



Ndege v Osho Chemicals Industries Ltd (Employment and Labour Relations Cause E1638 of 2018) [2023] KEELRC 3043 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 3043 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E1638 OF 2018
AN MWAURE, J
NOVEMBER 24, 2023**

BETWEEN

JAMLECK MUTHIKE NDEGE CLAIMANT

AND

OSHO CHEMICALS INDUSTRIES LTD RESPONDENT

JUDGMENT

1. The claimant filed an amended memorandum of claim dated 22nd November 2022.

Claimant's case

2. The claimant states he was employed as an area sales manager from 4th January 2005 and in June 1st 2015 he was made a regional manager and he held that position till his resignation on 6th October 2018. He says his letter of employment should have read 4th January 2005 not 4th January 2004. His net salary per month was kshs 75,000/- inclusive house allowance and less statutory deductions.
3. He says he was entitled to a commission if he made sales above 5 million at 1% above and 2% for sales of over 7 million and 1.5% for sales above 6 million.
4. He says he performed his work in an exemplary manner and earned several commendation letters between 2008 to 2018 and was also promoted as a regional manager at a salary of kshs 341,500/-.
5. The claimant says he worked in an exemplary manner and was honest and diligent. He says that on 6th October 2018 he tendered his resignation by giving 2 months' notice.
6. He says the company wrote to him on 11th October 2018 and accepted his resignation. They offered to release him by 15th October 2018 and wrongfully tabulated his dues and claimant did not agree with them.
7. He wrote to the respondent company with correct dues as in the claim paragraph 9 of the claim.



8. Claimant says in the year 2014 claimant asked for a commissions and respondent admitted and paid kshs 6,550,000 over a period of time. The respondent also sold a Toyota Hilux to the claimant and deducted kshs 1,000,000 from the commissions in two instalments of kshs 500,000 paid on 3rd July 2018 as well as 500,000/- paid on 4th July 2018 totalling kshs 7,550,000 as commissions.
9. He says the respondent has failed to pay his terminal dues and entitlement as provided in paragraph 9 above despite admitting he had paid partial dues of the commission.
10. The claimant claims total entitlement of kshs 90,441,163/63 plus costs and interest.

Respondents case

11. The respondent filed his response dated 30th January 2019. The respondent has set out the targets the claimant was expected to meet which was 1% for agricultural sales over 5,000,000/-. In 2006 the claimant did not even make sales of 3,000,000/- as per his admissions. He says the commissions was only applicable for the first 6 months. He says the commissions were then to be reviewed periodically.
12. Further the respondent says claimant worked as a team and sales could not be attributed to him alone. Furthermore, respondent paid for further promotions to increase sales like advertising in the media and use of customer care desk. The respondent gives a table of sales team which by 2014 were total of 26 members.
13. The respondent says the sales target kept being reviewed as hereunder 2006 was 120 million and by 2011 it was 200 million. (See pages 26-31). The respondents says claimant did not achieve all his targets and furthermore as his salary increased his targets were expected to increase. The respondent laid a table to show unachieved targets over the years 2005- 2018. He says his shortfall was 41.68% and bad debts equal to kshs 7,547,093/- and were recorded in claimant's account.
14. The respondent admits claimant tendered his resignation by a letter dated 6th October 2018 and respondent accepted the resignation by a letter dated 11th October 2018 and last working day was given as 15th October 2018.
15. The respondent retaliates that the claimant is not entitled to commission which in any event was already time barred after 6 years. He further says they paid claimant all his final dues amounting to kshs 203,931/-. The Respondent prays the claimant suit be dismissed with costs.

Claimants' evidence in court

16. The claimant gave his evidence in court on 6th March 2023. He says he was employed by the respondent from 2005 to 2018. Claimant says he was entitled to commissions as a sales relationship manager. He says they used a customer relationship management software (CRM). The claimant said there was letter that increased his target from 50,000,000 and 70,000,000 but in his target it reads 120,000,000. He says in his appraisals he was not given different targets.
17. Claimant says he was also entitled to transport allowance.

Respondents evidence in court

18. The respondent gave his evidence on 23rd March 2023. The witness said they used to extract reports by customer relationship management software (CRM) and nivision software. He also says company used to pay bonus at the end of the year.



19. The witness says they were not using two systems to avoid tax. He also says there were some statements produced by the claimant but are not from their company as they don't have company name. He says they never evaded paying tax and were audited by KRA in the year 2022.

Submissions

20. The court considered claimant's submissions dated 25th August 2022 and also respondent's submissions dated 19th September 2023.

