



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

**CAUSE NO. 2292 OF 2012**

**AMALGAMATED UNION OF KENYA METAL WORKERS**  
**CLAIMANT**

**VERSUS**

**PARKLANDS MOTORS LIMITED**

**RESPONDENT**

**JUDGMENT**

By a Memorandum of Claim dated 2nd October 2012 and filed in court on 11<sup>th</sup> November 2012 supported by a verifying affidavit of **SAMSON ODHIAMBO** herein after referred to as “the grievant”, the Claimant **AMALGAMATED UNION OF KENYA METAL WORKERS** avers that the grievant was employed by the Respondent as an artisan grade 111 at its business premises in Parklands, Nairobi in 1989; That his employment was terminated on 8<sup>th</sup> September 2011 on allegation of theft. The Claimant alleges that the true reason for termination of the grievant’s employment was because the grievant was involved in union activities as he is the one who enrolled his colleagues into the claimant union’s membership. The Claimant further alleges that the grievant attained trade test grade 11 but the Respondent continued paying him as grade 111, thus leading to underpayment of the grievant’s salary. That the dispute was reported to the Minister for Labour after the parties failed to resolve it at their own level. Parties were unable to reconcile at conciliation level leading to the issuance of certificate of disagreement by the conciliator thus paving the way for filing of this case under section 49 of the Labour Relations Act. That the Respondent was in breach of section 41 of Employment Act, Article 41 of the Constitution and ILO conventions no. 158, 87 and 98. The claimant also alleges that the Respondent was not paying NSSF and the grievant is therefore entitled to service gratuity.

The claimant seeks the following orders-

- a. An order that the action of the Respondent is unfair/unlawful and order reinstatement of the grievant without loss of any benefit,
- b. That in the alternative the grievant be paid his terminal benefits and an additional 12 months gross salary as compensation and damages of all his salary for the remaining period of 10 years before he would attain retirement age as follows:

i. Pay in lieu of notice (one month)	Kshs. 15,994.00
ii. Service gratuity (25 years)	Kshs. 173,850.00
iii. Annual leave	Kshs. 47,982.00
iv. Underpayment (3 years)	Kshs. 251,784.00
v. 12 months’ salary compensation	Kshs. 191,928.00
vi. Damages (10 years)	Kshs.1,919,280.00

- vii. That the grievant be issued with a certificate of service
- viii. Costs
- ix. Any other relief the Honourable Court may deem fit to grant.

The Respondent filed its Response to Memorandum of Claim on 27<sup>th</sup> February 2013 in which it denies the allegations in the Memorandum of Claim. It avers that the Respondent was employed by Solex Motors from 2003 to 2007, and thereafter by the Respondent from 2007; that the grievant's exit was as a result of ill health, that the Respondent is not aware about the allegation of theft as alleged by the grievant. The Respondent further alleges (*in contradiction to its averment that it is not aware about the grievant's allegation of theft*) that the Grievant was found stealing from the Respondent and decided to quit employment on his own volition and the Respondent paid him off. The Respondent further denies receiving notice of demand to sue from the claimant. The Respondent avers that the claim is misplaced and prays that the suit be dismissed with costs.

The case was heard on 24<sup>th</sup> June 2013 when the grievant testified on his behalf. In his testimony the grievant stated that he worked for Parklands Motors from 1989 as a spray painter. That at the time the company was called Parklands Esso Autoparts. The company changed its name in 1992 and was split into 3 different companies namely Parklands Motors, Autospray and Solex motors. The managing directors for Parklands Motors and Solex Motors are brothers. The grievant was transferred to work at Solex Motors in 2005 when an employee at Solex Motors by the name Odhiambo died. Parklands Motors continued paying his salary. In June 2010 he fell sick and was away for treatment for 3 months. When he came back he was put on light duty. On 7<sup>th</sup> September 2011 he went for treatment and when he reported back on 8<sup>th</sup> September he was accused of entering the store and stealing spare parts. He was given seconds to leave the premises failing which the Respondent threatened to call the police to arrest him. He left immediately and reported to Parklands Police Station where he recorded a statement. He was not paid any terminal dues. His last salary was Kshs. 9000.00. He was not a member of NSSF or any other retirement benefits scheme.

