



**Xcmg EA Limited v Ofula (Appeal E267 of 2024)  
[2025] KEELRC 3510 (KLR) (5 December 2025) (Judgment)**

Neutral citation: [2025] KEELRC 3510 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E267 OF 2024  
NJ ABUODHA, J  
DECEMBER 5, 2025**

**BETWEEN**

**XCMG EA LIMITED ..... APPELLANT**

**AND**

**STANLEY KEFA OFULA ..... RESPONDENT**

*(Being an appeal from the Judgment of the Chief Magistrate's Court at Nairobi delivered on 30th August, 2024 by Hon. Mrs. Lucy Ambasi (CM) in Milimani MCELRC No. E1002 of 2021 Stanley Kefa Ofula vs XCMG EA Limited)*

**JUDGMENT**

1. Through the Memorandum of Appeal dated 13<sup>th</sup> September, 2024 the Appellant appeals against the Judgment of Honourable Lucy Ambasi (CM) in Milimani MCELRC No. E1002 of 2021.
2. The Appeal was based on the grounds that:
  - i. The Hon. Magistrate erred in law and fact by awarding the Claimant a total sum of USD 18,360.38 (equivalent to Kshs 2,368,489.02) being commission for the sale of 4 items by the Respondent to different clients despite lack of evidence by the Claimant in following up with the sales and procedure as laid down by the Appellant to claim commission on sales.
  - ii. The Hon. Magistrate erred in law and fact by relying on unverified proforma invoices used by the Claimant to claim commission payment from the Respondent.
  - iii. The Magistrate erred in law and in fact by awarding the Respondent commission based on proforma invoices whose admission had been objected to by the Claimant's counsel.
  - iv. The Magistrate erred in law and in fact by placing the burden of proof on the Appellant to show that payments of commission to the Respondent were made.



- v. The Magistrate erred in law and in fact by awarding the Respondent salaries for the months of May, June, July, August and September, twice, all totalling to the sum of Kshs. 540,000 against the weight of evidence, while there was no evidence or basis at all in law or fact in support of such an unjustifiable award.
  - vi. The Magistrate erred in law and in fact by awarding the Respondent one month's salary in lieu of notice for Kshs. 60,000 against the weight of evidence, while there was no evidence or basis at all in law or fact in support of such an unjustifiable award.
  - vii. The Magistrate erred in law and in fact by formulating and determining her own issues, based on her own interpretation of paragraph 4 of the appellant response to the claim.
  - viii. The Magistrate erred in law and in fact by failing to analyse and consider the evidence presented by the Appellant and thereby reaching to an erroneous award.
  - ix. The Magistrate erred in law and in fact by failing to consider the submissions filed by the Appellant and instead relying wholly on the submissions filed by the Respondent.
3. The Appellant prayed that the Appeal be allowed with costs, the Claimant's Claim be dismissed with costs to the Appellant and the Judgment and Order by Hon. Magistrate be set aside and substituted by an award of this Honourable Court.
  4. The Appeal was disposed of by written submissions.

### **Appellant's Submissions**

5. The Appellant's Advocates Mutege & Mutege Advocates filed written submissions dated 19<sup>th</sup> June 2025 and on the issue of whether the trial court erred by awarding commission payments to the Respondent, counsel submitted that the Appellant and the Respondent had orally agreed that the rate of commission on sale would be 1% of the sales relating to clients referred by the Respondent but certain criteria had to be met in order to Claim commission. That one of the preconditions for claiming commission was that there must have been a sale made by the Company and not mere referral. Counsel relied on *Ogutu v Madison Group (Madison Life Insurance) (Employment and Labour Relations Cause E928 of 2022) [2023] KEELRC 3409 (KLR)(29 December, 2023) (Judgment)*, to submit that typically and reasonably, commissions are paid based on sales made and that the trial court made a wrong interpretation of the Appellant's Response to Statement of Claim where it was clearly stated that the commission fee of 1% was to be based on sales upon referrals by the Respondent.
6. Counsel submitted that the Appellant claimed the agreement on commission was an oral one but the Respondent testified that he signed a commissions clause with the Appellant. The burden of proof shifted to the Respondent to prove the contents of the alleged written agreement which he failed. In this regard counsel relied on the case of *Patrick Lumumba Kimuyu v Prime Fuels (K) Limited [2018] eKLR* to submit that the burden of proof in civil cases rests on the party that alleges a fact to be true so as to prove the existence and veracity of the fact; under the statutory basic principle that he who asserts must prove.
7. Counsel submitted that the Respondent admitted that he never made any demand for payment of commissions allegedly due to him from any sales. The demand for commission payment was an afterthought and therefore the Respondent was not entitled to the same.
8. Counsel submitted that the Respondent testified that with respect to his claim of USD 3374.22 being 1% commission in the sale of truck crane and Forklift to Messrs. Kenya Electric Generating Company of Olkaria Naivasha, the delivery note had been signed by one Emmanuel Masika and further



confirmed that his signature did not appear anywhere on the delivery note such as would have entitled him to payment of commission.

