



**Mutuah v Tracom Services Limited (Cause E767 of 2021)
[2023] KEELRC 2917 (KLR) (16 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2917 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E767 OF 2021
NZIOKI WA MAKAU, J
NOVEMBER 16, 2023**

BETWEEN

ROSE WANJA MUTUAH CLAIMANT

AND

TRACOM SERVICES LIMITED RESPONDENT

JUDGMENT

1. The Claimant instituted this suit claiming non-payment of outstanding commissions due to her by the Respondent. It was the Claimant's averment that the Respondent employed her as a Business Development Manager based on an Employment Contract dated 4th October 2014 on a gross salary of Kshs. 234,995/- per month. She averred that she was further entitled to commissions from sales of products and services as per the commission structure developed by the Respondent, whom she served with diligence, dedication and utmost loyalty during the period of employment. According to her, she made sales of products and services offered by the Respondent to respective clients and was able to surpass her targets that enabled her earn commissions in the course of the employment. It was the Claimant's case that on diverse dates spanning from the year 2017, she sought for payment of her outstanding commissions from the Respondent mainly through her Line Managers, Mr. Paul Njau and Mr. Anthony Karingi. Even though she raised concerns of her unpaid commissions, she only received responses that the matter was being looked into and she continued to discharge her duties without fail. She averred that upon tendering her resignation through a letter dated 7th July 2021, she made a claim to the Respondent for her unpaid commissions, laying down a breakdown of what she was owed, but the Respondent surprisingly refused/neglected to pay her the computed commissions. In addition, she received a text message from Mr. Karingi inviting her for a meeting to discuss the unpaid commissions and through an email dated 4th August 2021, she requested to be informed the date of the said meeting and the company's computation of her dues but the same was never provided.



2. The Claimant averred that she consequently wrote a demand letter dated 5th July 2021 to the Respondent, whose advocates replied vide a letter dated 23rd August 2021 denying ever owing her the claimed commissions. Furthermore, that the Respondent arrogantly asserted it was shocked why the Claimant continued working for it despite the large sums of commissions that remained unpaid to her. The Claimant thus proceeded to file this suit and laid out her unpaid commissions in tabulated form earned from 2017 to 2020 totalling Kshs. 72,895,978.80. Her stance was that her commissions having been unlawfully withheld without any justification, the Respondent had unlawfully victimised her. The Claimant thus prayed that this Honourable Court do enter judgment in her favour and award her in terms of declaring that the Respondent pays her the accrued commissions of Kshs. 72,895,978.80 with interest from the date of filing suit, costs of this suit with interest thereon at court rates, and any other relief the Court would deem just and expedient to grant.
3. In her Witness Statement, the Claimant stated that she served the Respondent with her resignation letter on 7th July 2021 to formally resign on 16th July 2021 and that she further surrendered her leave days to achieve the required two months' notice. She further stated that the Respondent's actions of declining to pay the accrued benefits and commissions due to her were contrary to fair labour practices as envisaged by *the Constitution*, the *Employment Act* 2007 and the general principles of natural justice. That this was because the said actions were discriminatory, lacked basis and the Respondent did not observe due process.
4. In reply, the Respondent filed a Statement of Response admitting to have employed the Claimant as pleaded but denied that she was entitled to commissions. It averred that there was no provision for commissions neither in the Claimant's Employment Contract whose commencement date was 6th October 2014 nor in the Addendum to Employment Contract dated 9th April 2021. Furthermore, there was also no commission structure provided to the Claimant for the years 2017 to 2020 as alleged and that the said transactions are non-existent. According to the Respondent, the Claimant repeatedly failed to meet her minimum required quarterly targets let alone qualify for commissions and that the company's liquidity did not allow for payments of any commissions. That in essence, there had been no commissions paid whatsoever to any employee of the Respondent company and remuneration was solely based on the scale as per the employment contract for every individual employee.
5. The Respondent also denied that the Claimant made sales of products and services offered by it to respective clients and surpassed her set targets to enable her earn commissions as claimed. That in fact, the Claimant was issued with a Notice of Underperformance dated 4th April 2019 during the first quarter of 2019. That as was confirmed during the meeting held on 3rd April 2019, the Claimant's closed sales amounted to Kshs. 2,587,953/- against the set target of Kshs. 87,500,000/-, which translated to 3% of the quarterly target. The Respondent averred that the Claimant did not improve towards the end of 2019 despite having been accorded the support required to improve her performance. That the Claimant was evaluated and the appraisal made recommendations which she failed to adhere to, making her work unsatisfactory and that she did not complete the tasks assigned to her in regards to following up on reports from clients after demos POCs. Moreover, that the EXCO meeting held on 27th March 2021 resolved to suspend all non-basic salary benefits and the same was communicated to all staff, including the Claimant, during the monthly town hall meetings. It further averred that the Claimant tendered in her resignation letter dated 7th July 2021 knowing very well that the half year appraisal on job performance was due a day letter on 8th July 2021.
6. The Respondent further averred that the Claimant did not formally raise any grievance arising from any unpaid commissions from 2017 to 2020. That the Claimant ought to have communicated in writing and formally explain the matter that was aggrieving her and that claiming the said commissions