On cross examination the grievant testified that he was never issued any employment documents, that he wrote a letter seeking increase of salary but the company declined stating that he was already being paid well. He denied that he was terminated on grounds of ill health.

The case was adjourned to 27<sup>th</sup> September 2013 for hearing of the Respondent's case but on the hearing date the court was informed that the Respondent did not wish to call any witness. Parties proceeded to file written submission.

I have carefully perused the pleadings, the court proceedings together with the annexures thereto and the written submissions filed by the parties.

The issues for determination in my opinion are the following;

1. Whether the grievant was employed by the Respondent in 1989 or 2007;
2. Whether the grievant's employment was terminated as a result of ill health and stealing from the employer, for trade union activities or left employment on his own volition ;
3. Whether the grievant was underpaid salary;
4. Whether the termination of the grievant's employment was unfair/unlawful;
5. Whether the grievant is entitled to the terminal benefits as prayed for.

**1. *When was the grievant employed by the Respondent***

The claimant has submitted that the grievant was employed in 1989. In his testimony under cross examination the grievant stated that he was not issued any employment documents by the Respondent. The Respondent however alleges that the grievant was employed in 2007 and that previously he was employed by Solex Motors. The grievant explained in his testimony that he worked for Parklands Motors and only went to work at Solex Motors when an employee of Solex Motors by the name Odhiambo died.

He testified that his salary was still paid by Parklands Motors which was owned by a brother of the Managing Director of Solex Motors.

In the bundle of documents filed by the Claimant there is a letter dated 7th January 2000 from Parklands Motors in which it communicated to the grievant its inability to increase the grievant's salary. There is no explanation anywhere in the pleadings filed by the Respondent wherein it explained what happened between 2000 when that letter was written and 12<sup>th</sup> July 2007 when the grievant allegedly signed a contract of employment with the same employer. The Respondent has not denied the authenticity of the said letter. The grievant on the other hand denied that he ever left employment except for the period when he worked for Solex but was paid by the Respondent.

In its Response to Memorandum of Claim and submissions the Respondent avers that the grievant was employed by Solex between 2003 and 2007 and only applied for employment with the Respondent in 2007. In its bundle of documents the Respondent has annexed a Certificate of Service from Solex to that effect which the grievant testified he saw for the first time at the labour office during the conciliation meeting.

Section 10(6) of the Employment Act obligates an employer to keep written prescribed particulars of employment, which include letters of appointment, for 5 years after termination of employment while section 10(7) provides that “ ***If in any legal proceedings an employer fails to produce a written contract ....the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.***” The Respondent does not deny employing the grievant. It has however neither adduced evidence to explain how the contract that existed in 2000 came to an end nor a contract accepting the (alleged) application for contract employment dated 12<sup>th</sup> September 2007 to confirm it employed the grievant pursuant to the application.

Having failed to submit evidence to controvert the allegation of the grievant that he was employed in 1989 and did not leave employment until 8<sup>th</sup> September 2011, I find that the grievant was an employee of the Respondent from 1989 to 8<sup>th</sup> September 2011.

## ***2. Was the grievant's employment terminated as a result of ill health and stealing from the employer, for trade union activities or left employment on his own volition?***

The grievant testified that he went on sick off on 7<sup>th</sup> September 2011 and when he reported back on 8<sup>th</sup> October he was asked to leave immediately on grounds that he had stolen spare parts failing which the police would be called. The Respondent admits at paragraph 8 of the Response to the Memorandum of Claim that “***...The [grievant] was not terminated from employment, on the contrary, he was found stealing from the employer and decided to quit and the employer paid him off.***” This is repeated in the second last paragraph at the last page of the Respondent's undated final submission. There is however no evidence that any payment was made to the grievant upon leaving employment.

The allegation that the grievant was terminated on account of union activities has also not been proved. No evidence was tendered by the claimant to prove that the grievant participated in any union activities.

Based on the admission by the Respondent I find that the reason for termination of the employment of the grievant was the alleged stealing from the Respondent.

## ***3. Whether the grievant was underpaid salary***

The Claimant alleges in the Memorandum of Claim that the grievant was an artisan grade 111 and later qualified as artisan grade 11 but was not paid commensurate salary. No evidence was adduced as to the underpayment of the grievant's salary or that he was in possession of either grade 111 or grade 11 trade test certificate or that he ever applied to be paid as either of the those grades.

