



REPUBLIC OF KENYA



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**Nyakwoka v Tata Africa Holdings Kenya Ltd (Cause 838 of 2015)
[2023] KEELRC 1115 (KLR) (9 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1115 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 838 OF 2015**

JK GAKERI, J

MAY 9, 2023

BETWEEN

JULIUS NYAKWOKA CLAIMANT

AND

TATA AFRICA HOLDINGS KENYA LTD RESPONDENT

JUDGMENT

1. The Claimant initiated this claim by a Memorandum of Claim filed on 20th May, 2015 alleging that he was discriminated, refusal by Respondent to pay him commission and incentives, underpayment, non-payment for untaken leave days as well as bonuses and gratuity.
2. The Claimant avers that he was employed by the Respondent on 4th June, 2012 as a Business Manager (Agricultural Equipment) at Kshs.215,000/= and house allowance of Kshs.50,000/=.
3. The Claimant further avers that under the contract dated 13th April, 2012, it was agreed that the Claimant would be entitled to target based incentives and/or commission which terms would be effected beginning the first quarter of employment.
4. That he served that Respondent diligently and faithfully.
5. The Claimant itemises some of his achievements during the 2 years.
6. That on 17th May, 2014, the Claimant expressed his unwillingness to renew the contract of employment and requested the Respondent to process his commission and incentives for 2 years and the contract lapsed on 3rd June, 2014 and the dues had not been paid.
7. It is the Claimant's case that the industry minimum commission was 1% amounting to Kshs.10,431,334.70 plus Kshs.1,690,481.25 of sales initiated and concluded pending deliveries by the time the Claimant left employment.



8. That he was discriminated and frustrated at the work place by being paid a low salary compared to his Asian counterparts in a similar position.
9. That by the time he left, he had 46 untaken leave days not paid for.
10. That he claims unpaid gratuity and bonuses as per the Internal Performance Tool-KRA (Key Result Areas) for the 2 years he worked for the Respondent.
11. The Claimant prays for;
 - i. An order compelling the Respondent to pay his incentives and commissions calculated at a minimum of 1% of the total sales made in 2 years of Kshs.10,431,334.70 plus 1,690,481.25 of sales initiated and concluded but pending deliveries.
 - ii. Payment in lieu of 46 untaken leave days.
 - iii. Payment for the difference between the Asian Managers at the same level with that held by the Claimant and the Claimant's salary.
 - iv. Damages for discrimination at the work place.
 - v. Interest on (i), (ii), (iii) and (iv) above at court rates.
 - vi. Costs of the suit.
 - vii. Certificate of service.

Respondent's case

12. In its Reply to the Memorandum of Claim, the Respondent admits that the Claimant was its employee as alleged but denies that he achieved the goals set out in paragraph 4 of the claim as they were within his job description and not part of the incentives or commissions he was to receive.
13. That it received the Claimant's letter of non-renewal of contract.
14. The Respondent avers that it paid the Claimant a bonus of Kshs.322,500/= and incentives amounting to a total aggregate of Kshs.537,500/= as per the pay slip dated 12th December, 2013 and there was no incentives for the year 2013 – 2014 as issues arose on the clearing of all overdue accounts.
15. That the Claimant continued working until August 2014 and was paid in full for all the months despite having been told to hand over and resigned in August 2014 by email to which the Respondent replied insisting on finalization of pending issues and handover.
16. It is the Respondent's case that the amount payable as incentives and commission was not agreed at 1% as alleged by the Claimant and he received the sum of Kshs.537,500/= as incentives and commissions.
17. That the Claimant had been asked not to extend further credit to customers but did so without approval.
18. The Respondent avers that it genuinely supported the Claimant despite his resignation and had outstanding credits to clear and was paid for the duration.
19. The Respondent prayed for dismissal of the suit with costs.