before this Court was just an afterthought after she hastily quit because of her underperformance. That the Claimant's final dues were tabulated and she was issued with a certificate of service without her raising any claim for commission at any stage of her clearing with the Respondent on 16th July 2021. That the demands for unpaid/computed commissions are therefore without any legal basis and the amounts tabulated by the Claimant herein are non-existent. The Respondent's stance was that the Claimant breached her contractual obligations by not issuing a three (3) months' notice of resignation or depositing with it three (3) months' salary in lieu of notice as stipulated under clause 21 of the Claimant's Employment Contract. It was the Respondent's averment that considering the foregoing, the Claimant was therefore not entitled to any of the reliefs sought or at all. The Respondent thus counterclaimed against the Claimant for the nine (9) days pending leave days totalling Kshs. 81,342/- and for three (3) months' salary in lieu of notice totalling Kshs. 784,985/-. It prayed for the Claim to be dismissed with costs.

7. The Respondent also filed a Witness Statement made by Francis Gitau who confirmed that the Claimant resigned effectively on 16th July 2021. He asserted that during the period of employment from 2016 to 2021, the Claimant received both formal and informal warnings on unsatisfactory performance. That despite the Claimant's inability to improve even with vigorous coaching, counselling and review of her performance, the Respondent still retained her in employment. He stated that the company only got hold of the Claimant's claim for unpaid commissions through her resignation letter and the Respondent then called for a meeting to address the same. That in the said meeting, it was resolved that there were no sales commissions owed to Claimant, who thereafter agreed to clear with the Company and all her dues were then paid to her.
8. The Claimant then filed a rejoinder through her Response to Memorandum of Reply and Defence to Counterclaim dated 28th January 2022. She averred that the Respondent had developed commission structures that were used to pay commissions she received in 2014, 2015 and 2016 and that it was only from 2017 to 2021 that she earned commission but the same was not paid to her. She contended that she met her quarterly targets and always qualified for commissions and denied the Respondent's assertions that non-basic salary benefits were suspended. She further averred that failure to meet her targets in the first quarter of a year could not be used to deny her earned commissions for the remainder of the year where she met targets and qualified to earn commissions. That in her email communications with the Respondent's management and produced in court, the Respondent admitted owing her the commissions but was non-committal on when the same would be paid. That a number of meetings were also scheduled to discuss the issue but the Respondent's management rescheduled some meetings on short notices.
9. The Claimant further averred that she gave requisite notice when she resigned and even forfeited her leave days as part of the notice and she thus denied owing the Respondent any leave days as alleged. In conclusion, she stated that she was not aware of any appraisals and no communication had been issued to her to that effect and prayed that the Memorandum of Reply and the Counterclaim be dismissed with costs to her.

