



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 81 OF 2016 CONSOLIDATED WITH CAUSE 82 OF 2016

GODFREY KINYANJUI KAMAU..... 1ST CLAIMANT

ROBERT SAPHANIA LASITI.....2ND CLAIMANT

VERSUS

TUSKER MATTRESSES LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 2nd December, 2016)

JUDGMENT

The claimants filed their respective statements of claims against the respondent on 05.05.2016 through Ishmael & Company Advocates. They prayed for judgment against the respondent on the headings of salary for January 2016, 2 months notice pay, bonus pay for 3 years, gratuity for 19 years for 1st claimant and 11 years for 2nd claimant (1st claimant a sum of Kshs.1,625,565 and the 2nd claimant Kshs.1, 469, 598). The claimants further prayed for general damages for unfair treatment arising from the resignation; an order for issuance of a certificate of service for the years served; costs of the suit and interest; and any other relief the court may deem fit to grant.

The statements of response were filed for the respondent in both suits on 10.06.2016 through Macharia, Burugu & Company Advocates. The respondent prayed for:

- a) The claimants' claims be dismissed.
- b) Costs of the suit.
- c) Any other relief the court may deem fit.

There is no dispute that the claimants were in the employment of the respondent.

The **1st issue** for determination is about the 1st claimant's period of service. The 1st claimant was employed by the respondent in June 1998 at the time the respondent was known as Magic Super Stores and which name changed to Tusker Mattresses Limited in 2001. There is clear evidence that the claimant did not continue in employment without a break from 1998 until the date of resignation. The court finds that by the letter dated 08.04.2001 the respondent employed the claimant effective 01.05.2000 and there was no reference to the previous service under Magic Super Stores. The court finds that the 1st claimant's period of service must therefore be reckoned from 01.05.2000 since the change in the employer's name did clearly affect the 1st claimant's period of service and it was not a mere change in name but also a

change in the legal personality thereby breaking the period of service. The period of completed years of service is 15 years as submitted for the respondent.

The **2nd issue** for determination is whether the claimants are entitled to general damages arising from the resignation. The claimants wrote to resign by giving 60 days notice as per clause 16(c) of the collective agreement. The respondent decided to waive the notice period as given by each claimant and instead asked the claimants to immediately leave employment. In view of the voluntary resignation, the court finds that the termination was by agreement in accordance with the provisions of the collective agreement, it was not unfair, and the claims and prayers for compensation are unfounded as they are not justified.

The **3rd issue** for determination is whether the claimants are entitled to urge the other remedies as prayed for on the basis of the collective agreement filed in court. First, the parties agreed to terminate the contract of employment in terms of clause 16(c) of the collective agreement. By that conduct, the court returns that the parties acknowledged that the collective agreement applied. Second, the collective agreement in clause 32 provided thus, **“This agreement shall be effective from 1st March 2013 and it shall remain in force for a period of 24 months. Thereafter, it shall continue in force until is amended by agreement between the two parties. Provided that any party wishing to amend it gives the other party one month’s notice of such intention giving in writing the detail of the amendment so required.”** In absence of any other collective agreement and by operation of that clause, the court returns that as at the time the claimants resigned in January 2016, the collective agreement applied. Third, the claimants testified and pleaded that they were members of the Kenya Union of Commercial, Food and Allied Workers and the court returns that the collective agreement applied.

The **4th issue** for determination is whether the claimants are entitled to the other remedies as prayed for. The court makes findings as follows:

1) The claimants would have worked for 60 days effective the date they gave notice. They gave the requisite contractual 60 days notice but the respondent asked them to leave immediately. The 1st claimant is entitled to pay for 6 days worked in January 2016 being **Kshs. 5, 928.00** and the 2nd claimant **Kshs.4, 940.00** for 5 days worked in January 2016. The claimants desired to work and earn for the 60 days notice period but the respondent failed to accord them the opportunity to work as per the contractual provision. Each claimant is entitled to 2 months pay in that regard at Kshs. 29, 644.00 per month and each is awarded **Kshs. 59, 288.00**.

2) The claimants prayed for overtime and pay in lieu of annual leave for the period prior to the collective agreement, being before 01.03.2013. The court finds that the claims were continuing injuries to be claimed within 12 months from the date they ceased to take place and as per the period of limitation in section 90 of the Employment Act, 2007. The 12 months lapsed on or about 01.03.2014 and the court returns that the cause of action as relates to those claims was time barred and the prayers are declined.

3) The respondent by the claimants’ pay slips for December 2013 established that the claimants had been paid the bonus for 2013. As for 2014 and 2015, the respondent stated that all workers had not been paid due to difficult financial times that the respondent was experiencing in those years. The claim for bonus is based on clause 28 of the collective agreement which states, **“The company shall pay all unionisable employees an annual bonus equivalent to the employee’s non variable salary (comprising of basic salary, housing allowance, commuter allowance and monthly bonus) to be paid half yearly. However, the bonus payment for the first year will be paid out once.”** The claimants have established that the bonus for 2014 and 2015 had not been paid to them. The court finds that the clause did not peg the payment to the respondent’s financial performance as was submitted for the respondent. In any event, the difficult financial times as was urged for the respondent was not exhibited. Thus for the 2 years each claimant is entitled to 2 months pay in that regard at Kshs. 29, 644.00 per month and each is awarded **Kshs. 59, 288.00**.

4) The 1st claimant prayed for gratuity for 18 years and the 2nd respondent for 11 years. Clause 24 of the collective agreement states thus, **“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.”** As submitted for the respondent, for the 1st claimant the pay upon non-variable salary being (29644/30) x20 x15 completed years (from May 2000 to January 2016) making **Kshs. 296, 440.00** and for the 2nd claimant (29644/30) x 20 x 10 completed years(from 01.07.2005 to 06.01.2016) making **Kshs.197, 626.70**.

5) The respondent to pay the 1st claimant a sum of **Kshs.420, 944.00** and the 2nd claimant a sum of **Kshs.321, 142.70** as found due in this judgment.

In conclusion judgment is hereby entered for the claimants against the respondent for:

a) The respondent to pay the 1st claimant **Kshs.420, 944.00** and the 2nd claimant a sum of **Kshs.321, 142.70** by 01.02.2017 failing interest to be payable thereon from the date of the suits 05.05.2016 till full payment.

b) The respondent to pay the claimants’ costs of the suit.

Signed, dated and delivered in court at Nyeri this Friday, 2nd December, 2016.

BYRAM ONGAYA

JUDGE