Claimant's evidence

20. The Claimant's written statement rehashes the contents of the Memorandum of Claim.
21. In his oral testimony, the Claimant testified that meetings with the Respondent on commission of 1% on total sales fell through.
22. On cross-examination, the Claimant stated that he was entitled to 1% commission of the total sales as an incentive and an industry minimum but had no document to prove the so called industry minimum. That his consolidated salary was Kshs.265,000/= per month and had an official motor vehicle.
23. The Claimant testified that the contract dated 13th April, 2012 made no reference to incentives or commission and review of salary was based on performance.
24. That by letter dated 18th April, 2012, the Respondent was to work out performance targets and had no percentage of the incentive. That he authored Appendix 5 which had neither been acknowledged by the company nor received.
25. It was the Claimant's evidence that a target based incentive meant that the amount payable was dependent on meeting the set target and he and the management had to determine the targets.
26. That he wrote a resignation letter voluntarily and the letter had no allegation of discrimination and had written earlier about it via email dated 3rd September, 2013 stating that "local processes, structures and leadership are discriminatory."
27. The witness testified that the email made no direct reference to the alleged discrimination against him. He testified that he supervised seven (7) members of staff.
28. That he neither demanded payment of commission or the 46 leave days.
29. That he worked until August 2014 and was involved in the recruitment of his successor and handed over to the designated officer.
30. On re-examination, the witness testified that the contract was due to lapse on 3rd June, 2014. That the letter dated May 2014 was a resignation letter.
31. That the parties could not agree on the percentage commission payable to him and Human Resource confirmed the number of leave days pending.
32. CWII, Mr. Stephen Suswa Marwa testified that he was the Branch Manager at Narok and handled sales as a Manager.
33. The witness confirmed that the letter dated 15th August, 2015 was his Appointment Letter and a Promotion Letter and had the Respondent's sales policy specific to him and the commissions payable under paragraph 3 related to him subject to full payment by customers.
34. That before appointment as a Sales Manager, he was a Sales Team leader and had a different contract and the minimum commission was 1%.

Respondent's evidence

35. RWI, Ruth Muthusi testified that she was the Respondent's Human Resource and Administrative Manager.
36. It was her testimony that the Claimant was an employee of the Respondent as a Business Manager and the terms of reference of his contract did not include any incentive/commission pay out.



37. That the letter from Naresh Leekha dated 18th April, 2012 on an incentive scheme was a one off letter on quarterly based incentive/commission dependent on prescribed conditions for the specific period and no incentive scheme letter was issued to the Claimant but was awarded a bonus of Kshs.322,500/= and an incentive commission of Kshs.215,000/= in December 2013.
38. That in 2014, the Claimant unilaterally sold equipment on credit, invoiced products at will and did not disclose whether payments had been made.
39. That the Claimant demanded incentive package at the alleged industrial minimum of 1% of sales.
40. That the Claimant had not achieved the requisite sales and allied services targets to justify payment of incentives/commission for a period of 2 years he worked for the company.
41. That during his tenure as an employee, he did not complain of any alleged frustration and/or discrimination.
42. RWI testified that matters touching on salary were confidential between employer and employee and he had negotiated his entry salary and accepted the offer given for the position.
43. That the Claimant neither completed the clearance process nor prepared a handover report for final payments to be processed.
44. On cross-examination, the witness testified that she was not an employee of the Respondent in 2012 but was relying on the records. The witness admitted that the Claimant had 46 leave days as confirmed by the email from one Agnes to the Claimant dated 2nd July, 2014.
45. That by 7th August, 2014, the Claimant's contract had lapsed and he had not utilized the 46 days.
46. That the letter dated 18th April, 2012 alluded to the working out of a target based incentive/commission but had no details of the commission payable and was to be worked out after he joined.
47. The witness denied that the sum of Kshs.537,500/= was a bonus as the payslip indicated that it was a sales commission but could not explain how the amount was arrived at or the percentage used.
48. The witness stated that the Respondent had not agreed with the computations of the Claimant.
49. On re-examination, the witness stated that the target based incentive/commission was to be worked out within quarter one and the targets were to be agreed upon or set.

