



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1904 OF 2016

ANTHONY GATHII MUHURI.....CLAIMANT

VERSUS

SCOTT TRAVEL GROUP LIMITED.....RESPONDENT

JUDGMENT

Introduction

1. This dispute is between Anthony Gathii Muhuri as the Claimant and Scott Travel Group Limited as the Respondent. Muhuri states his claim in a Memorandum of Claim dated 13th September 2016. The Respondent filed a Memorandum of Response on 23rd February 2017 to which the Claimant responded on 22nd May 2017.

2. The matter was initially heard by **Makau J** who took part of the Claimant's testimony. When the parties appeared before me on 3rd October 2021, they agreed that hearing proceeds from where my brother Judge had stopped. The Respondent did not call any witness.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent on 2nd December 2013, in the position of Tours and Travel Consultant. He was confirmed in his position by letter dated 10th June 2014.

4. On 3rd May 2016, the Claimant served the Respondent with a notice to terminate the employment relationship as per the employment contract.

5. The Claimant states that the notice of termination was to be calculated less the pending leave days, although he left later than he had indicated, upon persuasion by the Respondent's Managing Director.

6. The Claimant avers that as part of the terms of his employment contract, he was to earn commission based on a percentage that had been agreed upon with the Respondent.

7. The Claimant adds that at the time of his departure from employment, he was owed Kshs. 95,000 as commission earned but not paid.

8. According to the Claimant, the Respondent has on numerous occasions acknowledged owing the commission to him.

9. The Claimant therefore claims the sum of Kshs. 95,000 being unpaid commission. He also asks for costs and interest.

The Respondent's Case

10. In its Memorandum of Response dated 21st February 2017 and filed in court on 23rd February 2017, the Respondent admits having employed the Claimant as pleaded in the Memorandum of Claim.

11. The Respondent states that in the months of April and May 2016, the Claimant began shifting the Respondent's business to the company he was about to join, thereby failing to meet the terms of engagement as stipulated.

12. Regarding the notice period, the Respondent denies that the Claimant left later than he had indicated. The Respondent states the

following:

- a) It was expressly agreed that the Claimant would serve one month's notice without taking account of leave days;
- b) The Claimant assured the Respondent that he would serve the notice period of one month so as to finish his assignments and hand over as well as enable the Respondent find a suitable replacement;
- c) Instead, the Claimant left his employment on 19th May 2016 with over 50% of his assignments incomplete and unsatisfactory, thereby causing the Respondent to suffer losses;
- d) Despite the Claimant's actions, while settling his terminal dues, the Respondent paid for his leave days, which was against company policy.

13. The Respondent contends that the Claimant's abrupt termination of his employment thereby leading to losses, as well as diversion of business to a rival company, brought him under the ambit of summary dismissal as provided under Section 44(c) and (g) of the Employment Act.

14. The Respondent avers that it owes the Claimant Kshs. 41,760.67 as incentive, which amount the Claimant rejected, insisting on the amount of Kshs. 95,000 which the Respondent terms as unsubstantiated.

15. The Respondent concludes that the Claimant's claim is premature as the dispute was not referred to conciliation.

Determination

16. The Claimant's claim in this case, being for unpaid commission, falls within the purview of special damages. As held by the Court of Appeal in *Hahn v Singh [1985] KLR*, special damages must not only be specifically pleaded but strictly proved.

17. Apart from his word, the Claimant did not provide any evidence to support the claim which therefore fails and is dismissed.

18. Each party will bear their own costs.

19. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 17TH DAY OF FEBRUARY 2022

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JUDGE

Appearance:

Mr. Kamwaro for the Claimant

Mr. Omari for the Respondent