



**Lewela v Oracle Technology Systems (Kenya) Limited (Cause
392 of 2019) [2023] KEELRC 913 (KLR) (13 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 913 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 392 OF 2019
MN NDUMA, J
APRIL 13, 2023**

BETWEEN

ANDREW LEWELA CLAIMANT

AND

ORACLE TECHNOLOGY SYSTEMS (KENYA) LIMITED RESPONDENT

JUDGMENT

1. The claimant was employed by the respondent as a senior Technology Sales Manager vide a contract of employment dated 15th October, 2015.
2. The claimant served continuously in that capacity until he was promoted to the position of Cloud Platform Representative after 3 years. The claimant served in that capacity until the claimant wrote a letter of resignation dated 19th July, 2018 to Mr. Bob Hroch .
3. The claimant laid down his position and reasons of his resignation in the said letter.
4. The claimant testified that he was part of the team that delivered the largest private Cloud transaction for the government through ICT Authority through the respondent and had also negotiated the first framework agreement between the respondent and the government of Kenya.
5. The claimant testified that upon resignation he served one month notice required under his contract of employment as garden leave until 31st August, 2018.
6. The claimant consequently requested to be paid the following terminal benefits in the letter of resignation:-
 - (a) Payment of accrued leave days.
 - (b) Payment of salary during the notice period and other terminal benefits.



- (c) Payment of all outstanding commissions owed to the claimant for the deals closed during his tenure at oracle without any exception immediately.
- (d) Payment of Clawbacks that had been instituted on him that had led to the denial of remission of his commission up to the time he left the employment.
7. The claimant testified that despite demand the respondent has failed and/or neglected to pay to the claimant the aforesaid terminal dues.
8. The claimant testified that commissions due are as set out under paragraph 10 of the Statement of Claim in the sum of Kshs 6,431,427.
9. The claimant testified that failure by the respondent to pay his dues is a breach and violation of his contract of employment and human rights provided under Article 27(1) and (5); 41(1) and 2(b) of *the Constitution* and Section 35(5); 36; 40(1) (e) (f) & (g) of the *Employment Act* 2017.
10. That the claimant has been forced unlawfully to endure economic hardship and has failed in his responsibilities towards his dependants. The claimant prays to be awarded as set out in the statement of claim including:-
- (i) A declaration that the respondent is in violation of Section 35 of the *Employment Act*, 2017.
 - (ii) A declaration that the respondent is in violation of Articles 27(1) and (5), 41(1) and (2) (b) of *the Constitution* of Kenya.
 - (iii) Payment of outstanding commissions of Kshs.6,431,427
 - (iv) General Damages
 - (v) Cost for the claim.
 - (vi) Interest on (ii), (iv) and (v) above at Court rates from 31st July, 2018.
 - (vii) Any other orders that this Honourable Court will deem necessary and fit.
11. The respondent filed a statement of defence in which is denied that the claimant is entitled to the reliefs sought in that the claimant was bound by terms of the compensation plan and the respondent was therefore entitled to clawback the payments made from subsequent commissions arrived at upon failure by respondent's customers to pay for a closed deal.
12. The respondent admits that the claimant was employed by the respondent on 15th October, 2015 as a Sales Manager pursuant to a contract of employment of the said date. That the claimant rose through the ranks to the position of Cloud Platform Representative until his resignation effective 31st July, 2018.
13. Denies Mukui testified that he was the Human Resource Manager of the Respondent from March, 2019. That the claimant earned salary and commissions from sales made.
14. That payment of commission was guided by the terms of his contract and in particular the compensation plan therein. That the claimant had accepted all the terms of the contract by appending his signature to it. That the contract had a cautionary Annexure which took priority in case of conflict.
15. That the claimant is not entitled to the commission claimed in the sum of Kshs.6,431,427 as per the Oracle Policy since commission is earned when deal is closed.
16. That a customer must pay first before the payment of commission is made.



