



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

**AT NAIROBI**

**CAUSE NO. 1229 OF 2015**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 31<sup>st</sup> July, 2017)**

**JANE MWOLOLO.....CLAIMANT**

**VERSUS**

**AMAZON MOTORS LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant herein filed his Memorandum of Claim on 14.7.2015 through the firm of Nchogu, Omwanza & Nyasimi Advocates. He contends wrongful/unfair/unlawful/unconscionable termination by the Respondent and prays that the Respondent pays her terminal dues including notice pay, baggage allowance, leave pay, gratuity and payment in lieu of annual leave and damages for breach of trust and confidence.
2. The Claimant contends that she was employed by the Respondent on 16<sup>th</sup> August 1982 as a Stores Clerk Grade III and later promoted to be a Stock Records Assistant with effect from 1<sup>st</sup> November 1990 which position she held till the time of dismissal on 2.8.2013.
3. The Claimant avers that she was terminated vide a letter dated 31<sup>st</sup> day of July 2013 on allegations of restructuring without adhering to or complying with the requisite law.
4. The Claimant contends that the Respondent acted with outright malice, bad faith and contempt of Claimant's right to have knowledge regarding the decision to terminate her in the pretext of financial difficulties.
5. She also contends that the functions she was performing for the Respondent will continue to be undertaken by other person or persons and thus the purported reason was really an excuse to cover the underlying truth which nonetheless has not been disclosed to the Claimant that there was no agreed criterion on how retrenchment would be effected.
6. She contends that in effecting the said termination, the principles of natural justice and good industrial relations practice guidelines and statutory laws were not followed. She avers that the Respondent should have been more prudent and entered into meaningful dialogue, consultation and consensus building with herself or her representative as laid down in law to avoid unnecessary legal action.
7. The Claimant avers that she has made demand for payment and her dues including Kshs.25,376 which

was deducted from her Sacco contributions but the Respondent has neglected, refused or failed to make good the payments hence this suit. At the time of her termination she avers that she was earning Kshs.40,508/= as evidenced from her exhibited payslips (Appendix 6).

8. She prays for payment of Kshs.1,292,405/= as per her paragraph 9 of her claim.

9. The Respondent on their part filed their Response to the Claim on 3/9/2015 through the firm of Musyimi & Company Advocates. They admit having employed the Claimant but deny breaching any law in her termination as alleged.

10. They aver that they issued her with Notice of Intention to terminate her services on account of redundancy on 31<sup>st</sup> July 2013 in accordance with Section 40 of Employment Act 2007. That the said notice also gave reasons for the redundancy as required by law and the terms of the redundancy including the redundancy dues that would be paid.

11. The Respondent further submitted that they were forced to reduce staff at the company owing to financial difficulties and had been involved in restructuring and staff rationalization owing for financial difficulties since 2013 which the Claimant was aware of.

12. They aver that the redundancy was not done in bad faith and that the Claimant was paid all her severance pay at the rate of 18 days for each completed year of service.

13. The Respondent pray that this claim be dismissed with costs.

14. I have considered the evidence and submissions of both parties. I have also considered the documents attached to the pleadings herein and the pleadings themselves.

15. I have noted that the Claimant was indeed employed on 16.8.19982 as per the letter of employment dated 13.8.1982 Appendix 2. She served Respondent continuously earning herself promotion on 1<sup>st</sup> November 1990.

16. On 31.7.2013, she received a letter terminating her services which stated as follows:

**“RE: TERMINATION OF SERVICE ON RESTRUCTURING**

***As you might be aware, the Company has been operating under very difficult financial constraints. Though the management has tried to hold on the status quo, it has become increasingly unbearable. Accordingly, it has been decided that the Company’s operations be restructured. Among other areas, the restructuring involves staff rationalization.***

***In this regard, this is to inform you that you have been affected by the staff reduction programme. Consequently, your services with the Company will cease with effect from 2<sup>nd</sup> August, 2013.***

***You are advised to hand over to your head of section all company documents and property within your possession after which you will clear with all the Departments before the Accounts Department pays your terminal dues as follows:***

***a) Salary up to and including 2<sup>nd</sup> August, 2013.***

***b) Gratuity @ 18 days per each completed year.***

***On behalf of the Management and the entire Amazon Motors Staff, I take this opportunity to thank you for the dedication and devotion with which you have served this Company and wish you the very best in your future endeavors.***

*Yours faithfully*

*For: Amazon Motors Limited*

*Signed .....*”

17. From this letter, it is apparent that the Claimant was never given notice before this restructuring.

18. Section 40(1) of Employment Act 2007 states as follows:

**(1)“An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions:-**

**(a) Where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;**

**(b) Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;**

**(c) The employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;**

**(d) Where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;**

**(e) The employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;**

**(f) The employer has paid an employee declared redundant not less than one month’s notice or one month’s wages in lieu of notice; and**

**(g) The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service”.**

19. None of the provisions listed above were ever followed before the Claimant’s services were terminated. The Respondent may indeed have been having financial difficulties but they failed even to inform their employees and even engage in consultation as was held by the Court of Appeal in Civil Appeal No. 46 of 2013 **Kenya Airways Limited vs. Aviation and Allied Workers Union Kenya & 3 others (2014) eKLR**. JA Maraga (as he then was) states as follows:

**“As I have said, besides this Convention, the requirement of consultation is implicit in the principle of fair play under Section 40(1) of the Employment Act itself and our other labour laws. The notices under this provision are not merely for information..... I am of the firm view that the requirement of consultations are implicit in these provisions. The purpose of the notice, as is also provided for in the said ILO Convention No. 158- Termination of Employment Convention, 1982, is to give the parties an opportunity to consider measures to be taken to avert or to minimize the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment. The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable”.**

20. Though the Respondent stated that he was going through financial difficulties no evidence is tendered in Court to prove the same nor was such evidence given to the Claimant before termination.

21. It is apparent that the Respondent breached the law under Section 40(1) of the Employment Act and caused the Claimant an abrupt unfair termination- the abruptness that was bound to cause the Claimant untold suffering given the lack of notice or preparedness that Claimant was not given. I find the termination as a whole unfair, wrongful and in breach of the law.

22. In the circumstance I find for the Claimant and award her as follows:

***1 Severance pay at the rate of 18 days for each year worked being  $18/30 \times 40,508 \times 31 = 753,448.80$  less what was paid 711,591/=.***

***Balance owing is 41,857.80.***

***2. 1 months' salary in lieu of notice= 40,508/=.***

***3. Pending SACCO contribution deducted***

***from Claimant and admitted by the***

***Respondent in their pleadings = 25,375/=.***

***4. 26 leave days = 40,508/=.***

***5. 12 months' salary as damages for unlawful termination =  $40,508 \times 12 = 486,096/=$ .***

***6. Outstanding gratuity = 31,536/=.***

**Total = 665,880/=**

***7. Issuance of Certificate of Service.***

***8. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgment.***

Read in open Court this **31<sup>st</sup> day of July, 2017.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Mueni Nyokabi for the Respondent – Present

Wageshe holding brief Nyasimi for the Claimant – Present