

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**  
**NAIROBI**  
**CAUSE NO. E975 OF 2023**

**MICHAEL MUGAMBI MUTEGI.....CLAIMANT**  
**VERSUS**  
**REDACHEM EAST AFRICA LIMITED.....RESPONDENT**

**JUDGMENT**

1. It is common cause that the Claimant was employed by the Respondent as a Sales Engineer with effect from 1<sup>st</sup> April 2019 and that he resigned from the Respondent's employment on 17<sup>th</sup> February 2023.
2. The Claimant contends that the Respondent has a commission-paying structure under which sales employees are entitled to a 6% commission on the gross profit generated by the company in each calendar year.
3. The Claimant further avers that, throughout the subsistence of his employment, it was the agreed understanding and established practice that he would be paid annual commissions, and that he indeed received commissions for the years 2020 and 2021, with commissions for the year 2022 remaining due and payable.

4. It is the Claimant's contention that despite exiting the Respondent's employment in March 2023, the Respondent has failed to pay him the commission accrued for the year 2022, which, according to him, is now long overdue.
5. The Claimant further avers that the Respondent made monthly statutory National Social Security Fund (NSSF) deductions from his salary from the year 2019 until his exit from employment in 2023 but failed to remit the said deductions.
6. It is against this background that the Claimant seeks the following reliefs against the Respondent;
  - a) *Kshs 1,035,000 being the unpaid commissions for the year 2022;*
  - b) *A refund of all the unremitted NSSF deductions for the period between 2019 to 2023;*
  - c) *Interest on (a) and (b) from the date of filing the claim until payment in full;*
  - d) *Costs; and*
  - e) *Any other relief this Honourable Court may deem fit and just to grant.*

7. The Respondent opposed the Claim by filing a Memorandum of Response dated 3<sup>rd</sup> October 2024, in which it contends that the payment of commissions was dependent upon improved company performance and was at its sole discretion. In this regard, the Respondent admits that it paid the Claimant commissions for the years 2020 and 2021 owing to enhanced performance and improved business outcomes.
8. The Respondent countered the Claim by filing a Memorandum of Response dated 3<sup>rd</sup> October 2024. The Respondent contends that the payment of commissions was strictly dependent on its improved performance and was at its sole discretion. To this end, the Respondent admits that it paid the Claimant commissions in 2020 and 2021 as a result of performance and due to improved business.
9. The Respondent has further denied the Claimant's allegations regarding the non-payment of commissions for the year 2022, terming the same unsubstantiated and unsupported by any evidence.
10. The Respondent further avers that it duly performed its statutory obligations and remitted the Claimant's NSSF deductions as required.

11. In view of the foregoing, the Respondent prays that the Claimant's claim be dismissed with costs for lack of merit.

12. During the hearing which proceeded on 1<sup>st</sup> October 2025, both parties called oral evidence in support of their respective cases.

### **Claimant's Case**

13. The Claimant testified in support of his case as CW1 and, at the outset, adopted his witness statement to constitute his evidence in chief. He further produced the list and bundle of documents filed together with the Claim as his exhibits before the Court.

14. The Claimant testified that, in addition to his agreed salary, the Respondent had undertaken to pay him allowances and an annual commission in accordance with the company's commission-paying structure, under which sales employees were entitled to a 6% commission on the gross profit generated by the company in each calendar year.

15. He further averred that, without any justifiable cause and/or excuse, the Respondent defaulted in paying him the commission due for the year 2022, which was payable by the end of July 2023.

16.The Claimant additionally averred that the Respondent deducted sums from his emoluments for remittance to the NSSF on his behalf but failed to remit the same.

### **Respondent's Case**

17.The Respondent tendered oral evidence through **Harrison Miima**, who testified as RW1. He identified himself as the Respondent's Chief Accountant and similarly, he adopted his witness statement to constitute his evidence in chief. He further produced the list and bundle of documents filed on behalf of the Respondent as exhibits before the Court.