Claimant's submissions

50. Counsel for the Claimant isolated for issues touching on commission payable to the Claimant for 2 years amounting to Kshs.12,121,816/=, 46 leave days, discrimination of the Claimant and costs.
51. As regards the commission payable to the Claimant, counsel relied on the Respondent's letter to the Claimant dated 18th April, 2012 by which the Respondent undertook to work out a target based incentive or award within the first quarter and the items in the excel sheet were not disputed.
52. Counsel submitted that the letter by the Respondent was proof that the Claimant legitimately expected a target based incentive or commission from sales. That the Claimant was claiming a 1% commission on sales he initiated.
53. That CWII testified that the Respondent paid a minimum commission of 1% to its employees. The court was invited to accept his evidence as dependable.



54. Reliance was made on the decision in *Transport and Allied Workers Union v Comarco Properties (EPZ) Ltd* [2015] eKLR to urge that commission was an employment issue.
55. Counsel submitted that the Respondent's defence comprised mere denials that it did not commit itself to pay any commission to the Claimant, the evidence before the court notwithstanding.
56. The court was urged to find that Claimant was entitled to commission on the items he caused to be sold and award him the amount claimed.
57. Reliance was made on the sentiments of Rika J. in *Kamlesh V. Rawal v Achelis Material Handling Ltd* [2017] eKLR that a commission promised to an employee by the employer was payable.
58. As regards the 46 leave days, counsel relied on the sentiments of Mbaru J. in *Fancy Jeruto Cherop & another v Hotel Cathay Ltd* [2018] eKLR as regards the right to annual leave.
59. Counsel urged that it was common knowledge that the Claimant had 46 unutilized leave days by 30th June, 2014 and the Claimant ought to be paid for them.
60. On discrimination, counsel submitted that the Claimant was discriminated and frustrated as his salary was low compared to his Asian counterparts who held similar positions.
61. Counsel submitted that since the Respondent did not produce the payroll, it did not controvert the Claimant's allegation. That the undated and unauthenticated complaint against Sandeep Tickou, Rajeev Sharma and Navrose Adam by one Philip Gow provided by the Claimant was proof of discriminative tendencies by the Respondent.
62. Counsel relied on Article 27(4) of *the Constitution* of Kenya, 2010 and 5 of the *Employment Act*, 2007 to urge the right of equality and freedom from discrimination.
63. Counsel submitted that the Claimant had proved that he was discriminated and the court was invited to find as much and award damages.

Respondent's submissions

64. Although counsel did not specifically isolate issues for determination, he submitted on commission payable to the Claimant, discrimination and the reliefs sought.
65. As regards commission, counsel submitted that the contract of employment dated 13th April, 2012 had no specific provision for 1% commission on sales over and above the general gross salary of Kshs.265,000/= per month, specifically clause 2, counsel argued. That the letter dated 18th April, 2012 was not an addendum to the contract as alleged by the Claimant as providing for commission.
66. Counsel invited the court to examine the document keenly to discern that it was an encouragement to the Claimant to view his position as one with potential financial reward once the incentive scheme was put in place. That the letter was clear that the incentive scheme had not been put in place. That that was the intention i.e the word workout signified plan or formulate in detail in the first quarter of your joining.
67. Counsel submitted that no computation was given in the letter and was to rollout the scheme in Quarter I.
68. Counsel further submitted that the Claimant left employment because the incentive scheme had not been put in place and could thus not pray for it.



