



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 109 OF 2018

BETWEEN

JOSPHAT OMBALO MUYOGA.....CLAIMANT

VERSUS

EASYTRAINS LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Stephen Jumbale & Company Advocates for the Claimant

Wandai Matheka & Company, Advocates for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 2nd March 2018. He avers, he was employed by the Respondent as a Mechanic, on 1st September 2016. He reported to work on 17th June 2017. He was advised by the Manager to hand over Respondent's assets and leave. His contract was abruptly terminated. He was not heard. His salary was Kshs. 35,000 as at the time of termination. He prays the Court to declare termination unfair, and grant other orders as follows:-

a. Salary for 17 days worked in June 2017 at Kshs. 19,833.

b. 1 month salary in lieu of notice at Kshs. 35,000.

c. 12 months' salary in lieu of notice at Kshs. 420,000.

d. Rest days at Kshs. 101,111.

e. Public holidays at Kshs. 21,388.

f. House allowance at Kshs. 52,500.

Total...Kshs. 649,832.

g. Certificate of Service to issue.

h. Costs and Interest.

2. The Respondent filed its Statement of Response on 8th May 2018. Its position is that the Claimant was still under probation when termination occurred. His contract provided for probation of 3 months, which could be extended by the Respondent. The Claimant was employed on 1st September 2016. The first probation ended on 23rd November 2016. It was extended by 3 months, to end 1st March 2017. There was further extension by 3 months which was to end around 1st June 2017. There was another extension by 1 month, to end 1st July 2017. The Respondent states on or about 3rd June 2017, the Claimant received his May 2017 salary, and left employment, never to be seen again. He earned Kshs. 30,000 monthly, which included 15% as house allowance. He is not entitled to the prayers sought. The Respondent prays the Court to dismiss the Claim with costs.

3. The Claimant gave evidence and rested his case, on 4th November 2019. He adopted his Witness Statement and documents on record. Termination was on 17th June 2017. No reason was given to justify termination. Cross-examined, he testified that he worked for less than 1 year. He was paid Kshs. 30,000 monthly, all-inclusive. He was not on probation when termination occurred.

4. The Respondent did not call evidence, and hearing closed on 4th November 2019.

The Court Finds:-

5. The Claimant was employed by the Respondent as a Mechanic. He was paid a salary of Kshs. 35,000 monthly, which by his own admission, was all-inclusive. His prayer for arrears of house allowance has no foundation and is declined.

6. He similarly has not established that he worked on rest and public holiday days. There are no attendance records, showing the Claimant actively at work, on the stated days.

7. His contract was terminated by the Respondent after serial extension of probation. Section 42 of the Employment Act does not appear to have been adhered to by the Respondent in extending probation. The provision states that probation shall not be for a period of more than 6 months, but it may be extended for not more than another 6 months, with the agreement of the Employee. The Claimant denies that he was on probation at the time of termination. No evidence of his agreement on extension has been given to the Court by the Respondent. The Court does not agree therefore, that he was on probation, at the time of termination.

8. No reason is given to justify termination. The Respondent offered no evidence at all. It can only be concluded that termination was not based on valid reason, and was not fairly carried out. It was unfair under Sections 41, 43 and 45 of the Employment Act 2007.

9. The Claimant worked up to 17th June 2017. He was not paid salary for days worked. **He merits salary for 17 days, at Kshs. 22,884.**

10. Notice is merited and awarded at Kshs. 35,000 as prayed.

11. He worked for about 11 ½ months. It is highly unlikely that any Court, exercising its discretion judiciously, would award the Claimant equivalent of 12 months' salary in compensation for unfair termination. It is noted that he did not have anything to do with circumstances leading to termination. He was abruptly told by the Respondent to leave. There was no notice, no hearing. **The Claimant is granted equivalent of 2 months' salary in compensation for unfair termination at Kshs. 70,000.**

12. Certificate of Service to issue.

13. No order on the costs and interest.

Dated and delivered at Mombasa this 26th day of March 2020.

James Rika

Judge