



Osore v Metropolitan Life Assurance Kenya Limited (Employment and Labour Relations Cause E373 of 2020) [2024] KEELRC 1755 (KLR) (4 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1755 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E373 OF 2020**

MN NDUMA, J

JULY 4, 2024

BETWEEN

MOSES ODWAR OSORE CLAIMANT

AND

METROPOLITAN LIFE ASSURANCE KENYA LIMITED RESPONDENT

JUDGMENT

1. The suit was filed by the claimant against the respondent on 9/9/2020 seeking the following reliefs:
 - a. An order that the respondent pays the claimant Kshs. 5,039,119.76 with interest at court rates from 1st August 2019
 - b. Costs and interest
 - c. Any other relief
2. CW1, the claimant adopted witness statement dated 10th August 2020 as his evidence in chief and produced exhibits '1' to '33' in the bundle dated 10th August 2020.
3. The claimant stated that he was employed by the respondent by a letter dated 24/3/2014 in the position of Broker Consultant. That he was entitled to monthly salary of Kshs. 147,400 and an override commission of 12.7 % of the broker's commission on new and renewal business generated directly or through brokers in the claimant's structure. This was as per paragraph 5(a) and (b) of letter of appointment before court. In addition the claimant received Kshs. 2,600 cell phone allowance monthly.
4. That the claimant was confirmed to the position by letter dated 11/5/2015 upon completion of probation.



5. Claimant stated that he worked diligently and was recognized for the same by regular payment of override commission and increment of annual guaranteed remuneration as evidenced by letter dated 1/9/2015, 1/9/2016; and 13/9/2019.
6. That by the time of separation, the claimant gross salary was Kshs. 189,023.86.
7. That by a letter dated 6th August 2019, the claimant resigned from employment due to frustrations by his immediate boss which included non-payment of the override commission and instigation of criminal charges against the claimant by the supervisor Mr. James Oyugi. The claimant stated that the mistreatment had lasted a couple of years which made his continued employment untenable.
8. The claimant stated mistreatment to have included: -
 - i. Failure to pay override commission despite demand.
 - ii. Refusal to approve payment of the override commission.
 - iii. Refusal to approve funds for marketing
 - iv. Recent investigation of criminal charges against the claimant in Makadara Criminal Case No. 1846 of 2019, in which it was alleged that the claimant intended to extort money from Mr. James Oyugi by threatening to report him to EACC for the offence of failure to remit sales commission to Bilmax Insurance Brokers Ltd, and
 - v. Many more
9. The claimant gave one months' notice of resignation as per his contract. The claimant requested for payment of outstanding override commission of Kshs. 2,773,704/= before the end of the notice period. The claimant also requested to be paid in lieu of leave days not taken and asked to be advised if to proceed on leave during the notice period.
10. The claimant thanked the respondent sincerely for the opportunity granted him to serve the respondent and wished the company the very best in future endeavours.
11. The letter of resignation was acknowledged by a letter dated 15/8/2019 in which the respondent accepted the resignation but requested for payment in lieu of one month notice to the company. In a reply dated 5/9/2019 the claimant asked the respondent to deduct money equal of one month's salary in lieu of notice from his arrears override commission and pay him the balance of Kshs. 2,773,704/= plus payment in lieu of unpaid leave days.
12. The claimant however in his testimony before court stated that he was owed a balance of Kshs. 5,039,119.76 as arrear override commission in respect of:-
 - a. National police service (2018 override, Kshs. 2,507,982.85
 - b. Kenya Civil Aviation Authority (2018 override Kshs. 228,000.18
 - c. Kenya Civil Aviation Authority (2019 override Kshs. 242,667)
 - d. Agricultural Finance Corporation (2019 override, Kshs. 48,370/= and
 - e. Reserve retained for the period of employment Kshs. 2,012,033.73
13. The claimant stated that the respondent had declined to approve payment of above said commission on the renewal business secured from the National Police Service (NPS) and Kenya Civil Aviation Authority (KCAA) on the grounds that the claimant played no role in the renewal. The claimant



produced letter dated 7/5/2018 by one Timothy Muturi to the claimant which stated that the claimant did not qualify to be paid override commission for the KCAA renewal premium. The claimant produced statement indicating override commission earned and not paid at page 53 and 54 of his bundle.