69. That the unsigned and unacknowledged tabulations of the incentive/commission were not in the Respondent's letter head to signify the existence of the 1% commission.
70. The court was invited to find that the unsigned document had no evidential value.
71. As regards discrimination, counsel relied on Sections 107 and 112 of the *Evidence Act* to urge that the Claimant had not proved that his salary was lower than that of his Asian Colleagues, and the particulars of the alleged discrimination had not been pleaded.
72. Counsel submitted that the Claimant treated the issue casually to warrant serious interrogation, after all he had agreed to be paid a particular salary and did not raise the issue of discrimination in the 2 years.
73. That the complaint letter by Philip Gow did not identify the Claimant.
74. Counsel urged that differential salaries did not necessary amount to discrimination.
75. The Court of Appeal decision in *Ol Pejeta Ranching Ltd v David Wanjau Muhoro* [2017] eKLR was cited to reinforce the submission.
76. Counsel submitted that by failing to avail documentary evidence of the alleged different salary scales, the Claimant had not proved the alleged discrimination and as RWI testified, the Claimant's contract had no provision for commissions. That even if there were commissions, they were applicable subject to the conditions provided in the witness statement of the Respondent's witness and the Claimant was paid in December 2013.
77. Counsel submitted that in 2014, the Claimant had received at least 3 emails on unpaid credit transactions he had initiated.
78. That the Claimant had issues in the manner he handled his office and it was not coincidental that he resigned from office.
79. As regards bias, counsel relied on the decision in *Keith Wright V Kentegra Biotechnology EPZ Ltd* (2022) eKLR as well as the decision in *Ahmed Salim Bahannan V Foton East Africa* (2016) eKLR on payment of commission and variation of contract to urge that the Claimant had neither an oral nor written contract on entitlement to commission.
80. Counsel urged that the Claimant had not discharged the burden of proof.
81. On leave days, counsel relied on Clause 6 of the Employment Contract to urge that the Claimant had no claim for unutilized leave days as the same was contractual and was estopped from claiming payment, the Respondent's email dated 2nd July, 2014 notwithstanding.
82. Finally, counsel submitted that Section 51 of the *Employment Act* did not apply where an employee voluntarily resigned from employment and refused to handover.

Findings and determination

83. After careful consideration of the pleadings, evidence adduced in court and rival submissions by counsel, the issues that commend themselves for determination are;
 - i. Whether the Claimant was entitled to incentive/commission and at 1% of total sales.
 - ii. Whether the Claimant was discriminated by the Respondent in any manner.



iii. Whether the Claimant is entitled to the prayers sought.

84. As regards incentives/commission, parties have adopted contrasting positions. While the Claimant's counsel urges that Claimant is entitled to commission at the industry minimum of 1% of total sales, the Respondent's counsel submitted that he was not as the contract of employment made provision for it.
85. It is common ground that the Respondent employed the Claimant under a written contract of service dated 13th April, 2012 effective 4th June, 2012 for a period of 2 years and renewable thereafter for a further period of 2 years on similar terms and conditions.
86. The Claimant was entitled to 30 days leave per year to be taken at a mutually agreed time.
87. The Claimant's consolidated salary was Kshs.265,000/= per month which was reviewable by the Respondent at dates determined by it depending on personal performance, business environment and company performance.
88. It is equally not in contest that the contract of employment made no provision for incentives or commission or other allowances. However, by letter dated 18th April, 2012, the Respondent informed the Claimant that his designation was Business Manager-Agricultural Equipment reporting to the Head Business Development (East Africa).
89. In addition, the letter stated as follows;
- “ A part from emoluments, we have agreed to work out a target based incentive/commission within the first quarter of your joining.
- All other terms remain as per the letter.
- Yours sincerely,
- Signed
- Naresh Leekha
- Executive Director
90. According to the Claimant's counsel, the letter was an undertaking by the Respondent that it would work out a system of compensation and the only item missing was the rate which the Claimant completed as 1% the alleged industry minimum.
91. After leaving employment in September 2014, the Claimant prepared computations of his entitlement to commission at 1% on the total sales made during the two years and argues that that was the agreed commission of Kshs.12,121,816/=.
92. The salient issue is whether the Respondent's letter dated 18th April, 2012 promised an incentive/commission at 1% of total sales and the Claimant started earning the same from date of employment till he left employment.
93. A closer interrogation of the letter is necessary to decipher the intended message. The letter has no reference but the introductory sentence reads as follows;
- “ This is further to our contract of employment issued to you on 13th April, 2012.”
94. The term further which is key in the foregoing sentence denotes help the progress or development of (something).



