



**Kaveke v Capsule Limited t/a Flare (Cause E042 of 2023)
[2024] KEELRC 2555 (KLR) (18 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2555 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E042 OF 2023
SC RUTTO, J
OCTOBER 18, 2024**

BETWEEN

CHRISTINE KAVEKE CLAIMANT

AND

CAPSULE LIMITED T/A FLARE RESPONDENT

JUDGMENT

1. It is common cause that the Claimant was employed by the Respondent as a Business Development and Sales Executive Lead through a contract of employment dated 25th June 2021. The employment relationship was short-lived seeing that the Claimant tendered her resignation from the Respondent’s employment through her letter dated 17th November 2022. The Claimant’s claim against the Respondent is for the sum of Kshs 6,160,331.00 being unpaid bonus and pension allowance. The Claimant has further sought general damages for breach of contract as well as the costs of the suit plus interest.
2. Disputing the Claim, the Respondent contends that the Claimant consistently failed to meet sale targets in accordance with the terms of the contract and further, that she was not eligible for a bonus payment on grants. For this reason, the Respondent has urged the Court to dismiss the Claimant’s Claim with costs.
3. During the trial which took place on 21st February 2024 and 16th April 2024, both parties called oral evidence.

Claimant’s Case

4. The Claimant who testified in support of her case, sought to adopt her witness statement to constitute her evidence in chief. She further produced all the documents filed on her behalf as exhibits before Court.



5. It was the Claimant's evidence that as part of her roles and job description, she was to convert leads to discovery meetings, to proposals and ultimately to close deals. In the fulfilment of her role, she brought in the form of grants for the Respondent, 8 times her monthly gross salary. That as per her contract, she was entitled to 15% bonus on sales generated on the attainment of a target of 8 times her monthly gross salary.
6. The Claimant stated in further evidence that she was actively involved in making proposals and bringing on board the following clients; ITU, UAP Old Mutual, Ashoka (Making More Health), Austrian Development Agency (Kofi Annan), MSD (Merck for mothers), KTNEX, Absa Bank, Wanderlust and Nyarai training sales, BYONB to subscribe to the Respondent's services.
7. It was the Claimant's contention that in breach of her legitimate expectation, the Respondent failed to pay her bonus as agreed in her contract.
8. She further averred that she was entitled to her pension allowance of Kshs 618,200/= calculated as Kshs 56,200/= per month from December 2021 to October 2022.
9. The Claimant further averred that she resigned due to lack of good faith demonstrated by the Respondent in paying her dues.

Respondent's Case

10. The Respondent called oral evidence through Ms. Miriam Nyanjau Mugo who testified as RW1. She identified herself as the Respondent's Legal Services Manager. Equally, she adopted her witness statement and supplementary witness statement to constitute her evidence in chief. She further produced the documents filed on behalf of the Respondent as exhibits before Court.
11. RW1 stated that as per the Claimant's Contract of employment, bonus would be earned on a quarterly basis and would only be payable upon her attaining a minimum monthly sales target of Kshs. 1,200,000/=: which was equivalent to 3 times her monthly gross salary of Kshs. 400,000/=:
12. That further, the Claimant would be entitled to a bonus payment of 10% of the contract value if she attained a sales target of above 3 to 5 times her monthly salary; a bonus payment of 12% of the contract value if she attained a sales target of above 5 to 8 times her monthly salary; and 15% of the margin of the contract if she attained a monthly sales target of anything above 8 times her monthly salary.
13. According to RW1, the Claimant never made any sales that were more than 8 times her salary as she alleges. That from the start of the Claimant's employment, she failed to meet the minimum sales targets in that she did not make any sales in September 2021; while during Q4 2021 (October 2021 to December 2021), she only made Kshs. 369,000/= in sales; and in Q1 2022 (January 2022 to March 2022), the Claimant only made sales of Kshs. 50,000/=:
14. RW1 further stated that the Claimant did not make any sales during Q2 2022 (April 2022 to June 2022) while during Q3 2022 (July 2022 to September 2022), she only made Kshs. 346,744/=: and during Q4 2022 (October 2022 to December 2022), the Claimant did not make any sales.
15. RW1 further stated that as the Claimant consistently failed to meet her sales targets, in accordance with the terms of the Contract, the Respondent took the decision to allow her to work with other team members on projects for securing grants from prospective grantees/donors as opposed to only making sales, which the Claimant had failed to do.



16. It was the evidence of RW1 that grants are not sales and are awarded to the Respondent at the grantee/donor's discretion to help facilitate its operations. That all grants received by the Respondent have prescribed budgets and use of funds for specific social impact projects and operations.
17. It was RW1's further contention that in any event the Claimant worked in the grants team which won awards for the Respondent and no single grant can be attributed solely or directly to the Claimant.
18. RW1 further stated that in July 2022, the Claimant had a performance review meeting with her Line Manager and a proposed change in remuneration was discussed subject to an agreement on terms. This led to an exchange of messages between the Claimant and her Line Manager.
19. In the discussions with the Claimant, it was explained to her that as sales targets were not being met, the Respondent which is a startup company was not able to roll out a private pension scheme for its employees but that the Claimant's salary would be increased to inter alia, enable her plan for an individual private pension plan.
20. Following these discussions, the Respondent offered the Claimant a Deed of Variation to the Contract for review and signing. That the Deed proposed enhanced terms of employment including an increase of the Claimant's salary from Kshs.400,000/= to Kshs. 456,200/= per month.
21. It was RW1's evidence that the Deed would have offered her greater remuneration to enable her make private arrangements for a private pension plan.
22. From the messages exchanged with the Claimant, the Respondent followed up with her on the signing of the Deed on several occasions. She rejected the Deed and declined to sign it. As such, the Claimant's terms of employment remained as set out in the Contract.
23. RW1 further averred that for the entire duration of the Claimant's employment, the Respondent deducted and remitted her National Social Security Fund (NSSF) deductions. It was her view that the Claimant was not entitled to a separate pension scheme.
24. RW1 further averred that on 6th October 2022, the Claimant had a meeting with her Line Manager where the Claimant claimed to be entitled to bonus payments in respect of the awards won by the grants team in which she worked. It was explained to the Claimant that she was not entitled to commissions/bonus on grants as these were not sales and that she had never achieved her minimum sales target as set out in the Contract.
25. In RW1's view, the Claimant does not have any cause of action against the Respondent, and she is not entitled to any bonus.

Submissions

26. On her part, the Claimant submitted that in her resignation letter, she cites her frustration with the Director of the Respondent for her total denial to pay her bonuses as well as accumulated pension. Placing reliance on the cases of *Wester Excavating (ECC) Ltd vs Sharp (1978) ICR 221*, Cause Number 611 (N) of 2009 between *Maria Kagai Ligaga vs Coca Cola East and Central Africa Limited* and *Benuel Mariera vs Awand Enterprises Limited Mbsa*. Cause No. 191 of 2013, the Claimant submitted that the Respondent made it impossible for her to continue offering her services to the organization and its act and/or omission made it intolerable for her to continue working for the Respondent.
27. According to the Claimant, the facts of this case disclose that the Respondent's act and omission became intolerable such that her confidence and trust in the Respondent completely diminished when it (Respondent) changed its tune on the issue of bonus and accumulated pension.



28. The Claimant further argued that the measure of damages should be in accordance with the rule established in the case of *Hadley vs Baxendale* (1854) 9. Exh 341.
29. According to the Claimant, she had aptly demonstrated that the Respondent was in severe breach of the contract having withheld her bonus pay which she duly worked and is merited for her to earn.
30. On the Respondent's part, it was submitted that the Claimant cannot adduce evidence not contained in the Employment Contract in a bid to prove or disprove the terms set out in her Employment contract. On this score, the Respondent referenced Section 97 of the *Evidence Act* and the case of *National Bank of Kenya Limited vs Pipeplastic Samkolit (K) Ltd and another* [2002] 2 EA 503 (CAK).
31. Citing the decision in *Nairobi Civil Appeal 155 of 1992 Kukul Properties Development Ltd v Tafazzal H. Maloo & 3 others* [1993] eKLR, the Respondent submitted that the Claimant's deliberate choice not to execute the Deed of variation signifies her rejection of its terms. To this end, the Respondent contended that it should not be held to promises that were contingent upon mutual agreement which was not achieved. That therefore, the Claimant cannot claim entitlement to the additional benefits proposed in the Deed of Variation.
32. The Respondent further submitted that grants were not considered as income revenue and instead, were held in trust for the intended beneficiaries of the grants.
33. The Respondent maintained that it adhered to the restrictions imposed by donors and the specified budgets, which did not include provisions for employee bonuses or commissions.
34. According to the Respondent, the Claimant did not meet any of her minimum sales targets in any quarter to entitle her to a bonus. In the Respondent's view, the Claimant is seeking to reap where she did not sow and this Court should not rubber-stamp her attempts to be unjustly enriched.
35. It was the Respondent's further position that the Claimant was fairly remunerated and earned an above-average salary to compensate her for her duties and roles in the Respondent of which grant sourcing was reasonably and fairly related to.
36. Referencing the case of *BID Insurance Brokers Limited v British United Provident Fund* [2016] eKLR, the Respondent further submitted that the Claimant has an obligation to prove her case on the required standard of proof on a balance of probability. According to the Respondent, the Claimant has thrown figures at the Court for it to determine how the figures were arrived at.
37. The Respondent further submitted that save for producing contracts, the Claimant has not provided corresponding receipts and invoices to support her claim for special damages. In support of this argument, the Respondent placed reliance on the case of *Guardia Coach Ltd & another v Kiptoo (Civil Appeal 34 of 2020)* [2022] KEHC 12397 (KLR) (26 May 2022) (Judgment).

Analysis and Determination

38. 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.

Reliefs?

39. Before I delve into this issue, I find it imperative to address the question of constructive dismissal. At the outset, I must point out that this issue was not pleaded by the Claimant and that she has only brought



it up for the first time in her submissions. Indeed, the Claimant has invited the Court to consider a number of leading authorities in which the aspect of constructive dismissal has been addressed.

