



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1720 OF 2012**

**IGBAL PARVEZ..... CLAIMANT**

*VERSUS*

**SIMBA COLT MOTORS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

Mr. Tariq Khan for the Claimant

M/s Macharia for the Respondent

**JUDGMENT**

1. This suit was commenced by a Memorandum of Claim dated 21<sup>st</sup> September 2012 and filed on 26<sup>th</sup> September 2012 seeking damages for unlawful discrimination at the work place and unlawful withholding of salary and payment of terminal benefits particularized as:

- i. A deficit of Acting allowance for a period of 2<sup>1/2</sup> years working as the General Manager for Power Systems Division calculated at Kshs.500,000 multiplied by thirty five (35) months.
- ii. Costs of the suit.

**Facts of the Claim**

2. The Claimant was employed as a Field Service Manager in the Power Systems division of the respondent by a letter of appointment dated 20<sup>th</sup> November 1997. The Claimant was placed on probation and was confirmed by a letter dated 6<sup>th</sup> April 1998 effective 1<sup>st</sup> April 1998.

3. On or about November 2009, the then General manager Power Systems Division, a white expatriate by the name of John Jutson was relocated to other duties and the Claimant states that he took over the duties and Responsibilities of Mr. Jutson, who was prior to that date, his immediate supervisor.

4. The Claimant states that this movement and assumption of General Manager duties in the power Systems Division was a promotion. That in addition to the assumption of duties of General Manager the Claimant states that he continued rendering his services of field service manager simultaneously.

5. It is the Claimant's case that the Claimant repeatedly, continuously and constantly requested to be confirmed to the new position of General Manager Power Systems Division and sought to have his salary and benefits elevated to the remuneration earned by the immediate past holder Mr. John Jutson in vain. The Claimant tendered as evidence letters marked 'IP4' to this effect.

6. The request by the Claimant was however not heeded by the Respondent and the Claimant was never subsequently appointed officially to head the Power Systems Division as the General Manager nor was any adjustment to his remuneration done. The Claimant was also not paid any acting allowance or remuneration comparable to the services rendered. This situation persisted for a period of two and a half (2<sup>1/2</sup>) years.

As a result of this failure by the Respondent the Claimant tendered a letter of resignation dated 3<sup>rd</sup> June 2011.

7. It is the Claimant's case that the resignation was a result of gross fundamental breaches occasioned him by the Respondent. The letter of resignation was tendered in evidence as annexure 'IP5'.

Subsequently, the Claimant through his Advocates wrote letters of demand which were not heeded, hence this suit.

8. The Claimant gave oral testimony in support of his case and in summary stated that the conduct by the Respondent amounted to unfair discrimination contrary to **Section 5(3)(a)** of the Employment Act, 2007 in that the Respondent treated the previous holder of the position he had assumed differently in that the white expatriate was paid much higher remuneration than the Claimant for equal work done.

9. That this treatment was also in contravention of **Section 5(4)** of the Employment Act, 2007.

10. The Claimant further submits that the conduct by the respondent amounted to unfair labour practice and the different treatment was based on race in that the Claimant was a Kenyan of Asian origin while the predecessor was a white expatriate. That the two held the same position and they ought to have been remunerated similarly.

11. The Claimant relied on his various certificates to show that he had the necessary qualifications, experience and competence to replace Mr. Jutson and thus ought to have been remunerated similarly. The Claimant urges the Court to find in his favour and award him as prayed.

### **Respondent's case**

12. The Respondent filed a Response to the Memorandum of Claim dated 15<sup>th</sup> November 2012 on 19<sup>th</sup> November 2012.

The Respondent while admitting that it had employed the Respondent denies allegations that the Claimant was unfairly discriminated against based on race, as alleged or at all.

13. The Respondent adds that the Claimant was employed as a field Manager and rose to the position of Manager, Power Systems Division.

14. The Respondent in particular denies that the Claimant was promoted to the level of a General manager and / or that the Claimant assumed the roles, responsibilities or duties of a General Manager as alleged or at all and the Claimant was put to strict proof of the same.

15. The Respondent stated in its Response and through RW1 and RW2 who testified in support of its case that, upon the reassignment of the then General Manager Power Systems Division Mr. John Jutson, a white, expatriate, the Claimant assumed the responsibility of a Manager, not a General Manager; and his role was different and limited to day to day management of the division only. This position was confirmed via an internal office memorandum dated 5<sup>th</sup> May 2009 on staff appointments and re-allocations tendered in evidence before Court and also in the memorandum dated 29<sup>th</sup> July 2011 produced as 'IP3' in the Claimant's bundle of documents.

16. That the reassignment of Mr. John Jutson, from the position of General Manager Power Systems

Division was occasioned by among other reasons a decline in the business levels in the Power Systems Division and therefore the Division no longer warranted a General Manager as its head.

That this followed a loss of a big supply contract of Cummines diesel engines by the Respondent which necessitated the Respondent to rethink its entire strategy and to review Mr. John Jutson's responsibilities to inter alia source for new supply contract.

