



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE 433 OF 2015**

**JECONIA OTIENO ASERE.....CLAIMANT**

**VS**

**COASTAL IMAGE TECHNOLOGIES LTD.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. This is a claim for terminal dues and compensation for unfair termination of the claimant's employment contract by the respondent on 15.6.2015 before the expiry of his probation period. The respondent has denied that the termination of the employment contract was unfair and averred that she has no legal obligation to pay the claimant the damages sought.

2. The suit was disposed of by written submissions on the basis of the pleadings, witness statements and documents filed.

**Claimants case**

3. The claimant stated in his written statement that he was employed by the respondent on 25.2.2015 as Technical Department/Administrator at a monthly salary of kshs.50,000. He served three months under probation but on 9.5.2015, the respondent wrote a letter registering her dissatisfaction with his performance but never the less extended the probation by another 3 months. That on 15.6.2015 the respondent terminated the claimant's employment by serving 4 days notice.

4. He contended that the action by the respondent was actuated by bad faith and was not done after following the due process provided under the Employment Act (EA). He therefore prayed for 12 months salary as compensation, half month salary in lieu of notice, leave on pro-rata basis, overtime worked, certificate of service plus costs of the suit.

**Defence case**

5. Mr. Mohamed Mustafa Somji, a Director for the respondent filed witness statement. He explained that the claimant was employed by the respondent on 9.2.2015 as the Technical Department Administrator. That he was placed under probation for the first three months but performed poorly. That on 9.5.2015 the probation period was extended by another 3 months but again he performed dismally and his services were terminated.

6. He maintained that the claimant was terminated in accordance with the employment contract and denied that it was actuated by any malice or unfairness. He therefore denied the claimant's claim for kshs.681,729 as damages for the alleged unfair termination. In support of the foregoing statement, the defence counsel submitted that the claimant was terminated during probation period and as such he was disqualified from the protection of the law provided for under section 41, 43 and 45 of the Employment Act. That his rights were only confined within section 42 of the Employment Act which entitles the employee to a notice of 7 days or wages in lieu of notice.

### **Analysis and Determination**

7. There is no dispute that the claimant was employed by the respondent for a monthly salary of kshs 50,000 per month. There is further no dispute that the claimant was terminated while still serving on probation which was terminable by 7 days notice. The issues for determination are:-

- a. **Whether the claimant was unfairly terminated by the respondent**
- b. **Whether the reliefs sought should be granted.**

### **Unfair termination**

8. Under section 42 of the Employment Act, employees serving under probation like in this case are not availed the protection from unfair termination provided for under section 41 and 45 of the Employment Act. Such employees are therefore terminable without being given any prior hearing to justify their termination provided that they are served with prior notice as per their contract of employment or as provided under section 42 **supra**. The minimum notice provided for under section 42 of the Employment Act is 7 days or salary in lieu of notice.

9. In this case, the claimant was entitled to 7 days notice under his contract of employment signed on 12.6.2015. He was served with termination notice of one week vide the letter dated 15.6.2015 but he was not allowed to continue working during the notice period. The respondent has not rebutted the foregoing allegation. The defence witness's statement does not deny that the claimant was not allowed to serve the whole notice period of one week. I therefore find on a balance of probability that the claimant was wrongfully terminated without notice because despite being served with one week notice, he was not allowed to work throughout the said notice period.

### **Reliefs**

#### **Salary in lieu of Notice**

10. The claimant prayed for kshs.25,000 being salary in lieu of notice of 2 weeks. No justification was given to justify the 2 weeks notice. In my view the court should award the salary in lieu of notice for one week as provided for under the contract of employment as amended mutually by the parties herein with effect from 9.5.2015. I therefore award to the claimant kshs.12,500 as salary for 7 days in lieu of notice.

#### **Leave**

11. The claimant prayed for kshs 23076 in respect of leave on pro-rata basis. The claimant never served for a complete year and but worked only for 4 complete months. Based on the 21 days annual leave provided under the employment contract, he earned 7 days leave on pro rata basis. He is therefore awarded kshs.12500 for the 7 leave days earned. The respondent alleged that the claimant took 12 days leave during his probation period but no leave records have been produced to prove that.

#### **Compensation**

12. This relief is not available to the claimant because he was terminated while still on probation. The relief is therefore declined.

### **Overtime**

13. No particulars were pleaded in this claim and no evidence was provided to prove that the claimant worked overtime. I therefore declined to grant the overtime as prayed.

### **Certificate of Service**

14. The right to certificate of service after termination of his services is provided in mandatory terms by section 51 of the Employment Act. I therefore direct the respondent to issue the claimant with the certificate as prayed.

### **Disposition**

15. For the reasons stated above, I enter judgment for the claimant for **kshs.25,000** plus costs and interest. The claimant will also have Certificate of Service as prayed.

**Signed, Dated and Delivered this 29<sup>th</sup> day of July 2016.**

**ONESMUS MAKAU**

**JUDGE**