95. It also refers promote, advance, facilitate, aid or forward.
96. However, the more contentious part of the letter is paragraph 3 and in particular the words;
“ . . . we have agreed to work out a target based incentive/commission within the first quarter of your joining.”
97. Noteworthy, this letter was written a few days after the contract was entered into but before the Claimant joined the Respondent and was undoubtedly futuristic at any rate the first quarter was due to commence in June 2012.
98. In the court’s view, the Respondent promised that it would prepare or propose a target based incentive/ commission scheme for the Claimant, a promise it did not keep and was undoubtedly one of the main reasons for the Claimant’s non-renewal of the contract.
99. According to the Claimant, the letter was an agreement to pay him a commission whose rate could not be less than what he alleges was the industry minimum of 1%.
100. The Claimant tendered no evidence of the alleged industry minimum as no comparative report or study was provided as evidence.
101. Section 107 of the *Evidence Act* provides that;
Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.
102. Similarly, Section 108 provides that;
The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.
103. Finally, under Section 109;
The burden of proof of any particular fact lies on the person who wishes the court to believe in its existence.
104. The Claimant adduced no evidence to prove the alleged industry minimum commission and admitted as much on cross-examination.
105. In urging his case, the Claimant called CWII, Mr. Stephen Suswa Marwa who produced his transfer letter to the Eldoret Branch from 1st March, 2015 as the Sales Manager.
106. The witness referred to the letter as his appointment and promotion letter.
107. The purpose of the letter was to prove that the Respondent paid commissions at 1%.
108. The letter sets out in detail the rate of commission based on targets to be agreed upon with the Business Manager among other conditions.
109. Needless to emphasize, CWII was employed as a Sales Manager and the letter is dated August 2015, about one (1) year after the Claimant had left the Respondent’s employment.
110. Although, the letter reveals that the Sales Manager’s contract of employment or promotion expressly provided for commission, it does not prove that the Claimant was entitled to similar commission.
111. The witness was categorical that the letter on record was specific to him.



112. Secondly, the Claimant relied on computations he allegedly prepared in determining his commission.
113. Puzzlingly, the computations lack authentication by the Claimant or any other person and are undated.
114. Strangely, it is unclear to the court why the figures were not forwarded to the Respondent for its reaction or response. The Respondent would have wished to confirm the numerous alleged sales and receipt of full payment bearing in mind that the Claimant had outstanding queries on credit sales raised in January 2014, August 2014 and September 2014 as he had not handed over. The last email in September was emphatic that any pending compensation could only be discussed after sorting out the credit and stock issues.
115. The Claimant confirmed that he did not forward them to the Respondent.
116. If they were meant for the court, the Claimant led no evidence on what he considered in the computation since the targets were not set and whether the alleged sales had been concluded and funds received by the Respondent.
117. In the absence of authentication of the computations on record, it is the finding of the court that they are of no probative value.
118. Counsel for the Claimant submitted that payment of commission was an employment matter and relied on two decisions by Rika J. which the court is in agreement with.
119. In *Kamlesh V. Rawal v Achelis Material Handling Ltd (Supra)* where Rika J. awarded the Claimant Kshs.12,341,079.90 as commission, the Claimant's contract of employment provided for salary of Kshs.122,500/=, Kshs.300,000/= as school fees and 1% commission of the paid up total sales at the Mombasa Office.
120. In that case, the 1% commission was a term of the contract.
121. Finally, in the instant case, and as adverted to elsewhere in this judgement, the Claimant's contract of employment had no provision for a commission though he was paid a commission of Kshs.537,500/= in December 2013.
122. Instructively, the target based incentive/commission promised by the letter dated 18th April, 2012 did not materialize as the Claimant acknowledges in his lengthy email to Freda Wyngardt dated 7th December, 2013 at 12.41 pm.
123. As regards remuneration, the Claimant states that – “as for my team is concerned; the incentive scheme is yet to see the light of day despite prior contractual agreement.”
124. The contractual agreement being referred to is the letter dated 18th April, 2012.
125. For the foregoing reasons, it is the finding of the court that the Claimant has failed to prove on a balance of probabilities that he was entitled to a 1% commission on total sales for the duration he worked for the Respondent.
126. As regards discrimination at the work place, parties adopted rival positions. While the Claimant's counsel submitted that the Claimant was discriminated in that his salary was less than that of his Asian counterparts in commensurate positions, the Respondent contended that there was no discrimination.
127. In his memorandum of Claim, the Claimant stated that he would at the hearing pray to the court to compel the Respondent to produce its payroll in court.
128. No such prayer was made to the court.



