

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CASE NO. 428 OF 2017

GEOFFREY LOKIDOR.....CLAIMANT

VERSUS

AEGIS CONSTRUCTION LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant asserts that he was employed as a security guard by the Respondent in January 2015. He averred that at the time of the dismissal he earned a basic salary of Kshs. 10,356/- a month and that his services were terminated on 28th August 2017 by the Respondent's site agent one Philip Odhiambo via telephone call giving him seven days notice. He sought compensation for the alleged wrongful dismissal, underpayment, unpaid public holidays, unpaid leave for 2 years, one month's salary as compensation, and compensation for loss of income.

2. The Respondent did not file a defence and the matter proceeded for hearing undefended. The Claimant testified that he was dismissed on 23rd December 2016 by Philip Odhiambo working in Human Resources. He stated that he was paid Kshs. 6,000/- and the balance was due. In cross-examination by counsel for the Respondent, he testified that he was hired by Philip and that he did not have a letter of appointment. He stated that he was paid his salary in bits and that the payslip was his bank statement. He testified that he worked without a break and had no off days. If he went on off for illness, his pay was deducted. He said that he earned Kshs. 10,355/- which was high. He testified that sum of Kshs. 2,500/- was said to be part of salary. In re-examination he stated that the bank statement showed the payment.

3. The parties were to file submissions and the Claimant submitted that he was not given prior notice before termination which made the dismissal unlawful and unfair. He submitted that because the Respondent did not file a response his evidence was uncontroverted. He relied on the case of **Dan Owuor Ongado v Lake Basin Development Authority [2018] eKLR** on the failure to adduce evidence. He thus submitted that his claim should be granted as prayed for.

4. The Respondent submitted that the Claimant did not prove his case as despite saying he was underpaid he did not produce any evidence of the underpayment. It submitted that the payslips showed a consistent payment of Kshs. 2,466/- later reviewed to Kshs. 6,304/-. It was submitted that no evidence of the dismissal was availed and neither did he avail evidence of the days he failed to go on off days or the number of public holidays he was subjected to work. The Respondent urged the dismissal of the suit.

5. The Claimant had to prove his case despite there being no defence. In the case of **Dan Ongado v Lake Basin Development Authority (supra)** Nduma J. held that where there is failure to adopt the pleadings and documents as evidence where a matter proceeds on basis of documents filed, in the face of such failure, the pleadings do not all of a sudden become evidence for the purpose of evaluating the standard and burden of proof by the parties. The Claimant asserts his salary was Kshs. 10,355/- a month and availed bank statements evincing payment. His bank statements do not support this averment or the testimony he adduced. He earned varied figures hovering between Kshs. 2,466/- and 1,725/-. The highest amount credited into the account was Kshs. 10,356/- in August 2016. In addition, the Claimant herein pleaded the date of dismissal as 23rd August 2017 and his evidence was that he was dismissed on 23rd December 2016. What he failed therefore to do, was to prove his case. He did not show to the satisfaction of the threshold for a cause such as this that he was in the position of a watchman earning the sums he averred or claimed to earn. The suit falls for dismissal. Each party to bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 27th day of February 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar