



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 94 OF 2014

ANDREW NDERITU NDUNGU..... CLAIMANT

VERSUS

TUSKER MATTRESSES LIMITED..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 10th July, 2015)

JUDGMENT

The claimant filed the memorandum of claim on 06.08.2014 in person. The claimant prayed for judgment against the respondent for:

- a. Gratuity for 13 years at Kshs.169, 129 x 13 making Kshs. 2, 198, 677.00.
- b. One month pay in lieu of termination notice Kshs. 197, 729.00.
- c. Pay for 288 rest days at double pay Kshs.3, 247, 276. 00.
- d. Holidays 126 days at double pay rates making Kshs. 1,425, 723.00.
- e. 6 leave days being Kshs. 84, 564.00.
- f. 2 days worked and not paid Kshs. 11, 275.00.
- g. Total claim Kshs. 7, 065, 244.00 less Kshs. 197, 729.00 making **Kshs. 6,867,515.00.**
- h. Costs of the suit.

The respondent filed the statement of response on 29.08.2014 through Muthoga Gaturu & Company Advocates. The respondent prayed that the claimant's claims be dismissed with costs.

The claimant was employed by the respondent from 2001 to 2014. The claimant was initially employed as a shop assistant and promoted through the ranks to a branch manager. The claimant testified that he served for 14 years and he wished to progress his career in a different dimension. Thus on 30.04.2014 the claimant wrote to resign from employment. The letter addressed to the respondent's human resources manager stated as follows:

“RE: TERMINATION OF MY EMPLOYMENT SERVICES IN T.M.L

I have terminated my employment services as a branch manager and as an employee of Tusker Mattresses Ltd.

This is due to my health concern and other personal issues.

I have given two (2) months notice until lapsing date on 30th June 2014.

I thank the management for having given me the opportunity to serve Kenyans in Daima, Chigware, Imara, Adams, Embakasi and Chania branches for over thirteen years (13).

Thank you very much. GOD BLESS TUSKYS.

Signed

A.N.NDUNGU”

The respondent accepted the claimant’s resignation by the letter dated 2.05.2014. In that acceptance letter the respondent waived the notice required of the claimant and asked the claimant to leave by close of 2.05.2014 by proceeding on 15 days accrued leave pending the resignation. The respondent asked the claimant to handover before leaving, appreciated the claimant’s service, wished the claimant well and asked the claimant to collect his terminal dues from the human resources office on 14.06.2014 at 11.30a.m. The claimant also received the letter dated 2.05.2014 purporting to be a letter of gross misconduct alleging that the claimant irregularly took Kshs.2,000.00; the claimant’s performance was poor; and that the claimant took from the respondent’s supermarket 2 gallons of water without paying for it. The court finds that the letter alleging misconduct was irregular as it had no consequence because it came after the respondent had already accepted the claimant’s resignation thereby bringing the employment relationship to an end.

The main issue for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

1. The claimant was in the respondent’s management. He was not eligible to join the trade union and was not a member of the trade union at the time the employment relationship came to an end. However the respondent’s witness admitted and testified that between 31.01.2001 to 1.09.2007 the claimant was entitled to gratuity as per the then collective agreement being the then monthly salary Kshs. 62, 720.00 x 6 years of service divided by 2. The court has considered that the respondent did not pay that gratuity promptly or at all upon the claimant getting promoted to management cadre. Thus, to meet the ends of justice that gratuity will be computed on the basis of the claimant’s salary at separation being Kshs. 197, 729.00 x 6 years divided by 2 making **Kshs.593, 187.00** and the court awards the claimant accordingly.
2. The claimant prayed for one month pay in lieu of the termination notice. As it was submitted by the claimant, it was in breach of the contract when the respondent opted to accept the claimant’s resignation by requiring the claimant to forthwith leave employment. The respondent acted in breach of the clause on the one month notice and the claimant is entitled to one month pay in lieu of notice. The respondent’s witness RW testified that the employment ended on 15.05.2014 yet the claimant was paid full month so that the notice pay due would be for half month being Kshs. 197, 729.00 divided by 2 making **Kshs. 98, 864.50** and the court awards the claimant accordingly.
3. The claimant prayed for pay for 288 rest days being Kshs.3, 247, 276.00 and Kshs.1, 425, 723.00 being pay for 126 holidays worked and not paid. The claimant testified that he was not given complete rest days and he was denied rest on public holidays. The respondent’s witness admitted that the claimant was entitled to 26 rest days due and not taken or paid and in cross examination the witness admitted 99 days. The court finds that the claimant is entitled as admitted because in absence of further evidence in that regard, the court finds that the claimant did not justify the other days as claimed. Thus the claimant is entitled to 99 days x Kshs. 169, 129.00 x 2 divide by 30 days of a typical monthly service making **Kshs.1, 120, 211.40** .As for public holidays, the respondent’s witness admitted that the muster roll showed that the claimant worked all the 126 days as claimed and the same was to be paid at double the rate as claimed. The respondent’s witness alleged that the pay was not available to the managers like the claimant but the relevant policy as alleged by the witness was not filed in court. Accordingly the court finds that the claimant worked for the 126 public holidays and is awarded **Kshs. 1, 425, 723.00** as prayed for. While making that findings the court considers that the injury by reason of the claims based on rest days and the public holidays was of continuing nature and the employment having ended on 2.05.2014 and the suit filed on 06.08.2014, the suit was filed within 12 months of cessation of the

- injury as envisaged in section 90 of the Employment Act, 2007. The claimant is therefore entitled as found due.
4. The respondent paid the claimant full pay for May 2015 and the court has found that 15 days were fully paid during the leave period. Thus the court finds that the claimant is not entitled to leave pay as claimed.
 5. The claimant worked on 1st and 2nd May 2014. The full pay for May 2014 has already been applied on leave days and the half month pay in lieu of the termination notice. Thus the court finds that the claimant is entitled to the pay for the 2 days worked and is awarded **Kshs.11, 275.00** as prayed for.

The claimant has substantially succeeded in his claim and the court awards him costs of the suit fixed at **Kshs.50, 000.00** only.

In conclusion judgment is entered for the claimant against the respondent for the respondent to pay the claimant **Kshs. 3, 299, 260.90** by 1.10.2015 in default interest at court rates to be payable thereon from the date of this judgment till full payment.

Signed, dated and delivered in court at **Nyeri** this **Friday, 10th July, 2015**.

BYRAM ONGAYA

JUDGE