



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 314 OF 2017

SAMUEL MURAGURI KIRAGU.....CLAIMANT

VERSUS

AEGIS CONSTRUCTION LIMITED.....RESPONDENT

JUDGMENT

1. The Claimant herein was employed by the Respondent as an excavator operator from December 2014 till 30th June 2017 earning a basic salary of Kshs. 28, 547/-. He averred that prior to his termination there was no proof of alleged misconduct neither was he served with a notice to show cause before his services were terminated by the Respondent. He averred that his dismissal was unfair, unprocedural, illegal and/or unlawful. He thus sought the payment of compensation, salary arrears for the month of January 2016, the unpaid leave for 2 years, one month's salary in lieu of notice and compensation for the loss of income as well as costs of the suit plus interest. To his claim he attached the bank statements evidencing his salary payments and the letter from the site manager Alex Kombo and the demand letter.

2. The Respondent appeared through the Federation of Kenya Employers and no defence was filed. They withdrew from acting citing lack of cooperation from their client. The firm of Modi & Co. Advocates came on record but no defence was filed and the case proceeded as undefended. The Claimant testified that he was employed in December 2014 dismissed on 30th June 2017 without notice. He was cross-examined and he testified that he was told to give the excavator to another driver at the site and go to the yard for further action. He earned a salary of between Kshs. 25,000/- and 28,000/-. In re-examination he stated that he was not given any other assignment. The Respondent did not offer any evidence.

3. The Claimant filed written submissions in which he stated that the evidence he had given was uncontroverted. He submitted that he was entitled to the prayers sought as his dismissal was without cause and had proved his case on a balance of probabilities. He relied on the case of **Dan Owuor Ongado v Lake Basin Development Authority [2018] eKLR**. The Respondent submitted that the Claimant was vide the letter of 30th June 2017 sent to the yard for further action or redeployment and that no evidence was adduced before the court either by letter or otherwise on his dismissal. It was submitted that the Claimant decided on his own volition to quit employment. It was submitted that no evidence was adduced that he used to earn a salary of Kshs. 28,547/- or that he did not go on leave during the duration of his employment. The Respondent submitted that the Claimant did not prove his case on a balance of probabilities. The Respondent submitted that however, if the court is inclined to find the Claimant was entitled to compensation then he was only entitled to one month salary as he was in violation of Section 44 (a-e) of the Employment Act.

4. The Claimant was employed by the Respondent and performed duties as an excavator operator until his dismissal on 30th June 2017. The material parts of the letter from the site agent Albert Kombo was to the following effect:-

Reference is made to the above subject.

We have decided to send Samuel Muraguri Kiragu an operator of excavator (from Meru site) back to the yard for your further action.

Thanking you in advance for your usual co-operation.

The Claimant testified that upon reporting as directed he was not given any assignment. This is constructive dismissal and the letter from the site agent seems to have triggered the dismissal. No reason or cause is given for the dismissal. The Claimant was therefore not accorded the procedural safeguards he is entitled to. The Claimant was received a varied sums as salary each month and the lowest sum earned as evidenced by the bank statements produced was Kshs. 26,614/- and the highest salary earned was Kshs. 29,229/- after deductions. The Claimant was entitled to notice before termination in addition to the procedural fairness espoused in Section 41. He was not accorded these and therefore he is entitled to recover as he proved his claim on a balance of probabilities. The Respondent never filed any pleadings or offered testimony to rebut the averments of the Claimant or his testimony. It stands as uncontested. In the final result I will enter judgment

for the Claimant: as follows:-

- a. Salary in lieu of notice Kshs. 28,547/-
- b. Leave pay for 2 years Kshs. 57,094/-
- c. 8 months salary compensation Kshs. 228,376/-
- d. Costs of the suit.
- e. Interest on the sums in a), b), c) above at court rates from date of judgment till payment in full.
- f. The sum in c) above to be subject to statutory deductions in terms of Section 49(1)(c) of the Employment Act.
- g. A certificate of service in terms of Section 50 of the Employment Act.

It is so ordered.

Dated and delivered at Nyeri this 13th day of November 2018

Nzioki wa Makau

JUDGE