



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 2019 OF 2015**

**TONY LARABI.....CLAIMANT**

**v**

**TUSKER MATTRESSES LIMITED.....RESPONDENT**

**JUDGMENT**

1. Tony Larabi (Claimant) was employed by Tusker Mattresses Ltd (Respondent) as a shop Assistant through a letter dated 1 September 2006.
2. On 23 July 2015, the Respondent issued a *show cause* letter to the Claimant to show why disciplinary action should not be taken against him.
3. The Claimant responded to the show cause on 24 July 2015.
4. After the written response, the Respondent invited the Claimant to appear before a Disciplinary Committee on 7 August 2015. The invitation letter informed the Claimant of the allegations to confront and also advised him of the right to be accompanied.
5. The hearing took place on 14 August 2015, and on 15 August 2015, the Claimant was informed that his employment was being terminated for gross misconduct.
6. The Claimant was not satisfied and on 12 November 2015 he instituted these proceedings alleging unfair termination of employment.
7. The Respondent filed a *Response* on 13 January 2016 contending that the termination of the Claimant's employment was lawful.
8. The Cause was heard on 19 December 2018. The Claimant and the Respondent's Human Resources Manager testified.
9. The Claimant filed his submissions on 27 February 2019 (should have been filed before 25 January 2019) while the Respondent filed his submissions on ...
10. The Court has considered the pleadings, evidence and submissions on record and condensed the Issues for determination as addressed hereunder.

**Unfair termination of employment**

***Procedural fairness***

11. The Claimant was issued with a show cause letter setting out the allegations to confront and seeking his representations. He responded after which an oral hearing was held. Prior to the oral hearing, the Claimant was informed of the right to be accompanied.

12. The Court is satisfied that the process as conducted by the Respondent met the test of sections 35(1)(c) and 41 of the Employment Act, 2007.

***Substantive fairness***

13. In disputes concerning unfair termination of employment, an employer has a statutory duty of proving the reasons for the termination of

employment (section 43 of the Employment Act, 2007) and that the reasons are valid and fair (section 45 of the Act).

14. In the view of the Court, the burden placed upon employers by the two sections are a legal burden and where the employers fails to prove the reasons or demonstrate through evidence or through cross examination that the reasons are valid and fair, a conclusion of unfairness is inevitable.

15. The ground given for the termination of the Claimant's employment was gross misconduct. The particulars were

*neglected your duties and converged in an unauthorised gathering during working hours.*

16. The Claimant's defence at the disciplinary hearing was that at the shift change time/reporting, his colleagues who were reporting for the noon shift came to exchange pleasantries with him and in the course of that exchange a Director of the Respondent came around and instructed him and the colleagues to report to the Human Resources Manager's office.

17. The narration of events by the Claimant was not rebutted or shown as unbelievable during cross examination.

18. Employees are not robots or machines. Even in the course of the most hectic of chores, employees would be naturally expected to take a breather and relate with other colleagues. Exchange of pleasantries in the work place cannot in the view of the Court amount to neglect of duties.

19. Such cannot be gross misconduct or misdemeanour warranting the ultimate sanction of termination of employment.

20. Further, in the instant case, the Respondent did not lead any evidence to prove the reasons or demonstrate that the reasons were valid, and fair.

21. The Director who allegedly found the Claimant in *neglect of duty* was not presented in Court to give evidence, and the said failure was not explained.

22. Even an affidavit from the said Director was not filed.

23. The Respondent did not take advantage of pre-trial to seek to introduce and rely on affidavit evidence, if that was necessary. The witness who testified admitted he was not in the shop at the alleged time of *neglect of duty*.

24. The Claimant had no disciplinary history during his years of service with the Respondent.

25. The Court therefore concludes that the termination of the Claimant's employment was not fair and was not for valid reasons.

#### *Compensation*

26. Compensation is discretionary.

27. The Claimant had served the Respondent for about 9 years by the time of separation.

28. In consideration of the length of service, the Court is of the view that the equivalent of 10 months gross wages as compensation would be appropriate (gross salary at time of separation was Kshs 26,099/-).

#### **Salary arrears July to September 2015**

29. The Claimant sought Kshs 90,000/- being salary arrears for July to September 2015.

30. The Claimant was entitled to wages up to 15 August 2015 being the date of separation and he was paid the wages.

31. In the view of the Court, the Claimant cannot legitimately lay claim to wages after date of separation.

#### **Severance allowances**

32. The Claimant's employment was not terminated on account of redundancy, and therefore he is not eligible or entitled to *severance allowance*.

#### **Conclusion and Orders**

33. The Court finds and holds that the termination of the Claimant's employment was unfair and awards him and orders the Respondent to pay him

(a) Compensation     **Kshs 260,990/-**

34. Claimant is denied costs as he failed to file and serve submissions within the agreed and set timelines.

**Delivered, dated and signed in Nairobi on this 1<sup>st</sup> day of March 2019.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Larabi instructed by Mung'ao Rachier & Co. Advocates

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

Court Assistant Lindsey