17. That the claimant resigned with effect from 31st July, 2018. That at the time of that resignation, Independent Electoral and Boundaries Commission (IEBC) had not paid Oracle the proceeds of the contract sealed between Oracle and IEBC in respect of which the claimant seeks payment of commission. That IEBC had not made payments in respect of the said deal up to the time of the hearing this suit. R.W.1 produced letters dated 18th January, 2021 and 22nd February, 2022 written by the respondent to IEBC reminding IEBC to make the payments.
18. R.W.1 testified that the claimant was paid salary and commissions and same were reflected in his payslips. That the payslip for July, 2017 shows payment of commission to the claimant in the sum of Kshs 5,205,378.80. That the claimant acknowledged payment of the amount.
19. That subsequently, the respondent reverted to the company policy clause 14 which provided for commission and Bonus recovery where sales were closed. Sales incurred negative commission balance. That the claimant was aware of the clawback clause at the time he wrote the letter of resignation dated 19th July, 2018 which took effect on 31st July, 2018.
20. That the claimant now claims payment of commission lawfully clawed back by the respondent. That the respondent clearly explained the payment due to the claimant and the clawback made.
21. The claimant was therefore paid Kshs 11,799,271 and Kshs 3,570,567 was clawed back towards the payment made under IEBC. That Kshs1,374,420 was also recovered in respect of the deal with National Treasury. That total amount recovered was Kshs.4,950,987. R.W.1 testified that the total amount clawed back from payments made to the claimant was Kshs 5,205,378 which amount was the exact sum paid to the claimant under IEBC deal since IEBC had not paid the contract sum until the time the claimant resigned from employment.
22. That the claimant is therefore not entitled to any claims made.
23. Under cross-examination by Advocate Mutai for the claimant, R.W.1 insisted that the respondent was entitled to clawback the amount of commission paid to the claimant on account of failure by IEBC to pay the contract sum to the respondent. R.W.1 stated that the claimant earned Kshs 666,067 as the basic salary. That the claimant earned Kshs 44,442,30 as commission up to 31st March, 2017. That in July, 2017, the claimant earned Kshs 5,205,000 as commission.
24. That Kshs 5,242,874 was to be earned as commission by the claimant from the IEBC deal. That this amount was payable in July, and August, 2017. That the amount was clawed back leading to a negative balance on the claimant's commissions payable. That future commissions payable were therefore to be deducted. That Kshs.1,799,271 commission was earned by the claimant on Cloud ICTA; and this was paid in September, 2018.
25. That two commissions were earned and not paid due to clawback on IEBC deal.
26. That these were National Treasury Order No.354-867 and Order No. 11543. The claimant earned Kshs 105,616 from IEBC and 1,374,419 where Clawback was done. That IEBC has acknowledged the debt to the respondent on the IEBC deal closed by the claimant. That the non-payment led to the clawback of the commission otherwise earned by the claimant. That the claim lacks merit and it be dismissed with costs.

Determination

27. The issues for determination in this suit are:-
 - (i) Whether the claimant is entitled to payment in lieu of leave; and notice pay.



- (ii) Whether the claimant is entitled to payment of commission in the sum of Kshs 6,431,427 clawed back from his commission earnings.
28. With respect to issue (ii) above, the respondent while acknowledging that the claimant had earned commission in respect of various deals closed states that the claimant was duly paid. The respondent asserts the right to recover commission paid to the claimant on account of non-payment of the contract sum by IEBC in the sum of Kshs 166,279,102,00 claimed by the respondent in various letters written by the respondent to IEBC dated.
29. In a letter dated 10th February, 2021, IEBC vide the Commission Secretary acknowledged the debt owed by IEBC to the respondent and promised to pay the same upon budget provision and receipt of exchequer from the National Treasury. The respondent wrote letters dated 22nd July, 2020 and 18th January, 2021 to the Cabinet Secretary National Treasury in respect of the said debt for services rendered by the respondent to IEBC.
30. The claimant insists that the respondent has not provided to the Court prove of non-payment by the customers served vide deals closed by the claimant. The claimant also insists that the payment of the entire commission to the claimant by the respondent in respect of the deal closed with IEBC was sufficient proof that the respondent was satisfied that the claimant had closed the deal and was entitled to the payment. The claimant stated that there was no justification for the respondent to renege on the contract and clawback the commission already paid to him from subsequent deals closed by the claimant. The claimant testified that the clawback by the respondent was only done when the claimant resigned which action was malicious on the part of the respondent.
31. That in any event the policy document provides for payments of commission for work completed. That there is no provision in the Sales Compensation Plan terms and conditions that provided for any such clawbacks. The claimant insisted that the clawback was unlawful, and unfair.
32. The Court has carefully considered the contract of employment between the claimant and the respondent and the following clause in particular page 4 – Commission and Bonus/Incentive.

