



**Omboto v Xtranet Communications Limited (Cause 1633 of 2017)
[2024] KEELRC 1160 (KLR) (19 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1160 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1633 OF 2017**

**SC RUTTO, J
APRIL 19, 2024**

BETWEEN

RONALD OMBOTO CLAIMANT

AND

XTRANET COMMUNICATIONS LIMITED RESPONDENT

JUDGMENT

1. The Claimant avers through a Statement of Claim which was amended on 20th June 2022, that vide a contract of service dated 1st September 2009, he was employed by the Respondent to serve in the position of a Customer Service Manager. That owing to his diligence, he rose through the ranks to the position of Head of Support and eventually Technical Manager as at the year 2016 when he resigned from the Respondent company.
2. The Claimant further avers that under clause 5(4) of his contract of service, the Respondent was enjoined to pay him commissions on all successfully initiated sales and executed projects in terms of the commission structure adopted by the Respondent.
3. It is the Claimant's case that between 2015-2016, he undertook specific projects at the Respondent company and was entitled to commissions. He avers that in terms of the Contract of Service and Commissions Claim Policy at the Respondent, he duly filled commissions claim forms for the total sum of Kshs 874,893.16 and furnished the same to the Respondent but it failed, refused and or declined to pay the Claimant his said commissions or part thereof.
4. The Claimant further states that pursuant to the provisions of Section 35(5) of the *Employment Act*, he was entitled to be paid service pay.
5. It is on account of the foregoing that the Claimant prays for the sum of Kshs. 874,863.16 being unpaid Commissions, Kshs. 420,000.00 being service pay and Kshs 504,000.00 being pension contribution. He further prays for interest, costs as well as the issuance of a Certificate of Service.



6. The Respondent countered the Amended Memorandum of Claim through its Response dated 8th November 2023 in which it avers that the Claimant willingly resigned from employment.
7. The Respondent further avers that Commissions were only payable upon payment by the client. The Respondent further contends that no evidence by way of bank statements or receipts has been produced to show that the sums claimed to have been paid, were ever received by the Respondent. Putting the Claimant to strict proof, the Respondent denies receipt of any payment from the claimed transactions.
8. According to the Respondent, the Sales Commission Policy was clear on the activities that a person ought to have done for one to qualify for a commission. The Respondent further denies that the Claimant is entitled to any such commission as claimed or at all.
9. The Respondent further states that under Section 35(5) of the *Employment Act*, 2007, service pay accrues where a contract for service is terminated under Section 1(c) thereof. It is the Respondent's contention that the Claimant resigned and was not terminated.
10. With respect to the claim for pension contribution, the Respondent avers that the same can only be made by the Pension Scheme to which any pension would be payable. That no pension scheme has made a claim against the Respondent for unpaid contribution and the Claimant cannot claim on its behalf.
11. During the hearing which proceeded on 31st October 2023, the Claimant testified in support of his case, while the Respondent failed to call oral evidence. To this end, it sought to rely on its pleadings.

Submissions

12. The Claimant submitted that the Respondent never at any one time in all his (Claimant) email correspondences, stated that he was not entitled to the commissions claimed. It was his position that the Respondent had not disowned any of the correspondences or provided any evidence against the contents.
13. In further submission, the Claimant stated that his employment contract with the Respondent is valid and unambiguous in its wording. Referencing the case of *Five Forty Aviation Limited v Erwan Lanoë* (2019) eKLR, he urged the Court to enforce the employment contract as it is binding.
14. He further urged the Court to find that he was entitled to commissions during his employment.
15. The Respondent did not file written submissions as the same were missing from the court's record at the time of writing this Judgment. This is despite the Respondent being given a further extension of fourteen days on 28th February 2024, to comply.

Analysis and Determination

16. Flowing from the pleadings, the evidence on record as well as the Claimant's submissions, it is clear that the singular issue falling for the Court's determination is whether the Claimant is entitled to the reliefs sought.

Unpaid Commissions

17. The Claimant has sought the sum of Kshs 874,893.16 being unpaid commissions. According to the Claimant, he undertook certain projects between the year 2015 -2016 hence he is entitled to commissions. The Claimant proceeded to enumerate the projects he alleges to have completed, the



attendant transaction, the amount applied to the Commission and the specific amount of commissions he claims.