9. Counsel submitted that with regard to the claim for commission of USD 1096.1654 being 1% commission for the sale of Grader GR 215 to Messrs. Mega Worldwide Projects South Sudan and USD 560 being 1% commission for the sale of a Sheep Foot Roller XS143J to Messrs Mega Worldwide projects South Sudan, it was the Respondent's own testimony that he did not have any proof of sale of the grader or roller by the Appellant to warrant any claim of commission by the Respondent.
10. Counsel submitted that the Respondent's claim of USD 13,300.00 being 1% commission for the sale of a truck cane XCA 220Y to Messrs. Vestas Eastern Africa Limited, the Respondent testified that the said contract for sale was never signed and further the Respondent did testify that he had no proof that the contract was completed or paid off.
11. Counsel submitted that the Respondent adduced payment vouchers and proforma invoices to support the claim for commission. However, the said payment vouchers look doctored as the names at the top display different company names. In addition, the proforma invoices are not proof that the sales were made and cannot be used to claim for commission.
12. Counsel relied on the case of Total (Kenya) Limited Formerly Caltex Oil (Kenya) Limited v Janevams Limited (2015) eKLR to submit that proforma invoice was commitment to purchase at a specified price and not a receipt. That the Respondent did not discharge his burden of proving that he was entitled to the commissions he sought, he did not adduce any evidence that he had followed up on payments and that he had been issued with a notification that he was entitled to such commissions and therefore the award by the trial court was made erroneously.
13. On the issue of whether the award of damages by the trial court should stand, counsel submitted that the award for salaries for the months of May, June, July, August and September totalling to the sum of Kshs. 270,000/- was erroneous and grossly excessive.
14. Counsel submitted that it was during the Covid-19 pandemic, the Appellant issued a memo to the Respondent and all the other employees to proceed on unpaid leave from May to September 2020. That the Respondent did not deny that he received these memos and confirmed that indeed after the unpaid leave, he resumed work. That the said memos were copied to the labour office and he never protested any of the said memos issued to the employees or illustrate if he was treated differently from the rest of employees.
15. Counsel submitted that the award for one (1) months' salary in lieu of notice was erroneous as the Appellant had already made the payment to the Respondent vide the Notices to Retire dated 22<sup>nd</sup> December 2020 and 7<sup>th</sup> January 2021.
16. Counsel submitted that the Respondent was undeserving of the award as his employment was brought to an end as a result of his retirement and not termination by the Appellant that would warrant one month's salary in lieu notice.
17. Counsel relied on among other cases, the case of Butt v Khan [1978] eKLR to submit that an appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. That it was clear that the trial court did not fully apply the evidence supplied by the Appellant and hence the award made to the Respondent was manifestly excessive.