Evidence

10. The Claimant testified that she had never been summoned for any forgery of documents at the Respondent Company. Under cross-examination, the Claimant stated that she voluntarily resigned from the company because she got greener pastures and not because of non-payment of commissions. She asserted that the commission payment was made separately and that the Contract did not indicate the commissions to be paid. That she was entitled to earn commissions as discussed with Mr. Amos Kiarie and Francis Gitau who directed her to the HR Manager, Ms. Anna Wanyoro on the commission



structure. She stated that she only gave 2 months' notice as per the new contracts that they signed and which changed the notice period and that the calculations on her accrued commissions were done and given by the then HR and Accounts. That she also got the commission structure for 2017 from the then HR, Ms. Wanyoro and that the structure for 2018 covered the period until when she left the company. In re-examination, the Claimant confirmed that the email extracts for December 2018 at page 28 of the Claimant's Bundle discussed her commission payments and that the email was from Mr. Paul Njau to Ms. Wanyoro. That the email extract at page 36 from herself to Ms. Wanyoro also addressed the commissions for the sales she had done whereas pages 39-51 showed text messages between her and Mr. Anthony Karingi who had taken over from Mr. Njau. The Claimant stated that she had evidence of the commissions due to her and that the Respondent received the tabulation and Mr. Karingi acknowledged that they needed to have a meeting with her but which never happened.

11. The Respondent's witness, Mr. Francis Gitau (RW1) testified that the Respondent had never had any commission structure and denied there having been any variation of the Claimant's Contract. That there was no evidence that the Claimant made a sale and that items such as the LPO Sale would entail communication and contended that the item on Chase was probably a future sale as they did not know of it. That the commission structure produced by the Claimant at page 26 of the Claimant's Bundle had not been signed by key people in the company and that the Claimant had decided to award herself. RW1's testimony was that it was impossible to owe Kshs. 72 Million in commission. RW1 confirmed in cross-examination that the Claimant reported to Mr. Karinga who in turn reported to him. That the commission for 2018 could not be paid as targets were not met and they did not have obligations to pay commissions. He admitted that the Minutes at page 27 of the Respondent's Bundle made reference to commission and that he had at the said meeting proposed suspension of commissions. He asserted that the issue of commissions were variables. In re-examination, RW1 stated that the commission structure attached at page 60 of the Claimant's Bundle had not been signed and was thus non-binding.

Claimant's Submissions

12. According to the Claimant, the issues for determination are:
 - a. Whether the Claimant established her case that she is entitled to be paid commissions;
 - b. If yes, what is the rate payable to the Claimant;
 - c. Whether the Claimant is entitled to costs of the suit; and
 - d. Whether the Respondent is entitled to the prayers in the Counter-Claim.
13. The Claimant submitted that both oral and evidentiary testimony before this court outlined that she was to be paid commission at the rate of 15% as evidence by the commission structure produced at page 26 of the Claimant's Bundle of documents. That there were a series of documents and communication where she sought payment of her due commissions but the Respondent failed or ignored to make due the payments hence the current suit before this court. That in the circumstances, she had proved beyond reasonable doubt that she was and is entitled to payment of commissions as pleaded in the Claim. On the issue of the rate payable, the Claimant submitted that other than 15% aforementioned, she had sufficiently demonstrated at pages 52 - 54 the workings on the sales made and the commission earned and that the same had not been disproved by any document. She invited this Court to view the series of communication produced at pages 28-51 of the Claimant's Bundle in support of these submissions. The Claimant questioned why a director with full knowledge of the company's operations fail to dispute the issue of commission at the moment the Claimant first raised it and argued that her evidence before court was satisfactory proof of her claim on earned but unpaid commission. The Claimant submitted that costs follow the event and she had sufficiently



proved her case as against the Respondent. That fair labour practice envisages that where provision for performance and commission is placed as an award, the employer is bound to make good on this award and pay the due commissions properly earned by the Claimant. That the Claimant should be awarded the costs further because the Respondent had all opportunities to make payment before the matter came to court.

14. It was the Claimant's submission that the Court should realise that she forewent her salary and leave days' pay to sufficiently serve as payment for the notice period as provided under clause 21 (a) of the Claimant's Employment Contract. That the Respondent's Counter-claim was thus an afterthought and an attempt to fail to pay her in full the earned commissions and should be dismissed with costs. In support of her Claim, the Claimant relied on the authorities of *Mwosero Stephen Ogello v Sidian Bank Limited [2022]* eKLR; *Nixon Oduor Golla v Auto Sueco Kenya Limited [2016]* eKLR; and *Sifa Insurance Brokers Limited v A.I.G. Kenya Insurance Limited [2009]* eKLR.