18. It is not in doubt that the Claimant's claim is in the nature of a specific claim. It is trite law that a claim for special damages must not only be pleaded, it must also be strictly proved. This position was reiterated by the Court of Appeal in [Capital Fish Kenya Limited v the Kenya Power and Lighting Company Limited](#) [2016] eKLR.
19. Suffice to say, a party who desires the court to award him special damages, must as a matter of law, strictly prove damages to the required standard.
20. Turning to the instant case, the Claimant exhibited email communication in respect of work undertaken for the Kenya Wine Agencies Limited (KWAL), National Transport Safety Authority (NTSA), Judiciary, Agriculture, Fisheries and Food Authority (AFFA) and the Information and Communication Technology Authority (ICTA).
21. It is notable that aside from the ICTA contract, there was no accompanying documentation indicating the contract amount in each of the respective projects for which the Claimant is seeking commission. If I may say, the emails were just correspondence forwarding his claims and did not in any way indicate or suggest the contract price or the amount applied to the commission hence making a justification for payment of the commissions claimed.
22. Indeed, the Claimant merely pleaded for award of commissions under each project and left it to the court to figure out the basis for the awards. This did not satisfy the required threshold of strict proof.
23. Revisiting the determination of the Court of Appeal in [Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited](#) (supra), the learned Judges 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.”
24. In this case, the Claimant did not lay down a basis for the award of the commissions. It was not enough to exhibit email communication without supplying crucial evidence indicating the contractual amounts. How is the Court to confirm that the Claimant is entitled to the commission without evidence of the contractual amount involved?
25. If the projects were indeed undertaken, there must have been contracts in that respect. Further, there must have been payments made to the Respondent under the said contracts. This is the evidence the Claimant needed to prove his claim.
26. Needless to say, the Claimant was required to prove his claim as opposed to throwing figures to the Court without laying down a basis for the award of commissions. As it is, the Court cannot infer the Claimant's claim from the circumstances. Strict proof was required from his end.
27. The bottom line is that it is not possible for this Court to ascertain the Claimant's entitlement to the commissions sought and if so, the specific amounts against each project except the ICTA project.
28. With regards to the ICTA project, the Claimant exhibited a copy of an email indicating the contract amount as Kshs 3,886,000.00. Further, the Respondent in its letter dated 1st August 2016 through which it accepted the Claimant's resignation, confirmed that he would receive his commissions



including the ICTA phase I project. He was further notified that commissions in respect of the ICTA phase II project would be paid subject to the contract addendum being signed in August 2016. There is no evidence that this was done.

29. This being the case, the Court returns that the Claimant is only entitled to commissions claimed under the ICTA project Phase I being the sum of Kshs 363,600.00.

Service Pay

30. The Claimant has further sought to be paid service pay for the period he served the Respondent. Revisiting the Claimant's contract of employment, it is notable that Clause 5 provides that upon confirmation, a 5% matching contribution will be paid to a scheme of his choice. The import of the foregoing contractual provision is that the Claimant has been placed within the exclusions under Section 35(6) of the *Employment Act*. He is therefore not eligible for service pay.

Pension Contribution

31. Under Clause 5 of the Claimant's contract of service, he was to earn a 5% matching pension scheme contribution. The Respondent has not denied that the Claimant was entitled to a 5% matching contribution. Further, there is no evidence that the Respondent made the pension remittances as contractually agreed. As such, the Court returns that the Claimant is entitled to Kshs 504,000.00 being the pension contributions.

Orders

32. In the end, the claim succeeds to the extent of unpaid commissions in respect of the ICTA project phase I and pension contributions. As such, the Claimant is awarded:
- a. Unpaid commissions being the sum of Kshs 363,600.00; and
 - b. Unremitted pension contributions in the sum of Kshs 504,000.00. For the avoidance of doubt, the unremitted pension contributions shall be remitted directly to the Claimant's pension provider.
 - c. Interest shall apply on the award in (a) from the date of filing the suit until payment in full.
33. As the employment relationship has not been disputed, the Claimant shall be entitled to a Certificate of Service in line with Section 51(1) of the *Employment Act*. This shall issue within 30 days from the date of this Judgment.
34. The Respondent shall bear the costs of the claim.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF APRIL 2024.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Mr. Sabula

For the Respondent No Appearance

Court Assistant Kemboi



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 15th March 2020 and subsequent directions of 21st 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