18.RW1 averred that the Claimant's employment contract did not provide for commission as an entitlement, benefit, or matter of right. He stated that the Respondent only paid commissions out of goodwill where the company's overall performance in a particular year was impressive, as was the case in the years 2020 and 2021.

19.He further testified that during the Claimant's tenure, any commissions paid were paid randomly and solely at the Respondent's discretion and dependent on the company's prevailing financial position.

20.RW1 further stated that the Claimant voluntarily resigned from employment and was paid all his terminal dues in accordance with the law.

21.In RW1's view, the sum of Kshs. 1,035,000/- claimed by the Claimant is fabricated, as no evidence was tendered to demonstrate how the figure was computed.

### **Submissions**

22.It was the Claimant's position that he had a legitimate expectation of being paid commission for the year 2022 at the rate of 6% of the gross profit, based on a practice previously established by the Respondent. He further submitted that the Respondent did not communicate any intention to withhold or decline payment of the commission for the said year.

23.The Claimant further contended that the Respondent's failure to pay the commission for the year 2022 constituted a breach of contract. It was the Claimant's view that the Respondent took advantage of his resignation before the 2022 commissions were declared to withhold and deny him the income he had rightfully earned.

24.In support of his position, the Claimant placed reliance on the decisions in ***Teresa Carlo Omondi v Transparency International Kenya [2017] eKLR, Republic v***

***Kenya Revenue Authority Ex Parte M-Kopa Kenya Limited [2018] KEHC 9059 (KLR) and Mutuah v Tracom Services Limited (Cause E767 of 2021) [2023] KEELRC 2917 (KLR) (16 November 2023) (Judgment).***

25. The Claimant further submitted that he had established the existence of a commission structure, as evidenced by the annual payments he received. He argued that the Respondent's claim that commission payments were purely discretionary is unfounded, asserting that such discretion cannot be exercised arbitrarily once a consistent pattern of payment and satisfactory performance has been established.

26. Referencing the case of ***Ceasar Warui v Sirona Hotel Limited [2018] KEELRC 561 (KLR)***, the Claimant submitted that he is entitled to a refund of all unremitted NSSF deductions for the period pleaded.

27. On the Respondent's part, it was submitted that the employment contract dated 1<sup>st</sup> April 2019 does not provide for commission as a term or benefit of employment. In support of this position, the Respondent referred to the decision in ***Airtel Networks Kenya Limited v Ogugo (Civil Appeal 387 of 2018) [2023] KECA 1652 (KLR) (15 December 2023).***

28. In the same vein, the Respondent contended that the Claimant cannot rely on extraneous matters or expectations not reduced into a written contract.

29. The Respondent further submitted that the Claimant has not produced any documentary or other evidence to show that he is entitled to commission for the year 2022. Citing the decision in *Nyakwoka v Tata Africa Holdings Kenya Ltd (Cause 838 of 2015) [2023] KEELRC 1115 (KLR) (9 May 2023) (Judgment)*, the Respondent posited that the Claimant has failed to demonstrate how the sum of Kshs 1,035,000/- was arrived at.

### **Analysis and Determination**

30. Flowing from the pleadings by both parties, the evidence on record as well as the rival submissions, it is evident that the singular issue falling for the Court's determination is whether the Claimant is entitled to the reliefs sought.

### **Unpaid Commissions**

31. The Claimant claims the sum of Kshs 1,035,000/- as unpaid commission for the year 2022, asserting that he was entitled to an annual commission in accordance with the company's commission-paying structure, which the Respondent had agreed and undertaken to pay.

32.The Respondent, while admitting that it pays commissions to its employees, contends that such payments are discretionary and solely dependent on the Company’s financial position at the relevant time.

33.A review of the Claimant’s contract of employment reveals that it contains no provision for the payment of commissions. Accordingly, the Claimant’s claim is unsupported by the terms of his contract. Further to this, the Claimant did not produce any policy document or other evidence to demonstrate that the Respondent paid commissions as a matter of established policy.

