



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**CAUSE NO. 1362 OF 2016**

**DANIEL NJUGUNA CHEGE.....1<sup>ST</sup> CLAIMANT**

**CHARLES AKWAVA ANDREW.....2<sup>ND</sup> CLAIMANT**

**TIMOTHY MUTEGLI..... 3<sup>RD</sup> CLAIMANT**

**PETER THUVU .....4<sup>TH</sup> CLAIMANT**

**VICTOR K. KEGODUE..... 5<sup>TH</sup> CLAIMANT**

**V**

**TUSKER MATTRESSES LTD .....RESPONDENT**

**JUDGMENT**

1. The 5 Claimants instituted legal proceedings against Tusker Mattresses Ltd (Respondent) on 13 July 2016 and they stated the Issue in Dispute as Unlawful and unfair withholding of terminal benefits after compelling them to resign.
2. The Claimants sought severally, salary in lieu of notice, accrued leave, gratuity, overtime and certificate(s) of service.
3. In its *Statement of Response* filed on 9 September 2016, the Respondent contended that the Claimants voluntarily resigned and that it offered the Claimants terminal dues, but they declined to accept the same and therefore the claims were misguided.
4. The parties filed *Agreed Issues* for trial on 14 September 2018, and the Cause was heard on 1 October 2019 and on 14 November 2019.
5. The 1<sup>st</sup> Claimant and the Respondent's Human Resources Manager testified (although the Court encouraged the parties to attempt out of court settlement, no agreement was presented before the Court).
6. The Claimants filed their submissions on 13 December 2019 while the Respondent filed its submissions on 16 January 2020.
7. The Court has considered the pleadings, evidence and submissions.

**Unfair termination of employment**

8. Issues 1 and 2 as agreed by the parties related to the question as to whether there was unfair termination of employment.
9. The Claimants pleaded case was that the Respondent compelled or induced them to resign after requiring them to undergo training as a condition precedent to continue in employment.
10. The Claimants wrote resignation letters giving requisite notice(s) of resignation. Apart from the 3<sup>rd</sup> Claimant who cited personal reasons, the other Claimants did not give any reasons for the resignations.
11. The reason advanced by the Claimants in Court for the resignations was that they were being forced to go for training in order to continue working with the Respondent.

12. The Respondent's witness testified that the Respondent requires its employees, who number over 6000 to take continuous training from time to time to enhance their capacity and productivity.

13. The witness also admitted that the Claimants were called upon to go for training but instead opted to resign.

14. Continuous training for employees in both the public and private sector is an accepted standard practice and the calling upon an employee to undergo training at the employer's cost, cannot therefore in the view of the Court, amount to an undue inducement to an employee to leave work.

15. Even by the stretch of the wildest of imagination(s), such a requirement would not amount to the employer creating a hostile environment entitling an employee to invoke the doctrine of *constructive dismissal* and leave at once.

16. The Court finds that the Claimants have not proved that there was unfair termination of employment, even on grounds of *constructive dismissal*, or undue influence on the part of the Respondent. The resignations were voluntary.

### **Terminal benefits**

#### **Salary in lieu of notice**

17. The Claimants gave requisite notices save for 4<sup>th</sup> Claimant who gave 1-month instead of 2-month notice.

18. The Respondent opted to waive the notices and offered to buy out the notices by offering salaries in lieu of notice, which the Claimants declined to collect.

19. The Court, therefore, finds this head of the claim misguided, as the Claimants should not have litigated over a due which was offered.

#### **Accrued leave**

20. The Respondent wrote to each of the Claimants indicating the tabulation of accrued leave. The Claimants declined but now claim accrued leave spread over 3 to 4 years of employment.

21. However, the Claimants did not lay any evidential foundation to the claims for accrued leave as pleaded.

22. In any case section 28(4) of the Employment Act, 2007 circumscribes the amount of annual leave which may be carried forward.

23. With no evidence that leave was carried forward with the permission of the Respondent, the Court will allow this head of the claim in terms of the computations and/or admissions by the Respondent.

#### **Overtime**

24. Copies of payslips filed in Court by the Claimants indicate that overtime work was compensated for, and without any other evidential basis, the Court finds this claim not proved to the required standard.

#### **Gratuity**

25. The Claimants sought gratuity in terms of clause 24 of the *collective bargaining agreement* between the Respondent and the Kenya Union of Commercial, Food and Allied Workers.

26. Clause 24 provides that Where employment is terminated by either party, the company shall pay the employee gratuity at the rate of 20 days for each completed year of service.

27. In so far as a resignation is a termination of employment at the instance of the employee, and in consideration of the proviso at clause 24 of the *collective bargaining agreement* between Tusker Mattresses Ltd and the Kenya Union of Commercial, Food and Allied Workers, the Court finds that the Claimants who were unionisable in terms of section 59(1)(b) of the Labour Relations Act are entitled to gratuity.

28. The Court finds no merit in the argument advanced by the Respondent that the *collective bargaining agreement* had lapsed, as under clause 32 it was to continue being in force until registration of a new *collective bargaining agreement*.

29. The Respondent also argued that some of the Claimants were not unionisable because they were supervisors. The contention required proof which was not provided in the course of the hearing.

#### **Certificate of Service**

30. A certificate of service is a statutory entitlement and the Respondent exhibited copies of the Claimants certificates which they should collect.

## **Conclusion and Orders**

31. From the foregoing, the Court finds and declares

- (a) The Claimants voluntarily resigned.
- (b) The Claimants are entitled to terminal dues as computed by the Respondent.
- (c) The Claimants are entitled to gratuity by dint of clause 24 of the *collective bargaining agreement*.
- (d) The Respondent to compute and pay the Claimants their terminal benefits and gratuity within 21 days, failure to which the sums to attract interest from 13 July 2016.

32. Each party to bear own costs as Claimants failed to utilise the dispute resolution mechanisms agreed with the Union.

**Delivered, dated and signed in Nairobi on this 7<sup>th</sup> day of February 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimants Mr. Nyabena instructed by Nyabena Nyakundi & Co. Advocates

For Respondent Mr. Kanchory instructed by Kanchory & Co. Advocates

Court Assistant Lindsey/Judy Maina