14. The claimant stated that despite the demand and notice of intention to sue the respondent failed to pay the outstanding claims in respect of override commission.
15. The claimant prays to be awarded accordingly.
16. Under cross-examination by advocate Mangla for the respondent, the claimant reiterated his evidence in chief. He said he served the respondent for five years. The claimant stated that the override commission not paid was in respect of renewed business in respect of which he was entitled to override commission in terms of his letter of appointment. That the business was secured in 2018 and 2019 as reflected in his pleadings and attached documents. The claimant said he last earned commission in the year 2019 just before he resigned but the respondent declined to pay the claimed amounts.
17. The claimant denied that the *Insurance Act* section 69(1) prohibited insurance companies from paying commission to their employees for premiums secured. Claimant said that he was not aware that his contract with the respondent was illegal with regard to payment of override commission and prayed to be awarded accordingly.

Defence

18. RW1 James Oyugi the CEO of the respondent testified in defence of the suit. He adopted a witness statement dated 6/10/2020 as his evidence in chief and produced exhibits '1' to '12'.
19. RW1 said he joined the insurance industry in 1981 and is knowledgeable in the industry and the law applicable. That he knew the claimant from 2014 when he joined the respondent but had met him prior within the industry.
20. That the claimant was offered a contract dated 24/3/2014 which the claimant signed and RW1 signed as the employer. It was effective 1/4/2014.
21. That the remuneration package is at paragraph 5 of the contract. That the claimant held the position of broker consultant and his remuneration composed of override commission of 12.79% of the broker's commission on new and renewable business generated directly or through brokers in the claimant's structure.
22. That a broker consultant's primary role was to serve as a liaison on behalf of the respondent in managing the relationship between the respondent and insurance industry brokers. That in performing this role, the claimant's duties involved identifying, pursuing and establishing business channels through brokers and direct marketing efforts. He was also tasked with communicating insurance renewal schemes and coordinating business quotations with relevant departments for business development and purposes.
23. That the title 'Broker Consultant' was descriptive of the claimant's duties but was not intended to mean that the claimant was a broker in terms of the definition section 2 and provisions of section 150 of the *Insurance Act*, Cap 487 Laws of Kenya.
24. That the claimant was a permanent and full-time employee of the respondent and not an independent consultant, a third party or an intermediary operating separately from the respondent nor was he in legal stead to lawfully purport to perform the function of a broker.