40. As was held in the case of *Rem Ogodo Ogana v Kenya Sugar Board* [2016] eKLR, a case for constructive dismissal or termination must be specifically pleaded setting out the specific particulars which the employee believes pushed him/her out of employment involuntarily even though the employer did not actually terminate the employment relationship.
41. In this case, the Claimant did not plead in her Statement of Claim that she was constructively dismissed from employment. As a matter of fact, the Claimant has not sought the reliefs that ordinarily flow from a case of constructive dismissal. Granted, in her letter of resignation, the Claimant alluded to the fact that the Respondent had failed to pay her bonuses and that there was a fundamental breach of the contract. Be that as it may, the Claimant was required to specifically plead constructive dismissal in her Statement of Claim.
42. It must be appreciated that constructive dismissal is an entirely different realm of law and breach of the contract of employment is just but one element that is considered in determining a case of constructive dismissal.
43. It is also trite that submissions do not constitute evidence. Therefore, in the event the Claimant considered herself as having been constructively dismissed from employment, nothing stopped her from expressly pleading as much in her Statement of Claim and setting out the particulars thereof.
44. On this issue, I will follow the determination by the Court of Appeal in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR where it was held that: -

“We have already found that the 1st respondent failed to discharge his burden of proof of the existence of facts claimed of the companies, what they owned and whether property sales indeed took place, followed by transfers. So what we conclude is that the learned trial judge simply lifted the figure of sh.80,161,720/= from the 1st respondent’s submissions and awarded it against the appellant. This was wholly in error. Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.” Underlined for emphasis

45. The bottom line is that since the Claimant failed to specifically plead constructive dismissal, the same does not arise for determination at this juncture.
46. That said, I now turn to consider whether the Claimant is entitled to the reliefs sought.

Unpaid Bonus

47. The Claimant has sought against the Respondent the sum of Kshs 5,522,131/= being unpaid bonus calculated at 15% of the margin of the contract on any sales made above 8 times her monthly gross salary.
48. In her witness statement which she adopted to constitute her evidence in chief, the Claimant averred that she was actively involved in making proposals and bringing on board the following clients to subscribe to the Respondent’s services; ITU, UAP Old Mutual, Ashoka (Making More Health),



Austrian Development Agency (Kofi Annan), MSD (Merck for mothers), KTNEX, Absa Bank, Wanderlust and Nyarai training sales, BYONB.

49. In support of her case, the Claimant exhibited copies of the contracts entered into by the Respondent and the entities aforementioned.
50. Save for exhibiting copies of the said contracts, the Claimant did not provide the Court with a breakdown indicating the specific bonus amounts she is claiming against each contract as well as the respective contract value.
51. It is not in doubt that the Claimant's claim is specific in nature. 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.
52. 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.
53. As stated herein, the Claimant has sought a global sum of Kshs 5,522,131/= being unpaid bonus. It is not clear how she arrived at the said amount. According to the Claimant, this figure is pegged on a margin of 15% against the sales made. This being the case, the Claimant was expected to state the sales achieved against each contract hence making a justification for payment of the bonus amount claimed. This way, the Court would have been in a position to consider the claim for special damages against the evidence on record.
54. In the instant case, the Claimant did not make any attempt to justify an award of bonus against each of the clients she alleges to have brought on board to subscribe to the Respondent's services. Essentially, she has left the Court to figure out how to arrive at that amount. As such, I cannot help but question how the Claimant expects the Court to confirm that she is entitled to the bonus claimed. This does not satisfy the required threshold of strict proof.
55. Revisiting the determination of the Court of Appeal in *Capital Fish Kenya Limited vs 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.”
56. On this score, I agree with the Respondent that the Claimant has thrown figures to the Court for it to determine how she arrived at the said figures. The Court will not grope in the dark.
57. The bottom line is that it is not possible for this Court to ascertain the Claimant's entitlement to the bonus sought and if so, the specific amounts against each contract.
58. This being the case, the Court returns that the Claimant has not proved her case to the required standard.

Pension allowance

59. The Claimant has further sought to be paid pension allowance in the sum of Kshs 618,200/=. I have perused the Claimant's contract of employment dated 25th June 2024 and note that this item is



addressed under “Benefits” as follows “Separately, a pension plan to be reviewed post the probation period.”

60. From the record, the parties did not revisit the issue until the time when they were negotiating the Deed of Variation of the Contract of Employment. I say so because, from the communication exhibited before Court, the Claimant had proposed that the 10% pension consideration should be after taxation. Evidently, the parties never made it to the point of executing the Deed of Variation hence the proposal on the pension consideration was never reduced into writing. As such, the same did not constitute a contractual term capable of enforcement by the court. For this reason, the claim for pension allowance cannot be sustained.

Orders

61. In the final analysis, the Claim is dismissed in its entirety with an order that each party bears its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF OCTOBER 2024.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Ms. Wangui

For the Respondent Mr. Nkonge

Court Assistant Millicent Kibet

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