Analysis and determination

21. The claimant is seeking the following reliefs which will in that case constitute the issues for determination.
- Is claimant entitled to leave pay earned and not taken up to 6th December 2018 (11.5 days) being his contractual last day of service kshs 153,742/70.
 - Should claimant be paid his salary of up to 6th December 2018 (kshs 832,213/.60)
 - Is claimant entitled to unpaid commission up to December 2012 of kshs 89,582,638/33.
 - Is he entitled to monthly transport allowance amounting to kshs 76,500/-
 - Should he be awarded costs of this suit.
22. On the first issue on payment of leave days earned up to December 2018 the court notes the provision in section 38 of the *Employment Act*. Under that section the employer can elect to waive the obligation for the employee to continue working during the duration of the resignation notice period. Where such is granted the employee will be required to cease employment immediately. And the employer waiving the notice will be required to pay the employee the full salary for the duration covering the notice period. In the case of *Kenneth Onialo Vs Majlis Resort Lamu T/A Majlis Lamu Ltd* Case No 42/2018 the court observed that the respondent did not waive the notice period for claimant to cease working during that notice period and so was not entitled to any payment.
23. In the present case the claimant gave a resignation letter and he gave two months' notice and was ready to serve the employer for two months till 6th December 2018. Going by section 38 of the *Employment Act* which provides as follows:
- “Where an employee gives notice of termination of employment and the employer waives the whole or any part of the notice, the employer shall pay to the employee remuneration equivalent to the period of notice not served by the employee as the case may be, unless the employer and the employee agree otherwise”
24. The respondent waived the right of the claimant to serve for the two months.
25. He is obliged to pay his salary until 6th December 2018 as well as the unserved leave days.
26. Therefore, as pertains to the earned leave days until 5th December 2018 claimant is entitled to the 11.5 days and indeed respondent did not prove that he gave him the leave so this award for this prayer will be equivalent to kshs 153,742/20.
27. As for the salary up to December 6th the claimant is entitled to the same as he was ready to serve the notice period but is the respondent who released him from serving the full notice period to 5th



December 2018. He is awarded salary for one month (November) plus 15 days October 2018 and 6 days for December 2018 all totalling kshs 658,000/-.

Commission

28. Commission earned up to December 2012. The claimant claims he is entitled to commission earned above 5 million at 1% and 1.5% above 6 million and 2% above 7 million. He says he started earning his commission from 2005 until 2014 when the directors started paying him.
29. The claimant says he extracted his data from customer relationship management software (CRM) which is the system he could access. He used that system to get his sales accounts and work out the commission. He says the total earned was kshs 89,582,638/33. He says at filing the claim the respondent paid him kshs 203,931/- and he says the same should be deducted from his other entitlements being leave days for 11.5 days kshs 153,742.70
 - (b) salary up to December kshs 832,213.60
 - (c) transport allowance kshs 76,500/-
30. Claimant says one of the directors admitted they paid him commission amounting to kshs 7,550,000 but later filed a suit claiming it was a loan by Mr Kalpesh Parekh suit CMCC E 3471 of 2020.
31. He says the commissions were paid and acknowledged and were not bonuses.
32. Claimant says the outstanding commissions are kshs 89,582,638/33 from 2005 to 2018. The court has this to observe about the commissions: (a) it is true there was a clause in the claimant's *employment act* that he would be paid commissions at 1% for sales of above 5 million and 1.5% for sales over 6 million and 2% for sales over 7 million.
33. The claimant says he was paid kshs 6,550,000 but he has no records whatever of who and when the same were paid. That was a huge amount to have been paid so casually. The claimant must have had documents to authentic how the same was paid and how he acknowledged the same. There is no such evidence.
34. In fact the two parties were very casual in the way they handled their relationship. The respondent says he loaned the claimant kshs 6,550,000/- but again there is no loan agreement and yet that was a big amount of money.
35. The other point is that claimant says as part of his commissions he bought a vehicle from the respondent and kshs 1,000,000 was appropriate as part of the sale price from the commission. Again there was no agreement availed to court to prove the sale transaction of a motor vehicle.
36. There is no clear evidence of how the claimant earned the commissions claimed of kshs 89,582,638. Further the said claim go as far back as 2005 which then would definitely mean good part of the claim even if was due and owing was time barred since 6 years limitation period had expired under *limitations of actions act*.
37. The other observation is that claimant in his amended memorandum of claim filed on 24th November 2022 prayed for commission of kshs 89,582,638.
38. On record as well is a letter dated 12th October 2018 where the claimant had demanded his commissions at kshs 18,450,000/-. It is also in the first memorandum of claim dated 28th December 2018 where claimant had quoted commissions as kshs 82,849,783. All these discrepancies raise eyebrows as to whether the claimant is even clear on what his commission would have been even if he was entitled to the same.



39. For all the years the claimant worked for the respondent he should have kept proper records of the commissions owned on regular basis and that would have made it easy to determine if he was owed any commission and if so, how much.
40. The court is guided by sections 107 and 109 of the *Evidence Act* that he who pleads must prove. The claimant has made generalised and unsupported demands of commissions which have huge discrepancies as demonstrated herein. In that case the court finds and holds the claim for unpaid commissions have not been proved and is declined.
41. As for transport allowance the same for the reasons given for salary up to 6th December and leave allowance is also granted. The tabulation is as follows November 2018 allowance and 15 days in October and 6 days in December 2018 all totalling kshs 76,500/-.
42. Total award is kshs 888,242.20 less 203,931/- totalling 684,311/20 plus interest at court rates from date of judgment till full payment.
43. Claimant is also to be paid costs.
Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 24TH DAY OF NOVEMBER, 2023.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