25. That section 69(1) of the *Insurance Act* provides inter alia that no Insurer shall employ in any capacity a person whose remuneration or any part thereof takes the form of commission or bonus or share in the valuation surplus in respect of long term insurance business (emphasis added).
26. RW1 testified that since the respondent carried on long term insurance business it followed that section 69(1) aforesaid prohibited the practice of paying override commissions, rendering payment of such commissions to staff illegal and unenforceable (emphasis added)..
27. In view of the above, the respondent stopped the illegal practice of paying override commissions to members of staff, including the claimant some time in 2017. The decision was communicated by an internal memo dated 26th February 2018 at page 2 of the respondent's bundle. According to the author of that memo Ms. Jeridah Okot, she was responsible for processing payment of override commission and as at that time only the claimant qualified for payment of override commission.
28. Jeridah said processing and payment had been done until October 2017 and as at 26/2/2018, when she wrote that memo, the claimant was owed Kshs. 145,150.75 in unpaid override commission.
29. RW1 stated that in any event the claimant did not procure nor even facilitate the renewal of business for National Police Service, Kenya Civil Aviation Authority and/or Agriculture Finance Corporation.
30. RW1 stated that:-
 - a. NPS business was procured directly by pioneer advance company limited whereupon they requested the respondent to enter into a co-insurance arrangement with them as per page 22 to 25 of the respondent's bundle.
 - b. KCAA business was procured in March 2013 long before the claimant was employed and consequently he could not have procured it. Besides, the claimant was initially posted in Mombasa and therefore he could not have serviced the business. RW1 referred to page 26 to 29 of respondent's bundle showing award letters for KCAA from 2013, 2014, 2015 and 2018.
 - c. Further, KCAA categorically stated that they did not want broker services as per email at page 29.
 - d. That AFC business was procured directly by RW1 as the respondent's principal officer and not by the claim as per page 30 to 32 of the respondent's bundle.
31. RW1 stated that he had appointed the claimant as the liaison for the aforesaid corporations but was forced to remove him from that position following complaints and/or requests from customers themselves. That the claimant was however paid all commissions due to him for the period that he served as liaison. In this respect RW1 referred to page 33 to 36 of the respondent's bundle. In this regard the email written by CEO to NPS dated 8/12/2016, points the claimant as the point of contact assigned by one Timothy Muturi.
32. By an email dated 5/12/2017, RW1 told NPS that the claimant will no longer be 'contact person' due to his heavy workload and that Timothy Muturi would remain as the point of contact.
33. RW1 stated that the claimant's performance was below par; harassed staff for commission payment; engaged in criminal activities which led to his being prosecuted in criminal case no. 779 of 2007 of theft by servant and the claimant was never harassed by RW1 as alleged or at all nor did RW1 instigate criminal proceedings against the claimant but that RW1 reported a case of criminal extortion by persons who visited his office.



34. RW1 made allegations in his witness statement at paragraph 18 that the claimant resigned because he could not stand the shame of continuing in employment on the face of stated damning revelations.
35. RW1 said he did not approve payment of override commissions claimed as such payments were prohibited by the law and that the claimant was not entitled to the payments because he did not play any role in securing or reviewing the said business.
36. RW1 was closely cross-examined by Mr. Kiptum for the claimant and said the respondent had introduced an incentive programme when they stopped paying override commission to staff. RW1 admitted that he made payment of override commission to the claimant on 7/3/2018 and 4/4/2018. RW1 admitted these approvals were done after the respondent had suspended payment of override commission on 26/2/2018 because that business was earned in the year 2017. That payment was done in arrears.
37. RW1 admitted that the contract of employment between the claimant and the respondent that provided for payment of override commission was not amended after the alleged suspension on 26/2/2018.
38. RW1 denied that he brought the said changes when RW1 demanded to share the override commission earned by the claimant with him. RW1 admitted that the claimant filed an affidavit presented to the Board of the respondent reporting the demand by RW1 to share his override commission to authorize payment.
39. RW1 said the allegations made by the claimant were considered by the Board and were dismissed and that is why he was still the CEO of the respondent. RW1 admitted that the decision of the board on the complaint was not produced before court by RW1. RW1 denied that the claimant had participated in the getting or renewal of the business in respect of which he is seeking to be paid override commission.

Determination

40. The parties filed submissions which the court has carefully considered together with the evidence adduced by CW1 and RW1. The issues for determination are:-
 - a. Whether the claimant has proved that he is entitled to be paid override commission claimed.
 - b. Whether costs of the suit and interest are payable as claimed.
41. The claimant has proved vide oral and documentary evidence adduced by the claimant before court and corroborated by admission made by RW1 that the contract of employment between the claimant and the respondent dated 24/3/2014 and effective from 1/4/2014 expressly provided that the respondent would pay the claimant override commission of 12.79% of the broker's commission on new and renewable business, generated directly or through brokers in the claimant's structure.
42. The claimant has proved vide evidence adduced by himself and corroborated by RW1 that the terms of this contract were not varied and or amended until the claimant resigned from employment of the respondent on 6th August 2019.
43. The claimant has further proved vide evidence adduced by himself and corroborated by RW1 that the respondent paid override commission to the claimant earned up to the end of year 2017.
44. RW1 admitted that the override commission paid to the claimant, was paid in arrears by cheque dated 26/2/2018



