



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CASE NO. 439A OF 2017

HIRKENA ATHONTO ELEMO.....CLAIMANT

VERSUS

JIANGXI ZHONGMEI ENGINEERING

CONSTRUCTION COMPANY LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent seeking relief for the unlawful termination of his contract of service. He averred that he was employed as a guard and that he worked from 2012 earning Kshs. 12,000/- a month. He stated that he had no rest days or leave days and had to report at 6.00pm and leave at 8.00am. He worked for 2 years and was not heard prior to the dismissal. He thus sought payment for the overtime worked, underpayment and leave allowance as well as house allowance. He also sought costs of the suit.

2. The Respondent neither entered appearance nor filed a defence in the cause. The case thus proceeded undefended. The Claimant stated that the Respondent underpaid him and that he was not paid any house allowance or for overtime worked. He produced an agreement reached between the Kenya Building Construction Timbers and Furniture Union (KBCTFU) and the Respondent, and a letter from the Deputy County Commissioner Marsabit Central Sub County to the site manager of the Respondent on the Marsabit-Turbi Road project. He testified that the underpayment was not rectified despite the letter and the agreement reached and that the Respondent did not adhere to the wages guideline.

3. The Claimant filed submissions and stated that the liability against the Respondent was 100% as the Respondent had failed to defend as held in the case of **Regina Mwikali Wilson v Stephen M. Gichuhi & Another [2015] eKLR** which cited with approval the Court of Appeal decision in the case of **Felix Mathenge v Kenya Power & Lighting Co. Ltd [2008] eKLR** that the question of liability was moot upon entry of interlocutory judgment and only the issue of quantum remained. The Claimant thus prayed for the payment of the sums due for the underpayment and the unpaid house allowance.

4. The Claimant had a duty, a burden to prove the claims he made with particularity. He therefore cannot rely wholesale on the dicta of the Court of Appeal in the case of **Felix Mathenge v Kenya Power & Lighting Company Ltd (supra)** cited in support of the assertion that all I had to do was assess damages. The court finds that the claims the Claimant proved was on house allowance, the underpayment, leave and the absence of notification before termination. He thus is entitled to an award on this claim of unpaid house allowance since this element of his pay was not factored in the monthly payments. He is also entitled to the unpaid leave dues, pay in lieu of notice as well as the underpayment of salary. He failed to prove the other claims as he did not show the overtime worked and the specific dates he was at work and was not paid for the extra hours put in. He thus is only entitled to the following reliefs:-

- i. Underpayment of wages – Kshs. 384,184/-
- ii. Annual leave pay – Kshs. 52,166/-
- iii. Payment in lieu of notice – Kshs. 34,777/-
- iv. Unpaid house allowance – Kshs. 51,750/-
- v. Costs of the suit

It is so ordered.

Dated and delivered at Nyeri this 12<sup>th</sup> day of February 2019

Nzioki wa Makau

JUDGE