17. That Mr. John Jutson was a professional of much higher qualification and experience than the Claimant and that the Claimant had no ability to assume the roles and responsibilities formerly held by Mr. John Jutson as alleged or at all. The Respondent produced a wide range of professional certificates and testimonials in Court to demonstrate this fact.

18. That this was the sole basis of different remuneration between the Claimant and Mr. John Jutson and that the Respondent did not use any racial considerations in that decision.

19. The Respondent further states that an independent job evaluation and grading exercise was conducted by Deloitte Consulting Limited wherein the position of the head of power Systems Division was evaluated to be that of a middle Manager as seen in exhibit 'SCC-1'.

20. In terms thereof, positions within similar levels of responsibility accountability and skills requirements were placed in the same grading level and the position of the head of the Power Systems Division was graded as that of middle level Manager.

21. It is the Respondent's case that, it was not in the circumstances envisaged or possible to promote the Claimant to the position of a General Manager when that function had been rendered obsolete, on the basis of the declined level of performance of the Division and on the basis of the recommendation of a reputable professional services firm.

The Respondent submits that the Claimant's case has no basis and the same be dismissed with costs.

## 22. **Issues for determination**

- i. Was the Claimant discriminated against on the basis of race by the respondent at the work place?
- ii. If question (1) above is in the affirmative, what remedy is available to the Claimant?

### **Issue i**

23. **Section 5(3)** of the Employment Act, 2007 provides;

*"No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee –*

*on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, or pregnancy, mental status or HIV status;"*

to satisfy the aforesaid requirement, subsection 5(4) further provides;

*"An employer shall pay his employees equal remuneration for work of equal value."*

24. The Claimant relies on these two provisions in his endeavor to satisfy the Court that;

- a. He was an employee of the Respondent.
- b. That he was a Kenya of 'Asian' origin.
- c. That he was promoted to and held the position of General Manager Power Systems Division for 2<sup>1</sup>/<sub>2</sub> years.

- d. That the immediate predecessor was Mr. John Jutson, a white expatriate.
- e. That upon assuming this position by virtue of his racial origin, the Respondent paid the Claimant much less remuneration than that previously paid to Mr. John Jutson only for the reason that the Claimant was a person of Asian descent whereas Mr. John Jutson, was a white person of British descent.
- f. That the Respondent therefore discriminated against the Claimant on grounds of race.

25. The Employment Act, 2007 does not define discrimination but **Convention No. III Convention concerning discrimination in respect of Employment and Occupation, 1958** defines discrimination under Article I thus;

*“for the purpose of this Convention the term “discrimination” includes;*

*Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;”*

(emphasis mine)

This convention, which is ratified by Kenya is part of our municipal law by dint of **Article 2(6)** of the Constitution of Kenya 2010 which provides;

*“Any treaty or Convention ratified by Kenya shall form part of the law of Kenya under this Constitution.”*

26. The Court therefore adopts this definition of the term ‘discrimination’ in arriving at the conclusion, based on the facts of this case, whether or not the Claimant was discriminated upon by the Respondent on the basis that he was for a period of 2<sup>1</sup>/<sub>2</sub> years paid a lower remuneration to that previously paid to John Jutson simply because the Claimant was of a Kenyan of Asian descent whereas Mr John Jutson was a white person of British descent.

### **Conclusions of Fact**

27. Upon a thorough consideration of the pleadings by the parties, the oral and documentary evidence by the Claimant and that by RWI, Isabel Ngugi, the General Manager Human Resource of the Respondent and that by RW2 John Ikinya, Human Resource Manager of the Respondent, have come to the following conclusions of fact;

- i. the Claimant was promoted to the position of Manager – Power Systems Division on or about November 2008;
- ii. this position was a diminished position, with less duties and responsibilities to the position previously held by Mr. John Jutson, the then General manager, Power Systems Division;
- iii. the Claimant has failed to prove on a balance of probabilities that he ever at any one point held the position of General Manager Power Systems Division;
- iv. the allegation by the Claimant that he received less remuneration than previously paid to Mr. John Jutson while holding the same position has no factual basis;
- v. Mr. John Jutson had far much higher, diverse and relevant technical qualifications and experience than the Claimant and therefore, it is incorrect for the Claimant to assert otherwise in support of his case.
- vi. There is complete lack of indicators tending to show that Mr. John Jutson was favoured and better remunerated only for the reason that he was a white person. Quite to the contrary, the ability of Mr. Jutson to discharge much wider duties, based on qualification and experience was clearly demonstrated.

28. It follows therefore that the allegation by the Claimant that he was discriminated against on the basis of race by being paid less remuneration for work of equal value is not based on any proven fact.

29. I concur with the finding by the South African Labour Court in **Michael Louw V. Golden Arrow Bus Services, case No.C.37/97** thus;

“discrimination on a particular ‘ground’ means that the ground is the reason for the disparate treatment complained of. The mere existence of disparate treatment of people, for example, different races, is not discrimination on the ground of race unless the difference in race is the reason for the disparate treatment .....

30. Consequently, the Claimant has failed to prove any of the particulars of claim on a balance of probabilities with the result that the entire suit is dismissed with costs to the Respondent.

**Dated and Delivered at Nairobi this 5<sup>th</sup> day of June, 2015.**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**