



## REPUBLIC OF KENYA

### IN THE EMPLOYMENT & LABOUR RELATIONS

#### COURT OF KENYA AT NYERI

#### CAUSE NO. 312 OF 2017

SHADRACK MWANIKI NGARU.....CLAIMANT

VERSUS

AEGIS CONSTRUCTION LIMITED.....RESPONDENT

#### JUDGMENT

1. The Claimant herein was employed by the Respondent as a puncture repairer on 4<sup>th</sup> August 2014 at a basic salary of Kshs. 20,000/- and that his employment was terminated on 1<sup>st</sup> July 2017 by the Respondent's agent. Prior to his termination there was no proof of alleged misconduct nor was he served with reasonable notice to show cause before his services were terminated by the Respondent. He averred that his dismissal was unfair, unprocedural, illegal and unlawful. He thus sought the payment of compensation, salary arrears for the month of June 2017, payment of salary in lieu of notice and unpaid leave due for 2 years as well as costs of the suit. He attached bank statements to show his salary payments and the letter of 5<sup>th</sup> May 2017 by the site administrator sending him back to the yard for further directions.

2. The Respondent only caused an appearance to be entered and never filed a defence despite being accorded opportunity to do so. The matter proceeded as an undefended cause.

3. The Claimant testified that he was sent to the yard by the supervisor and was summarily dismissed. He sought the prayers as per his claim. The Respondent sent an advocate to represent it at the hearing and he cross-examined the Claimant. In cross-examination, the Claimant testified that he was paid through the bank and that no payslips were given by the Respondent and that he had no letter of employment. He testified that he was given the letter of 5<sup>th</sup> May 2017 while at work and that the letter stated that he was sent to the head office because he was said to be rude and arrogant. He stated that he went back and worked for one day before he was dismissed. He was re-examined and he stated that the Respondent did not issue him with an appointment letter. The Respondent did not offer any evidence.

4. The Claimant filed written submissions on 22<sup>nd</sup> October 2018 and the Respondent filed written submissions on 29<sup>th</sup> October 2018. In the submissions filed by the Claimant, he stated that his testimony was uncontroverted. He submitted that he had made out a case against the Respondent for compensation for the unlawful termination. The case of **Dan Owuor Ongado v Lake Basin Development Authority [2018] eKLR** was cited in support of the Claimant's claim on the award sought. The Respondent on its part submitted that the Claimant decided on his own volition to quit employment and that no evidence was adduced before the court either by letter or otherwise on his dismissal. It was submitted that no evidence was adduced that he used to earn a salary of Kshs. 20,000/- or that he did not go on leave. 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.

5. There is no contest that the Claimant was an employee of the Respondent despite the fact that no letter of employment was exhibited. The letter of 5<sup>th</sup> May 2017 confirmed he was an employee working as a puncture repair man. He was paid various sums as salary each month which sums varied. The lowest sum the Claimant earned as evidenced by the bank statements he produced was Kshs. 16,598/- and the highest sum earned was Kshs. 21,438/-. By and large, the average income that was deposited was Kshs. 20,713/- or thereabout and these sums were after deduction of tax and payment of statutory dues. He asserts that he was unlawfully terminated from employment. The biggest pointer to the cause of termination is perhaps best captured from the letter of 5<sup>th</sup> May 2017 from the Site Administrator. The said letter stated as follows:-

*We have decided to send Shadrack Mwaniki of ID number 22276825, puncture maker back to the yard for further direction. He is incompetent, rude, arrogant and lack of respect to the site management. He joined us 4<sup>th</sup> August 2014.*

*Thanking you in advance for your usual co-operation.*

6. The letter aforesaid was one which the provisions of Section 41 of the Employment Act applied. Section 41 of the Employment Act provides (*in pare material*)

*41.(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*

*(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.*

7. The Claimant was stated to be incompetent, rude, arrogant and lacked respect for the site management. Before the dismissal he was entitled to the safeguards under the law. The employer must not only have a manifestly valid and proper reason for termination but must also exercise due process in effecting the termination. Put another way, there must be both substantive and procedural fairness. In this case the Claimant was not accorded any such hearing as envisaged under Section 41. The site manager thanked the Respondent's head office for the usual co-operation in relation to the reference of the Claimant to the head office. The Respondent never filed any pleadings or offered testimony to rebut the averments of the Claimant or his testimony. It stands as uncontested. He proved his case on a balance of probabilities and in the final result I will enter judgment for the Claimant: as follows:-

- a. Salary in lieu of notice Kshs. 20,000/-
- b. Leave pay for 2 years Kshs. 40,000/-
- c. 8 months salary compensation Kshs. 160,000/-
- 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 13<sup>th</sup> day of November 2018**

**Nzioki wa Makau**

**JUDGE**