45. RW1 admitted that these payments were done after the respondent had unilaterally stopped further payments of override commission earned by the claimant after the year 2017.
46. The claimant has proved on a balance of probabilities that RW1 having failed to rebut cogent and credible evidence adduced by the claimant that he was directly or through the brokers in his structure involved in procurement of new and renewed insurance cover in the year 2018 and 2019 for NPS and KCAA and for AFC for the year 2019 and premium paid in respect thereof attracted override commission as set out in the claimant's testimony before court in the sum of Kshs. 5,039,119.76.
47. The court finds that the respondent failed to adduce any tangible evidence to rebut the testimony by the claimant. The said claims have been proved on a balance of probabilities.
48. The respondent admitted that in terms of the contract of employment of the claimant which had not been amended until the claimant resigned override commission was still payable. The respondent however stated that, the respondent had suspended the payments upon taking a decision that continued payment of override commission to its employees was unlawful and in violation of section 69(1) of the *Insurance Act* Cap 487 of the Laws of Kenya.
49. The respondent did not produce before court evidence by the insurance regulatory authority which justified the step they had taken against the claimant despite clear and unequivocal provisions in the contract of employment between the claimant and the respondent.
50. The title of the position held by the claimant and job description of the claimant presented by the respondent depicts the claimant as a liaison between the respondent on one hand and the brokerage on the other.
51. The override commission was payable from the earnings of the brokerage firms through which business had been obtained or renewed vide the liaison activities of the claimant.
52. The contract specifically stated that the new and renewal business needed not to have been directly generated by the claimant provided it was procured by the brokers in the structures of the claimant.
53. The testimony by RW1 that the claimant was not at the time in 2018 and 2019 the said new and renewal business was procured associated with the said procurement fell short of rebutting the tangible evidence adduced by the claimant to the satisfaction of the court.
54. The respondent is obliged to pay the override commission duly earned by the claimant as set out in the statement of claim.
55. The court is not satisfied that the contract between the claimant and the respondent was illegal by dint of section 69(1) of the *Insurance Act*. The Authority relied on by the respondent, Kenya Airways Limited versus Satwat Singh Flora [2013] eKLR, cited with approval by the Court of Appeal in Five Fourty Aviation Limited versus Erness Lanoe [2019] eKLR is not applicable in the circumstances of this case. The claimant was clearly a broker consultant and not just any other employee of the respondent and cannot be said to be an employee of the respondent to the exclusion of the brokerage firms the claimant served to secure business on their behalf and from whom override commission was earned.



56. The term liaison used in the job description of the claimant means: -

“a person who acts to arrange and assist interaction between parties” from Wikipedia whereas the concise Oxford English Dictionary 12th Edition defines the term liaise as “act as a link to assist communication between.”

57. It is the court’s conclusion that the claimant played not only the role of liaison between the respondent and brokerage firms but as a consultant, he was also a professional expert with the role of tying up business between the respondent and brokerage firms and so fell outside the ambit of an ordinary employee so as to be denied override commission earned from premiums paid to brokerage firms who were in his defined structure.

58. In the final analysis judgment is entered in favour of the claimant against the respondent as follows:-

- a. An amount of Kshs. 5,039,119.76 with interest at court rates from date of filing suit till payment in full.
- b. Costs of the suit

DATED AT NAIROBI THIS 4TH DAY OF JULY, 2024

Mathews Nderi Nduma

JUDGE

Appearance:

Mr. Kiptum for claimant

Mr. Mangla for respondent

Mr. Kemboi Court Assistant

