



REPUBLIC OF KENYA

Industrial Court of Kenya

Civil Suit 1553 of 2011

JAMES MBOGO NJUGUNACLAIMANT

VERSUS

AMAZON MOTORS.....RESPONDENT

JUDGEMENT.

By a statement of claim filed in Court on 12th September, 2011 the claimant states that he was employed by the respondent company in October, 1995 as a management trainee at a salary of Kshs. 17,100 per month. The salary was reviewed from time to time such that as at April, 2001, the claimant was earning 70,000 per month.

The claimant in May 2001 for what he described as frustrations, resigned his position and joined Master Mind Tobacco. However he stated that after working there for sometime, the respondent approached the claimant and persuaded him to rejoin them. After negotiations he rejoined the respondent as a manager at salary of Kshs. 180,000/- per month. The claimant attached as appendix 1 the letter of appointment setting out his terms and conditions of service.

According to the claimant, he worked faithfully and diligently for the respondent until 8th February, 2010 when his services were wrongfully and unlawfully terminated by the respondent. He claimed that he had a clean employment record devoid of any warnings.

The claimant's contract provided for one month's termination notice or salary in lieu thereof. The Employer however had the right to dismiss the employee summarily where the employee disobeys any lawful order and or instructions of the management; is guilty of any serious misconduct or neglect in the performance of his duties among other things.

By a memo dated 8th February, 2010 the claimant was dismissed summarily on among many other grounds that he had lost interest in his employment and that he had opened his own garage thereby competing with his employer. The claimant disputed the grounds for his dismissal and informed the respondent that he will be seeking legal redress in the matter. He however demanded to be paid his terminal dues plus damages for wrongful termination.

The respondent never responded to these demands prompting the claimant to commence the present suit.

The respondent filed its memorandum of response in which they admitted that the claimant was the respondent's employee but accused him of not paying keen attention to the work done by his subordinates leading to several customer complaints. The respondent further repeated the accusation that the claimant in breach of his employment contract opened his own garage which provided unfair competition with the

business of his employer.

When the matter came up for hearing, only the claimant was present despite the fact that the date was fixed by consent of the parties. The Court therefore proceeded to hear the matter ex parte.

The claimant in his short testimony reiterated most of the issues in the memorandum of claim and concluded by urging the court to award him the prayers sought in his memo of claim.

These are:

	Kshs.
1. Half salary for December, 2009	90,000
2. Salary for January 2010	180,000
3. salary for eight days worked in February, 2010	48,000
4. Untaken leave	346,500
5. 12 Months salary as compensation	2,160,000
6. One month's salary in lieu of notice	180,000
7. Service pay for each year of completed service.	

Section 47(5) of the Employment Act provides that the burden of proving an unfair termination or wrongful dismissal is on the employee while the justification of the grounds of termination is on the employer. The matter having proceeded ex parte the claimant did not undergo the rigours of cross-examination hence his allegations will go uncontroverted.

The claimant was hired on 12th November, 2004 and was summarily dismissed on 17th February, 2010. His claim for half salary for December, 2009 and full salary for January was unsupported by any evidence. The claimant did tell the court under what circumstances he was paid half salary in the month December, 2009 and why his salary for January, 2010 remained unpaid until the time he was relieved of his duties. Evidenciary burden of proof always lie with he who alleges. The claimant made the allegation that he was paid only half his salary in December, 2009 and that he was not paid at all for the month of January, 2010. It was therefore his duty to lead evidence to show that no such salary was paid and under what circumstances and reasons it was not paid. The claimant failed to do so hence this limb of the claim fails.

Regarding claim for service pay, under clause 3(j) of the claimant's contract of employment, he had the responsibility to register with NSSF and NHIF and forward the number to the employer.

Under section 35(5) of the Employment Act service pay shall be payable to any employee on a contract for one month or more on termination of service however this section shall not apply to employees who are members of a pension scheme under Retirement Benefit Act, gratuity or service scheme under a Collective Bargaining Agreement or any scheme operated by an employer whose terms are more favourable or NSSF.

No evidence was led to show whether the registration was done and if not the reason why it was not. In any event if the claimant failed to register he cannot be heard to claim for severance pay since that would amount to benefiting from his own act of omission. His claim for service pay also fails.

The claimant further claims untaken leave. He however did not lead any evidence to show that during his term with the respondent he never took any leave and the reason why this was not possible. Under clause 6(a) of the employment contract, all leave must be taken during the year in which it accrues or during the period of 12 months next following its becoming due. Clause 6(b) further provides that no leave may or shall be accumulated from year to year except with the prior written agreement of the employer and any leave due and not taken shall be automatically forfeited. The claimants claim for untaken leave is therefore disallowed.

Under section 43 of the Employment Act the burden of proof on summary termination rests with the employer. Failure to do so, the termination will be deemed unfair within the meaning of section 45. This

section prohibits unfair termination of employment. The respondent never attended the hearing to discharge this burden therefore the deeming provisions of this section will be invoked by the court and a finding made that the termination was unfair.

An employee who has been unfairly terminated is entitled to among others the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service; the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

In making an order for compensation under the Act, section 49(4) set out factors which the court ought to consider when making an order for compensation or reinstatement. Of relevance to this case, these include the wishes of the employee, length of service with the employer, opportunities available to the employee for securing comparable or suitable employment and any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination.

The claimant testified during the trial of this action that he joined the respondent for the first time in 1995 and left due to what he called frustrations in 2001 to join another company. He rejoined the company once more in 2004 and worked till February, 2010 when he was summarily dismissed. The claimant further informed the court that presently he runs an auto-garage. This shows that the claimant is quite industrious and capable of taking steps to mitigate his loss and or find alternative employment.

As at the time of termination the claimant was earning a consolidated salary of Kshs. 180,000/- in the circumstances he is entitled to one month's salary in lieu of notice, the claimant is further entitled to salary for the 8 days worked in the month of February, 2010. In addition the court considers an award of six months salary as a fair compensation for the unjustified termination.

In Conclusion the court orders as follows:

One month's salary in lieu of notice	180,000
Salary for eight days worked in February, 2010 (8/30x180,000)	48,000
Six months salary for unfair termination	<u>540,000</u>
Total	768,000

This judgment is subject to statutory deductions. The claimant will have costs of the suit. It is so ordered.

Delivered this 25th day of October 2012

Abuodha Jo

Judge

Delivered in open Court in the presence of for

the Claimant and for the respondent.