## Respondent's Submissions

18. The Respondent's Advocates, Mulondo & Company Advocates filed written submissions dated 29<sup>th</sup> September, 2025 and on the issue of whether the trial court erred by awarding commission payments to the Respondent, counsel submitted that the Respondent's position was that the commission was payable for all sales that he had concluded while the Appellant's position was that the commission was only for sales relating to clients referred to the Appellant by the Respondent.
19. Counsel submitted that the Appellant stated that the agreement on commission was also made with all its salespersons under agreed terms which were that for open tenders the salesperson would have to be assigned to process the tender documents, submit then oversee the process of delivery if the tender was awarded. For sale by private treaty, the salesperson was required to notify the directors that he was making follow ups with the client.
20. Counsel submitted that the Appellant failed to prove that indeed commission was only payable for sales relating to clients referred to the Appellant by its salespersons, the Appellant ought to have produced evidence showing that other salespersons received commission for sale to clients who they referred to the Appellant.
21. Counsel submitted that the Appellant's claim on when commission was payable was contradictory as on the one hand, the Appellant claimed that commission was only payable if a sales person referred a client and on the other hand if the sales person was making follow ups with the client.
22. Counsel submitted that the Respondent testified that he sealed the contract for sale of a truck, crane and forklift to Kengen for a purchase price of USD 337,422. In support of this claim, the Respondent produced delivery notes and proof of payment of the purchase price. Counsel further submitted that the Appellant refuted the Respondent's claim that he was in charge of the Kengen contract and the evidence of RW1 was that the Kengen contract was an open tender which was applied for by the company. If indeed this was the case the Appellant ought to have provided documents showing that the tender was applied for by the Company as alleged. Counsel submitted that the Respondent conducted the sale of a Grader GR 215 to Mega Worldwide Projects for a sum of USD 109,616.54 and produced a proforma invoice in support of this claim. That although the Appellant claimed that the sale to Mega World Wide was followed up by Emmanuel Masika, no proof was provided to support this claim. That the proforma invoices to Mega Worldwide produced by the Respondent showed that he was the contact person for the sale, a fact which was not disproved by evidence to the contrary.
23. Counsel submitted that the Appellant's witness RW1 alleged that proforma invoices were ordinarily generated by either himself or Masika with the approval of the management. No document was however produced to show that this was the company's policy.
24. Counsel submitted that RW1 also claimed that the proforma invoices produced by the Respondent did not belong to the company as they issued different invoices to the clients which were stamped. This claim was equally not supported by any evidence through production of the alleged correct invoices.
25. Counsel submitted that although RW1 testified that the Roller to Mega Worldwide was not sold, the Respondent produced a proforma invoice showing that he was the contact person for the sale. That an invoice is issued to request payment from a customer where a transaction has either taken place or is ongoing.
26. Counsel relied on Mohammed Ali & another v Avenue Cargo Enterprises Ltd [2021] eKLR to submit that a proforma invoice is given in respect of an advice sought from a supplier as to what the cost of



goods sought and an invoice is given in cases where an order for supply of goods has been made but payment is not yet made.

27. Counsel submitted that the invoice produced by the Respondent therefore proves that there was supply of the Grader to Mega World Wide and what was pending was payment. The invoice is dated March 2020 which is the period when the Respondent was ordered to work from home and he therefore could not have known when payment was made.
28. Counsel submitted that on the sale of the Truck Cane to Vestas East Africa, the Appellant claimed that the tender was signed in September 2021. This was controverted by the proforma invoices produced by the Respondent which were generated in February 2020. The Respondent also produced communication from the Appellant to Vestas in February 2020. The Appellant did not produce any documents to prove that the tender was signed in September 2021.
29. Counsel submitted that it was trite law that he who alleges must prove. The allegations made by the Appellant opposing the Respondent's claim for commission were not supported by any proof and they were therefore mere allegations.
30. Counsel submitted that the case of *Ogotu vs Madison Group (Madison Life Insurance) 2023 eKLR* quoted by the Appellant in its submissions was distinguishable from this case as in the said case, the Claimant did not make a single sale and there was therefore no basis for him to claim commission while in the present case, evidence by the Respondent showed that he concluded sales for Kengen, Mega Worldwide and Vesta and he was therefore entitled to commission.
31. Counsel submitted that the claim that the demand for commission payment was an afterthought and that the Respondent admitted that he never made any demand for payment of commissions is false and it is discernible from the proceedings that no such admission was made. The Respondent produced correspondence he wrote to the Appellant during his employment in which he raised the issue of payment of commission.
32. Counsel submitted that the trial Magistrate rightfully found that the Respondent proved that he initiated the contract for sale of truck crane and forklift to Kengen and also rightfully held that he was entitled to commission for the sales to Mega Worldwide and Vestas having been the contact person for the said sales.
33. On the issue of whether the award of damages by the trial court should stand, counsel submitted that the Respondent was sent on unpaid leave in March 2020 and ordered to work from home on account of the COVID 19 pandemic. He worked from home until September 2020. In April 2020, the Appellant informed the employees that their salaries would not be paid from May 2020.
34. Counsel submitted that RW1 testified that the Appellant sent its employees on unpaid leave and produced internal memos sent to the employees. The internal memos were addressed to all employees and were signed by the company representative. The Appellant did not produce any letter addressed to the Respondent informing him of the changes to the terms of his employment in terms of the unpaid leave. That the Appellant did not issue individual letter to the Respondent neither did he execute any document agreeing to proceed on unpaid leave.
35. Counsel relied the case of *Maxwell Miyawa & 7 others v Judicial Service Commission [2017] eKLR* to submit that the decision by the Appellant to send the Respondent on unpaid leave amount to unilateral variation of the terms of the Respondent's employment without his consent which is an unfair labour practice.