“You are eligible to participate in any incentive scheme which Oracle may, in its sole discretion, decide to operate relating to your job. The compensation type relating to your job is described below:-

Compensation plan

“You are eligible to participate in an individual compensation plan set out in a separate Terms and Conditions document which will be made available to you once you have joined the company.”

33. In terms of the aforesaid clause, the respondent provided:-

“Annexure to Terms and conditions of contract of Employment for Kenya.” to the claimant. The terms were signed by both parties and acknowledged as part of the employment contract.

The annexure did not elaborate the issue of commissions.

34. The respondent provided payslips which shows the claimant was paid in addition to basic salary as follows:-



- (i) Commission in the sum of Kshs 44,52.30 per payslip dated 31st March, 2017.
 - (ii) Commission in the sum of Kshs 5,205,378.80 as per payslip dated 31st July, 2017.
 - (iii) Commission in the sum of Kshs 141,589.90 as per payslip dated 31st August, 2017.
 - (vi) Commission in the sum of Kshs 1,799,271.50 as per payslip dated 30th September, 2018. This payslip showed zero (0) payment of basic salary which was provided in earlier payslips in the sum of Kshs 662,666.67.
35. The respondent attached a tabulation of commission confirming the clawbacks made on the claimant paid commissions as a result of alleged debt payment by the IEBC. The claimant attached Oracle FY 2019 Sales Compensation Plan Terms and Conditions for the period June, 2018 to May, 2019.
36. The respondent relied on Clause 14 which reads:-
- “All prior commissions, Bonuses, and Compensation credits associated with a sale are recoverable against current or future Commissions or Bonuses from the Sales Employees originally credited in the following circumstances where Sales Employees incurs a negative commission balance.Customer’s account receivable becomes greater than the local limit for days past due.Account or Project is adjusted via Credit Memo, is cancelled mid-term or debooked.Account is deemed uncollectible under the terms of the Company’s accounting policies and written-off.Sales Credit adjustment arising from system miscalculation or error, administrative error or post-commission payment notification of misallocation Sales Credit.
- Recovered Sales Credit will result in a corresponding reduction in attainment in the month of recovery and a corresponding recovery f Commission/Bonus in the current month, Recovered Sales Credit, Memos and Reinstated Sales Credit will be applied to the Commission or Bonus rates of the original Plan in effect at the time the Sales Credit was originally calculated.
- Each fiscal year territories and Sales Targets are reset, therefore compensation Credit attainment will not carry over into the next fiscal year. However, the company may recover a negative commission balance through current or future commissions or Bonuses or invoke a collections process when negative commission balance cannot be recovered in a reasonable period.
- Negative Balances in a Pool Plan where the ultimate Fiscal Year funding is lower than the Bonuses paid out during the year will also carry over into the following fiscal year.
- Rehired Sales Employees with a Negative Commission Balance will be responsible to pay their Negative Balance before they are paid Commissions or Bonuses.”
37. The respondent submits that payment of commissions was strictly governed by contractual terms mutually agreed upon by the parties and the Court is bound to uphold the same. The respondent referred the Court to the holding in National Bank of Kenya Limited -vs- Pipeplastic (K) Limited and Another [2001] eKLR.
38. The respondent submitted that it was entitled to recover commissions already paid to the claimant when the “customer’s account receivable becomes greater than the Local Limit four days past due.”
39. This is the particular clause relied by the respondent to recover from the claimant commissions already paid when IEBC account receivable became greater than the local limit to offset his negative commissions Account balance.



40. That the respondent lawfully utilised subsequent commissions earned by the claimant to offset his negative commissions Account balance.

41. The respondent submitted further that:-

“The claimant’s right to earn commissions under the Sales Commissions Plan terminated upon his resignation on 31st July, 2018 in terms of clause 20 of the Sales Compensation Plan.”

Clause 20 reads:-

“20 Position changes and Employment Termination

A Sales Employee’s ability to earn commission and/or Bonuses under the Plan terminates on the Sales Employee’s last date of employment with the company or on the date of transfer to a non-Sales position. Participants who terminate employment or transfer out of sales shall be eligible to receive commissions and/or Bonuses resulting from sales credits on transactions which book and meet the applicable sales credit determination and calculation triggered by the Sales Employee’s final day of employment or transfer date.