I find that the grievant has not proved the claim and dismiss it.

#### 4. *Whether the termination of the grievant's employment was unfair/unlawful*

The Claimant alleges in paragraph 2.3 of the Memorandum of Claim that the grievant's employment was terminated due to involvement in union activities as he was the one who enrolled his colleagues into the union's membership and that the allegation of theft by the Respondent is not true. No evidence was adduced by the claimant to support this allegation. The Respondent on the other hand has stated at paragraph 4 of the Response to Memorandum of Claim that the grievant's exit was as a result of ill health and theft from the Respondent. Again no evidence was adduced by the Respondent in support of this allegation the Respondent having opted not to call any evidence.

As I have already found herein above the grievant was terminated for "**alleged**" stealing from the Respondent. This was pleaded by both the claimant and the respondent. There is no evidence that the grievant was given a hearing before termination of his employment as alleged by the claimant neither any evidence that the grievant left employment on his own volition after being found stealing from the employer.

It is a cardinal rule of evidence that he who alleges must prove. Having failed to submit evidence in support of his claim that he was unfairly/unlawfully terminated, this claim has not been proved. The claim is accordingly dismissed.

#### 5. *Whether the grievant is entitled to the terminal benefits as prayed for*

The claimant has prayed for the following remedies;

- i. Pay in lieu of notice (one month)      Kshs. 15,994.00
- ii. Annual leave      Kshs. 47,982.00
- iii. Underpayment (3 years)      Kshs. 251,784.00
- iv. 12 months' salary compensation      Kshs. 191,928.00
- v. Damages (10 years)      Kshs.1,919,280.00
- vi. That the grievant be issued with a certificate of service
- vii. Costs
- viii. Any other relief the Honourable Court may deem fit to grant.

I will proceed to consider each of the remedies.

- i. Pay in lieu of notice (one month)      Kshs.15,994.00**

The respondent having admitted at paragraph 4 of the Response to the Memorandum of claim that the grievant's employment was terminated as a result of ill health and theft from the respondent the grievant is entitled to payment of notice. At paragraph 2.7 of the Memorandum of Claim it is pleaded that the grievant's last salary was Kshs. 9000 per month. I therefore award the grievant the said sum of Kshs. 9000 as pay in lieu of notice.

- ii. Service gratuity (25 years) Kshs.173,850.00**

Section 35(5) as read with section 35(6) of the Employment Act provides for payment of service pay to any employee whose employment has been terminated provided the employee is not a member of a registered retirement benefits scheme, gratuity scheme or NSSF. The respondent did not deny the claim for payment of service gratuity or adduce evidence to contradict the claim that the grievant is entitled to payment of the same.

I find that the grievant is for these reasons entitled to service pay. The amount payable is 15 days salary per year worked i.e.  $15/30 \times 9000 \times 22 = 99000$ .

I award the grievant the sum of Kshs. 99,000.00 on account of service pay.

**iii. Underpayment (3 years) Kshs. 251,784.00**

As I have already found under item 2 above the grievant did not prove underpayment of salary or specify how the sum Kshs. 251,784 claimed has been derived. I accordingly dismiss the claim.

**iv. 12 months' salary compensation Kshs. 191,928.00**

I have found above at item 4 that the grievant did not prove unfair termination of employment. Any claim for compensatory damages are only payable where the claimant proves unfair termination. Having failed to prove that his employment was unfairly terminated the grievant is not entitled to compensation and the claim is hereby dismissed.

**v. Damages (10 years) Kshs.1,919,280.00**

The claimant has not submitted any evidence or explained the basis for this claim. Damages for future earnings on account of loss of employment are not provided for in the Employment Act nor in any other employment legislation that I know of and neither has any been brought to my attention by the claimant.

For this reason I find the claim without merit and the same is dismissed for want of proof.

**vi. That the grievant be issued with a certificate of service**

The grievant is entitled to certificate of service I terms of the provisions of section 51 of the Employment Act.

**vii.Costs**

Having failed to establish that the grievant was unfairly terminated the claimant is not entitled to costs. Each party shall bear its costs.

**DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF JANUARY, 2014.**

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

**In the presence of**

..... **for the Claimant, and**

..... **for the Respondent**