129. Relatedly, the Claimant attached an undated and unauthenticated complaint by one Philip Gow under the subject;

“Complaint of Harassment and Unethical behaviour”

130. The complaint was against Sandeep Tickoo (Head of Auto (Tata Kenya), Rajeev Sharma, (Area Manager, Customer Care, Kenya, Uganda and Tanzania) and Navrose Adam Parts Coordinator (Tata Kenya).

131. The gist of the letter is an account by the complainant of his interactions and dealings with the three officials and the opinion he had about them.

132. The complaint makes no allegation of discrimination against the complainant or other person and specifically makes no reference to the Claimant who confirmed as much on cross-examination.

133. The pith and substance of the Claimant’s case on discrimination is exclusively on salary, in fact, he styled the prayer as underpayment.

134. The law requires the employee who alleges discrimination to place sufficient material before the court to buttress the allegation for the burden of prove to shift to the employer.

135. According to Black’s Law Dictionary, 10th Edition, Discrimination is defined as “failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.”

136. The International Labour Organization Discrimination (Employment and Occupation) Convention, 1958 defines discrimination to include any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing quality of opportunity or treatment in employment or occupation. Such distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the member concerned after consultation with representatives of employer’s or workers’ organizations where such exist and with other appropriate bodies. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.

137. Finally, in Peter K. Waweru v Republic [2006] eKLR, the High Court defined discrimination as follows;

“ . . . Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by race, tribe, place of origin or residence or other local conviction, political opinions, colour, creed or sex whereby persons of one such description or restrictions to which persons are subjected to disabilities of another such description are not made subject or accorded privileges or advantages which are not accorded to persons of another such description.

Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex . . . failure to treat all persons equally where no reasonable distinction can be found between those forwarded and those not favoured.”

138. Article 27 of *the Constitution* of Kenya, 2010 at Clause (4) and (5) provides that;

“(4) The state shall not discriminate directly or indirectly against any person on any ground including race, sex, pregnancy, marital status, health status, ethnic or



social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in Clause (4).”

139. These provisions lay it bare that no person should discriminate against another person on any of the grounds specified or contemplated in Article 27(4) of *the Constitution* of Kenya, 2010 and more specifically for purposes of this case race or ethnic or social origin.

140. Similarly, Section 5(3)(a) of the *Employment Act*, 2007 provides that;

No employer shall discriminate directly or indirectly against an employee or prospective employee or harass an employee or prospective employee on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, marital status or HIV status.

141. The provisions of the *National Cohesion and Integration Act* prohibits discrimination of a person.

142. In *Simon Gitau Gichuru v Package Insurance Brokers Ltd* [2021] KESC 12 KLR, the Supreme Court of Kenya underscored the protection accorded to employees against discriminatory conduct in the following words;

“The protection of employees against any form of discrimination at the work place is therefore a significant matter and the burden placed upon an employer to disprove the allegations of discrimination is enormous. The employer must prove that discrimination did not take place as alleged and that where there is discrimination it was not with regard to any of the specific grounds.”