34.Accordingly, the Claimant’s case was based on the fact that he received commissions in 2020 and 2021. On this basis, he has submitted that he had a legitimate expectation of receiving a commission for the year 2022.

35.On the question of what constitutes a legitimate expectation, the Supreme Court of Kenya had this to say in *Petition No. 14 of 2014, Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR: –

**“[265] An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil.”**

36. In the present case, the Claimant pleaded that the commission payable was calculated at 6% of the gross profit earned by the Respondent in each calendar year. Having made this assertion, it follows that the commission was contingent upon the Respondent generating a profit. Accordingly, it was reasonably incumbent upon the Claimant to produce evidence demonstrating that the Respondent made a profit in 2022, as only then could a claim of legitimate expectation arise.

37. Be that as it may, the Claimant neither proved nor even suggested that the Respondent generated a profit in 2022, a prerequisite for his claim for commission to arise. How is the Court to determine that the Claimant is entitled to the commission without any evidence showing the gross profit earned by the Respondent company?

38. Moreover, since the Claimant's claim is for a specific sum, he was required to both plead and strictly prove it. In addition to failing to prove that the Respondent company generated a profit in 2022, the Claimant did not demonstrate the manner in which he arrived at the sum of Kshs 1,035,000/-.

39. Although the Claimant stated that he was entitled to a commission calculated at 6% of the gross profit earned by the Respondent each calendar year, he failed to

demonstrate how this percentage translated into the claimed sum of Kshs 1,035,000/-.

40. As it is, the Claimant has left it to the Court to figure out how the claimed amount was calculated. Consequently, I cannot help but question how he expects the Court to confirm his entitlement to the claimed commission without the necessary proof.

41. Indeed, the Claimant merely pleaded for the award of Kshs 1,035,000/- as commission without presenting any evidence to substantiate the claim, falling short of the required standard of strict proof.

42. The Court concurs with the decision in *Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited* ([2016] eKLR, in which the Court observed as follows:

**“The appellant apart from listing the alleged loss and damage, it did not...lead any evidence at all in support of the alleged loss and damage. As it were, the appellant merely threw figures at the trial court without any credible evidence in support thereof and expected the court to award them. Indeed there was not (sic) credible documentary evidence in support of the alleged special damages.”**

43. Similarly, in the present case, the Claimant has presented figures to the Court without establishing any basis for the award of Kshs 1,035,000 as commission. Consequently, the Court cannot infer his entitlement from the circumstances.

44. Needless to say, the Court cannot determine whether the Claimant is entitled to the commissions claimed, nor can it ascertain the specific amount.

45. In light of this, the Court finds that the Claimant has not established his case to the required standard of proof.

#### **Reimbursement of NSSF deductions**

46. The Claimant has further averred that the Respondent made NSSF statutory deductions from his salary from 2019 until 2023, when he left employment, but failed to remit the deducted amounts as appropriate. In support of his claim, the Claimant produced a provisional member statement from the NSSF indicating that no remittances were made from May 2019 to December 2019. Notably, the statement does not contain any entries for the years 2020, 2021, or 2022.

47. The Respondent has denied the Claimant's assertion and, on its part, has produced the Claimant's provisional member statement from NSSF showing that remittances were made for the periods 2019, 2020, 2021 and 2022.

48.It is worth noting that the Claimant did not challenge the accuracy of the said provisional member statement, and therefore the Court sees no reason to doubt the correctness of the entries contained therein.

49.In view of the foregoing, the Court finds that the Claimant’s claim for reimbursement of the NSSF deductions substantially collapses.

**Orders**

50.In conclusion, the Claim is dismissed in its entirety with an order that each party shall bear its own costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 23<sup>rd</sup> day of January 2026.**

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**STELLA RUTTO**

**JUDGE**

**In the presence of:**

For the Claimant	Ms. Bett instructed by Mr. Wakoko
For the Respondent	Mr. Imbugua
Court Assistant	Catherine

## **ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**