Respondent's Submissions

15. According to the Respondent, the issues for determination are:
- a. Does the Claimant have any basis for the claim of commissions for the year 2017, 2018, 2019 and 2020?
 - b. Whether the unsigned commission structure for year 2019 was existent;
 - c. Whether the Respondent is entitled to the Counterclaim; and
 - d. Whether the Claimant is entitled to the reliefs sought.
16. On the first issue, the Respondent submitted that the terms and conditions governing the Claimant's employment were expressed by the parties in the Employment Contract dated 6th October 2014 and 9th April 2021 respectively, on the Respondent's Bundle of documents nos. 1-14. That there was no specific clause as admitted in evidence that specified any structure or agreement as pertains payment of commissions. It was the Respondent's submission that there was no evidence to support the claim for alleged commissions earned and not paid, and that the statement showing the orders placed, the invoiced amount, payment received and the commissions payable was not exhibited to support the unpaid alleged commissions. It relied on the case of *Patrick Lumumba Kimiyu v Prime Fuels (K) Limited [2018]* eKLR in which the Court held that the burden of proof in civil cases vests on the party that alleges a fact to be true so as to prove the existence and veracity of the fact; under the statutory basic principle that he who asserts must prove per sections 107 – 109 of the *Evidence Act* Cap. 80 Laws of Kenya.
17. It further submitted that even if it was founded on the contract or established work place policy, it had not been shown that the Respondent made profits for the years claimed to warrant payments of the commissions as alleged by the Claimant herein. That RW1 testified before court that the tabulated statements as exhibited in court were in draft form and were not the final audited account of the Respondent and that the same should therefore not be considered useful in determining if commissions were payable as demanded by the Claimant. The Respondent argued that the Claimant had not pleaded the particulars of the monthly net profit and particulars of the business she alleges she brought to warrant payment of commission as alleged. It cited the case of *Angela Gwiyo Kuria v Schenker Limited [2020]* eKLR in which the Court found that the claimant was not entitled to commission as she had not pleaded the particulars and it was not how she never raised the demand since 2014. The said Court returned on a balance of probabilities, that the claimant had failed to satisfy by way of evidence the contractual conditions for payment of commissions. Regarding the alleged



commission structure for 2019, the Respondent submitted that the same was not existent because it had not been signed, approved and executed by the Respondent. That the Claimant had not shown how she arrived at the figures she claimed were owed to her through the unsigned structure and did not make any effort to give a record of how the alleged commissions for 2017 to 2020 were arrived at based on unsigned commission structure. It submitted that the Claimant produced a copy of unsigned schedule indicating her name and the name of one of her colleagues and the sales achieved, which she had prepared for her own use. That the unsigned document was not sufficient to demonstrate that the Claimant was entitled to commission in the period in question, as illustrated in the case of *Lawrence Musyimi Ngao v Liquid Telecom Kenya Ltd [2019]* eKLR where Radido J affirmed that there was need for adequate demonstration of signed copy of the commission structure for one to be eligible for payment of commissions. The Respondent argued that the commission structure having only been signed by the Claimant, it was not open for her to unilaterally impose the structure for the payment of commissions and or other benefits, outside the agreed terms of payment and to the detriment of the Respondent. Further, the Respondent submitted that this Court cannot rely on information printed via WhatsApp messages as the same did not comply with the provisions of section 106B of the *Evidence Act*. That it is a mandatory requirement that the gadget used in the preparation of the computer print-out must be confirmed to have been owned by the person preparing the report and in working condition. In addition, these details including the serial number and IMI number must be recorded but which was not the position in the instant case. That notably, the documents before court have no details of the printer used to print out the document, there are no details of the serial number of the cable used to transmit the information to the computer from the mobile phone to the printer and there are no details of the phone number used to transmit the screenshot from the number's handset. That in essence, there is no document filed to confirm ownership of the machine used to print the document and the Claimant had failed to prove existence of a contract for payment of commission. On this submission, the Respondent relied on the case of Rachel Njoki v Gideon Migiro Nyambati [2020] eKLR in which the claimant failed to prove that she was entitled to any commission as alleged and the documents produced inform of WhatsApp were found not admissible in evidence for lack of proper certificate as expressed under section 65(8) as read with section 106B of the *Evidence Act*. It was the Respondent's submission that in the event that indeed commissions were owed to the Claimant, there were procedures to be followed as per the provisions of the Employment Relations Policy. That the Claimant never followed the grievance procedure provided at pages 22 to 23 of the Respondent Bundle of documents whereby she was required to first formally raise a grievance in writing and explain the matter aggrieving her, if not satisfied, she was entitled to then appeal against the decision in writing and if not yet satisfied, she could lastly appeal in writing to the Board of Directors.