36. Counsel relied on the case of Kenya County Government Workers Union v Wajir County Government & another [2020] eKLR to submit that the Appellant flouted the provisions of Section 10(5) of the *Employment Act* which requires an employer to consult the employee where any of his employee particulars change and revise the contract and notify the employee of the change in writing. Counsel submitted that as a result of the unlawful actions of the Appellant, the Respondent was deprived of his salary for the months of May, June, July, August and September 2020. The trial Magistrate did not therefore err in awarding the Respondent Kshs. 270,000 as unpaid salary for the said months.
37. Counsel submitted that on the claim for salary in lieu of notice, the Respondent testified that he was issued with a notice to retire dated 22<sup>nd</sup> December, 2020 on 5<sup>th</sup> January 2021. The Respondent was again issued with a revised notice to retire dated 7<sup>th</sup> January, 2021. The Respondent then wrote a letter dated 13<sup>th</sup> January, 2021 handing over company property to the Appellant.
38. Counsel submitted that in the revised notice to retire, the Appellant informed the Respondent that he would be paid one month's salary in lieu of notice from 11<sup>th</sup> January to 10<sup>th</sup> February, 2021. There is no proof that this was paid to the Respondent.
39. Counsel submitted that the Appellant did not deny that the Respondent was not given his salary in lieu of notice. The Appellant only claimed that the Respondent took a loan and his salary was used to repay the loan. This claim was not supported by proof and therefore the Respondent was entitled to pay in lieu of notice.

#### **Determination**

40. The court has considered the Appeal, the record of appeal and submissions filed by the parties herein, the authorities relied on by counsels and notes that the Judgment of the trial court was that judgment was entered in favour of the Claimant against the Respondent as follows: -
  - a. USD 3,374.22 being 1% Commission in the sale of Truck Crane and Forklift to Messrs Kenya Electric Generating Company of Olkaria, Naivasha
  - b. USD 1,096 being 1% commission for the sale of Grader GR215 to Messrs Mega projects South Sudan.
  - c. USD 560 being 1% commission for the sale of a Sheep Foot Roller XS143J to Messrs Mega projects South Sudan.
  - d. USD 13,3000 being 1% commission for the sale of a Truck Cane XCA 220Y to Messrs Vestas Eastern Africa Limited.
  - e. Salaries for the months of May, June, July, August and September totalling to the sum of Kshs 270,000/=
  - f. One month's salary in lieu of notice for Kshs 60,000/=
  - g. Certificate of Service
  - h. Costs and interests.
41. The Appellant being aggrieved with the above judgment fronted nine grounds of appeal which the court will frame in to two issues as framed by the parties in the submissions as follows: -
  - i. Whether the trial court erred by awarding commission payments to the Respondent.
  - ii. Whether the award of damages by the trial court should stand.



## **Whether the trial court erred by awarding commission payments to the Respondent.**

42. As observed by the trial court the parties had an oral agreement for payment of 1% commission on Respondent and what brought the dispute was that the Appellant claimed that a sale had to be made and the client referred by the Respondent while the Respondent alleged that what really mattered was the mere referral of the client and that he was the contact person all along in those transactions.
43. This court appreciates that it is only logical for commission to be paid once a sale has been made. A mere referral without sale cannot make one earn commission. This was the holding in the case of *Ogutu v Madison Group (Madison Life Insurance) (Employment and Labour Relations Cause E928 of 2022) [2023] KEELRC 3409 (KLR) (29 December, 2023) (Judgment)* that: \_
- .. commissions could be paid based on sales made. Typically, and reasonably, this is what is expected. The Claimant admitted that he did not make a single sale. Put in another way, he did not bring a single business to the Respondent in terms of paid insurance proposals. Given this premise, I find considerable challenge to fathom what informed the Claimant's claim for the millions he has sought.
44. This court appreciates that the Respondent had the burden of proof to specifically plead the commission and illustrate if he indeed earned the said commission. It is trite law that he who alleges must prove as per clear provisions of sections 107-109 of the *Evidence Act*. This court will therefore relook at each transaction to ascertain if the trial court erred.
45. On the claim for USD 3374.22 being 1% commission on sale of Truck Cane and Forklift to Messrs Kengen of Olkaria Naivasha the Appellant alleged that the delivery note was signed by one Emmanuel Masika and not the Respondent. The Respondent on the other hand alleged that he was the contact person and the Appellant's allegations that it was an open tender were not proved. The trial court found that without proof that the said Masika or Hellen initiated the transaction the Respondent was entitled to the commission payment.
46. This court notes that although delivery note was signed by the said Masika and received by Hellen the same happened at a time the Respondent was sent on unpaid leave. This can be seen from page 34 to 36 of the record of appeal. This court agrees with the trial court that without evidence of the two initiating the transaction the Respondent was entitled to the commission payment.
47. On the claim for USD 1096. 1654 being 1% commission for the sale of Grader GR 215 to Messrs Mega Worldwide projects South Sudan and USD 560 for the sale of Sheep Foot Roller XS143J to the same client the Appellant alleged that proforma invoices did not belong to the company as the company had issued invoices which were stamped while the Respondent alleged he was the contact person. The trial court found that the Respondent was the contact person and awarded him the said commission.
48. This court notes from the proforma invoices at page 40 and 41 the Respondent was the contact person and even though the proforma invoice is not proof of sale like a receipt. However, without proof from the Appellant that the sale never happened leads to this court agreeing with the trial court that the Respondent was entitled to the same. In the case of *Total (Kenya) Limited Formerly Caltex Oil (Kenya) Limited v Janevams Limited (2015) eKLR* relied on by parties it was held that:\_