143. Indeed, Section 5(7) of the *Employment Act* provides that;

In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged and that the discriminatory act or omission is not based on any of the grounds specified in this section.

144. This issue turns on whether the Claimant had placed sufficient material before the court for the burden to shift to the employer as the shift is not automatic.

145. In *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] eKLR, the Supreme Court held that Section 107 of the *Evidence Act* applied to cases involving discrimination and the Claimant had to prove his case.

146. In the instant suit, the Claimant was required to provide the necessary material before the court to discharge the evidential burden of demonstrating that the salary he received was indeed lower than that of his Asian counterparts in the same position and that the same was discriminatory for the burden to shift to the Respondent.

147. Intriguingly, the Claimant neither provided a copy of his pay slip nor any of the Asian counter parts who were allegedly earning more in commensurate positions and as mentioned elsewhere in this judgement he did not move the court to compel the Respondent to produce its payroll.

148. Equally, the Claimant failed to identify the alleged counter parts by name or the positions they held or how much they earned.

149. In a nutshell, the Claimant adduced no scintilla of evidence of the alleged salary disparities or what he characterised as underpayment or demonstrate that it was unconstitutional.



150. Having failed to place substantial material before the court to discharge the burden of proof that he was discriminated on account of salary, it is the finding of the court that the burden of proof did not shift to the Respondent. The Respondent had nothing to explain.
151. For the foregoing reasons, it is the finding of the court that the Claimant has failed to prove on a balance of probabilities that he was discriminated by the Respondent on account of salary.
152. As regards the prayers sought, the court proceeds as follows;
- i. Having found that the Claimant had not established entitlement to the “industry minimum” commission or any commission at all, the claim for commission of Kshs.12,121,816/= is declined.
 - ii. Pay in lieu of leave for 46 days
153. Under the contract of employment dated 13th April, 2012, the Claimant was entitled to 30 days leave per year and an email from Agnes Tikolo dated 2nd July, 2014 reveals that the Claimant had 46 days leave unutilized. The email was prompted by the Claimant’s inquiry on the same day.
154. Significantly, the Respondent adduced no evidence to show that the Claimant had proceeded on leave and thus utilized all his leave days.
155. Needless to belabour, leave is a statutory entitlement under Section 28 of the *Employment Act* and it is the duty of the employer to ensure that the employee takes annual leave when due or pay in lieu (See *Rajab Barasa & 4 others v Kenya Meat Commission* [2016] eKLR).
156. The retort that the leave days were forfeited as per the contract of employment cannot avail the Respondent as it has no statutory backing and Section 3(6) of the *Employment Act*, 2007 is unambiguous that its provisions on terms and conditions of employment constitute the minimum and any agreement to relinquish, vary or amend the terms is null and void.
157. The Respondent cannot run away from its written confirmation that the Claimant had 46 unutilized leave days.

The Claimant is awarded pay for 46 leave days.

- iii. Having found that the Claimant failed to establish that he was discriminated on account of salary, the claim for payment of the difference between his salary and that of his Asian counter parts is unsustainable and is disallowed.
 - iv. Having found that the Claimant tendered no credible evidence to prove that he was discriminated at the work place, the claim for damages for discrimination was not proven and is disallowed.
 - v. The Claimant is entitled to a certificate of service by dint of Section 51 of the *Employment Act*, 2007.
158. In the end, judgement is entered for the Claimant against the Respondent in the following terms;
- a. Payment for 46 unutilized leave days.
 - b. Costs of the suit.
 - c. Interest at court rates from date of judgement till payment in full.
 - d. Certificate of service.



It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 9TH DAY OF MAY 2023

DR. JACOB GAKERI

JUDGE

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 has 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.

DR. JACOB GAKERI

JUDGE