42. The evidence before Court is that the claimant had been fully paid commission in respect of the IEBC transactions. That by the time of his resignation, the claimant had fulfilled payment conditions in respect of all the subsequent deals he had concluded but the respondent elected to unilaterally clawback the payments it had already made to the claimant in respect of the IEBC transaction on the basis that at the time of claimant’s resignation, the customer had not yet paid to the respondent the contract amount.

43. The respondent did not place before Court any tangible evidence that the IEBC account had been “deemed uncollectable under the terms of the company’s accounting policies and written-off.”

44. To the contrary, the correspondence placed before Court between the respondent and the customer (IEBC) and the Cabinet Secretary Treasury clearly indicated as at the time of the last correspondence IEBC was ready and willing to make good the payment to the respondent as soon as budgetary allocation was provided by the Treasury.

45. It is the Court’s considered interpretation of the contract of employment between the claimant and respondent read with Clause 14 and 20 of the Company Commission Compensation Plan, that as at the time of the claimant’s resignation, the claimant had already earned the commissions already paid to him but clawedback by the respondent before the claimant tendered his resignation.

46. It is a breach of the contract of employment between the claimant and the respondent to refuse to pay the claimant commission already earned and was due and payable as at the time of claimant’s resignation.

47. Clause 20 speaks of ability “to earn commissions” and not respondent’s responsibility to pay commissions “already earned” as at the time of termination of sales employee contract. The claimant had already earned the commission claimed as at 19th July, 2017 when he tendered the letter of termination.

48. The Oracle FY 2019 Sales Compensation Plan Terms and Conditions for the period June 11th 2018 to May, 31st, 2019 were placed before the Court by the claimant. The contract of the claimant expired



with effect from 31st July, 2018. This policy document was therefore applicable to the claimant with regard to payment of commissions due and earned.

49. The claimant had done the work required of him or had rendered services required of him and had earned the commissions he now claims as at effective date of his resignation on 31st July, 2018.
50. The question of ability to earn does not therefore arise in the circumstances of this case upon resignation of the claimant. However the responsibility to pay commissions earned remained on the part of the respondent.
51. The evidence before Court shows that the claimant served a full month notice upon tendering letter of resignation. The respondent was bound to pay the claimant a full salary during the period the claimant served one month notice. The Court finds that the respondent owes the claimant the full salary in the sum of Kshs 666,666.64 for the full month the claimant was in Garden Leave in terms of the contract of service.
52. The claimant did not adduce any evidence to substantiate the number of untaken leave days owed to him by the respondent at the time of his resignation. Indeed the fact that the claimant served one month Garden Leave contradicts his claim for payment in lieu of leave days not taken.
53. The clause on termination in the contract between parties provides for one month termination notice and states;

“Where either you or the company have given notice of termination of your employment, the company may as at its sole discretion, require that you do not carry out any duties or part of your duties, or do not attend any company or Oracle premises.”
54. The termination notice clearly stated;

“I wish to tender my resignation effective 31st July, 2018. As per the terms of contract. I will serve one month notice as Garden Leave till 31st August, 2018.”
55. The claimant testified that he served the notice period but was not paid salary for the period of Garden Leave. The respondent did not contradict this position.
56. Accordingly, the Court enters judgment in favour of the claimant as against the respondent as follows:-
 - (i) Kshs 666,666.67 being one month’s basic salary for the notice period served between 31st July, 2017 and 31st August, 2018.
 - (ii) Kshs 6,431,427 being commission duly earned, paid and clawed back by the respondent from the claimant’s earnings before the date of his resignation on 31st July, 2018.
 - (iii) Interest at Court rates from the date of termination of contract on 31st July, 2018 till payment in full.
 - (iv) Costs of the suit.
57. For the avoidance of doubt, this was a claim purely based on a contract of Employment between the claimant and the respondent. The Court finds that though the failure by the respondent to pay the claimant’s dues earned breached the contract, the said breach did not amount to any violation of Articles 27(1) and (5) 41(1) and (2) (b) of *the Constitution* to warrant award of general damages to the claimant in addition to the special damages proved by the claimant and duly awarded by the Court.



58. It is so ordered.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 13TH DAY OF APRIL, 2023.

MATHEWS N. NDUMA

JUDGE

Appearances

Mr. Chenge for claimant

M/s Muma for Respondent

Ekale – Court Assistant

