract lawful in that the respondent had complied with all the requirements under *Section 42 of the Employment Act, 2007*.

19. Furthermore, the claimant is not entitled to the reliefs sought in that it has been established that he was paid in lieu of two weeks notice and he was not entitled to any further payments in the circumstances of the case.

20. The respondent paid statutory dues including NSSF and NHIF on behalf of the claimant and the claimant is not entitled to payment of any service gratuity in the circumstances of the case.

21. Furthermore, the contract provided for a consolidated salary which included the basic pay, house allowance and other benefits in the sum of Kshs. 82,677. The claim for payment of further house allowance is misconceived, lacks merit and is dismissed.

22. The claimant is not entitled to any general or special damages considering the circumstances of the case.

23. Accordingly, the suit by the claimant against the respondent is dismissed in its entirety.

24. The claimant left another job to join the respondent and was unexpectedly terminated from employment before completing the probation period. This is a suitable case for each party to bear their own costs of the suit.

**Judgment Dated, Signed and delivered this 27<sup>th</sup> day of February, 2020**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Okoth for Claimant.

M/S Wambui for Respondent

Chrispo – Court Clerk