18. On whether the Respondent was entitled to the Counterclaim, it submitted that the Claimant abruptly tendered her resignation without issuing adequate notice of three months as per her Employment Contract. That the Claimant had not proved by way of evidence that the notice was deducted from her leave days and she therefore was yet to pay the Respondent the three months' pay in lieu of notice. It was the Respondent's submission that Claimant cleared with the company on 16th July 2021 waiving any further claims against it after receiving all her terminal dues. That the Claimant even voluntarily signed a Discharge Agreement as shown on page 24 of the Respondent's Bundle of documents. That since there were also no vitiating factors when the Claimant signed the clearance form and was paid terminal dues owed to her, the discharge agreement constituted a binding contract between the Claimant and the Respondent and she was estopped from filing this suit against the employer to press for more reliefs. On this submission, the Respondent relied on the decision of the Court of Appeal in Coastal Bottlers Limited v Kimathi Mithika [2018] eKLR that a court faced with whether or not a settlement agreement or discharge voucher bars a party thereto from making further claim should first address its mind on the import of such discharge and secondly, whether



it was voluntarily exercised by the concerned parties. It was the Respondent's submission that the Claimant had failed to prove on a balance of probability that she was entitled to payment of the alleged commissions on sales. That parties began discussing possibilities of payment of commission and sustainability of a commission payment plan and structure but the same had not been finalized by the time the Claimant stopped working. The Respondent thus urged that the Claimant's claim be dismissed with costs and the counterclaim by the Respondent be allowed.

19. This claim centers around the issue of commissions and the giving of notice at time of resignation. The Claimant had served notice indicating her desire to resign from the Respondent's employ. The Claimant offered her leave days as recompense for the notice period and the Respondent on its part asserts the Claimant did not give it adequate notice thereby entitling it to claim payment in lieu of such notice. The Claimant tendered her resignation on 8th July 2021. The resignation asserted that the Claimant would have 16th July as her last working day and she would encash pending leave days to fill the 2 months notice. She also sought payment of her unpaid commissions. The Claimant sought commissions amounting to slightly over 72 million earned between 2017 and 2020. The figure for 2017 was Kshs. 5,458,320/-, 2018 – Kshs. 5,088,912.12, 2019 – 3,766,496.58, in 2020 – Kshs. 58,582,250/-. The Claimant asserted that these were for her sales to clients of the Respondent. No additional information was forthcoming save for some obtuse acknowledgement from the Respondent that sales commissions were suspended or being looked into. On a balance of probabilities, there were commissions due but the Court does not find basis for a sum of Kshs. 58,582,250/-. The figure of 5,088,912.12 is unsupported by a sales figure. The sum of Kshs. 5,458,320/- and Kshs. 3,766,496.58 making a total of Kshs. 9,224,816.58 would be payable by the Respondent as unpaid commissions. The Claimant would pay off the equivalent of two month's salary in lieu of notice since 28 days do not equate to 2 months which was the notice period under her contract per the addendum made on 9th April 2021. The Claimant is thus liable to pay a sum of Kshs. 261,661.66 to the Respondent being the amount due for the unpaid one month of her 2 month notice. The other month was netted off the pending leave days.
20. In the final analysis, the Court enters judgment for the Claimant against the Respondent for:-
- a. Kshs. 8,963,154.92 being balance of unpaid commission after deducting Kshs. 261,661.66 due from the Claimant.
 - b. Costs of the suit reduced by a third due to partial success on counterclaim.
 - c. Interest on the sum in (a) above at court rates from date of judgment till payment in full.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF NOVEMBER 2023

NZIOKI WA MAKAU

JUDGE

