



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA**

**CAUSE NO. 49 OF 2019**

**DOCK WORKERS UNION (K) .....CLAIMANT**

**VERSUS**

**ASSOCIATED MOTOR VEHICLE ASSEMBLERS.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 01<sup>st</sup> April, 2022)

**JUDGMENT**

The claimant filed the memorandum of claim on 13.08.2019 alleging constructive dismissal of Christopher Mwandjenje Warugha and Harun Omar Ngoye (1<sup>st</sup> and 2<sup>nd</sup> grievants respectively). There is no dispute that the respondent employed grievants on 10.01.2004 and 21.02.2004 respectively to perform general maintenance duties. The 1<sup>st</sup> grievant was a welder and the 2<sup>nd</sup> grievant had experience in construction works. Their case is that on 28.01.2019 they were assigned to remove an old ramp the folk lift to move the old ramp was not availed so that they did not do the assigned work and they received warning letters of 29.01.2019. and they protested that it was not their mistake not to undertake the assignment. In mid-June they were assigned to remove a roof so as a staircase to the roof to be constructed. They needed certain plastics to seal holes to prevent leakage on the roofs they were assigned to remove but the adhesives were lacking. The consequence was that the holes were not sealed, heavy rains came and a disaster happened in that the premises were flooded.

The claimant's further case is that the grievants' supervisor refused to take responsibility of the floods for insisting the works are done by grievants without the sealing of the holes. The claimant states that the respondent then offered the claimants an option to resign with full benefits or to get dismissed with loss of full benefits.

The 1<sup>st</sup> grievant wrote a resignation letter dated 18.07.2019 stating he had decided to leave work to go home and sort out some family pressing issues and thanked the respondent for employing him for 14 years and for improving the economy of Kenya. The respondent accepted his resignation letter by the letter dated 18.07.2019 and offered to pay him all accrued wages inclusive overtime, leave pay for due leave days, service gratuity of Kshs. 328, 022.00 per clause 10(2) of CBA and 3 months' gross salary in lieu of notice. His gross dues were Kshs. 557, 767.00 and after due deductions the net was Kshs. 285, 467.00 which he received by cheque.

The 2<sup>nd</sup> grievant wrote his resignation letter on 17.07.2019 stating he wished to resign from employment and he asked to be released immediately for personal reasons. His resignation was accepted by the respondent's letter dated 17.07.2019 and along the same headings as the 1<sup>st</sup> grievant, his gross payment was Kshs. 525, 728.00 and a net of Kshs. 112, 839.00. Each signed a certificate of final dues stating that they had received the payment in full and final settlement to discharge the respondent as they had no further claims against the respondent.

The claimant claims that the grievants were forced to resign and the resignation amounted to unfair constructive dismissal and prayed for reinstatement. In alternative they prayed for notice pay, pay for unutilised leave days, withheld payments under section 18 of Employment Act, 2007, 12 months' compensation for unlawful termination, gratuity per CBA, and any other relief the Court may deem just. At the hearing it turned out that many of the claims had already been paid per the certificate of final dues so that parties recorded a consent thus, **"(1) By consent the only issue for determination is whether there was constructive unfair termination and whether compensation is due to grievants and costs. (2) All other prayers and claims are marked as withdrawn or settled."**

The respondent filed the memorandum of response on 13.11.2013 through the Federation of Kenya Employers. Opolo & Opolo Advocates subsequently represented the respondent. The respondent's case was that the claimants voluntarily resigned and the issue of unfair constructive dismissal and compensation does not arise. It was prayed that the suit be dismissed with costs.

The grievants testified to support the claimant's case and the respondent's witness(RW) was the Joseph Mwanzia Musyoka, the respondent's human resource manager at the material time. The Court has considered the submissions, evidence and pleadings.

The Court returns that the claimant's case must collapse and fail. The evidence is that the grievants resigned voluntarily and no particulars of forced resignation were pleaded or proved. The grievants cannot be trusted in saying that they copied the resignation letters from a draft by RW whereas that was not pleaded and further, each wrote it voluntarily. The parties agreed to mutually separate when the respondent accepted the resignations and paid the claimants the final dues which they happily took and enjoyed – and thereafter engaged in an attempted unjust enrichment by filing the instant case. Their designs cannot be aided by the Court.

The court has considered all circumstances of the case and finds that the claimant will pay the respondent 25% of costs of the suit to be agreed upon or taxed.

In conclusion the suit is dismissed with orders that claimant to pay the respondent 25% of costs of the suit to be agreed upon or to be taxed.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 01ST APRIL, 2022.**

**BYRAM ONGAYA**

**JUDGE**