A proforma invoice is considered a commitment to purchase goods at a specified price. It is not a receipt, and as such cannot attest to the existence of or the acquisition of goods. We consider that a proforma invoice was not satisfactory proof of the Respondent; loss or the replacement value of the respondent's equipment.



49. On the claim for Truck Cane to Vestas, the Appellant alleged that tender was signed in September but the Respondent alleged that proforma invoices were signed in February 2020 and produced communication between the Appellant and the Client in February, 2020. That he was the contact person. The trial court found that the proforma invoices showed that the Respondent was the contact person hence entitled to the commission.
50. This court again notes that the Respondent was the contact person and the same was done in February 2020 since there is communication between the Appellant and client along the same time hence the Appellant's allegations that a tender was signed in September, 2021 could not be true. This court therefore agrees with the trial court that the Respondent was entitled to the commission.
51. In addition, there are payment vouchers from page 44 to 45 showing payment of sales commission to the Respondent for other sales in 2019 hence the Respondent was entitled to his commissions. Although the Appellant denied the name used in the payment vouchers of Tisco Construction limited the court notes that the Appellant used to interchange between the Tisco and XCMG East Africa limited in its documents hence it had to prove that the name did not belong to it. The trial court did not err by awarding the Respondent his commissions payments.

**Whether the award of damages by the trial court should stand.**

52. The trial court awarded the Respondent salaries for the month of May-September, 2020 when the Appellant sent its employees on unpaid leave due to the effects of Covid-19. While this court takes judicial notice of the effects of the Covid-19 pandemic on businesses this court appreciates that the Respondent had to be consulted as this move was going to affect his remuneration. The Memos were general to all employees and not specifically addressed to the Respondent to give his feedback and consent.
53. The supreme court in *Gatuma v Kenya Breweries Ltd & 3 others* (Petition E023 of 2023) [2024] KESC 52 (KLR) (Civ) (30 August 2024) (Judgment) held that: -

From the provisions of sections 10(5) and 13 of the *Employment Act*, any unilateral variation of the terms of an employment contract may be deemed as a repudiation of the contract and in case the same would lead to termination of employment the same may be deemed as constructive dismissal. The provisions of section 13 equally applied to remuneration. Any unilateral changes in remuneration and terms of employment without informing the employee would be tantamount to unfair labour practices.

That in case of any change of terms the employee ought to be consulted.
54. In this case there was no proof that the Respondent was consulted before being sent on the unpaid leave and if there were any negotiations on payment of the accrued salary once he resumed work. This court agrees with the trial court that the Respondent was entitled to the accrued salary for the month of May to September, 2020.
55. On the claim for notice pay despite the same being promised in the notice of retirement letters there was no proof by the Appellant that the same was paid to the Respondent. This court therefore upholds this claim as awarded by the trial court.
56. The Appeal is therefore found unmerited and is hereby dismissed with costs to the Respondent.
57. It is so ordered.

**DATED AT NAIROBI THIS 5TH DAY OF DECEMBER, 2025**



**DELIVERED VIRTUALLY THIS 5TH DAY OF DECEMBER, 2025**

**ABUODHA NELSON JORUM**

Presiding Judge-Appeals Division

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