



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**ELRC CAUSE NO. 194 OF 2016**

**EDWARD OMAIYO MOGIRE.....CLAIMANT**

**VERSUS**

**THE STAR PUBLICATION LIMITED....RESPONDENT**

**JUDGMENT**

1. The suit was filed by the claimant on 8<sup>th</sup> July, 2016 against the Respondent in which the claimant prays for the following reliefs:-

**(a) Declaration that the Respondent has breached and/or violated the terms of the Contract Agreement entered into on the 3<sup>rd</sup> day of April, 2014.**

**(b) Payment of Kshs 2,092,316.20 only** (details in terms of paragraphs 16 hereof).

**(c) Interests at Court rates (14%) per annum.**

**(d) Costs of the suit/proceedings be borne by the Respondent.**

**Facts of the Case**

2. The claimant testified that he was on 26<sup>th</sup> March, 2014, contracted for services towards popularizing the newspaper owned by the respondent and specifically for procuring advertisement and incidental business for the respondent.

3. A copy of the contract between the parties dated 3<sup>rd</sup> April, 2014 was produced by the claimant in terms of which the claimant was contracted as an Advertising Executive (*freelance*) with effect from 1/4/2014.

4. In terms therefore, the claimant was to be paid a monthly retainer of Kshs 25,000 and telephone allowance in the first four (4) months and thereafter the claimant was only to receive commission calculated at 20% of sales on collected amounts subject to taxation on the gross amount payable.

5. The claimant was given a sales target of Kshs 800,000 per month.

6. In terms of the contract, the claimant was not entitled to leave days and the contract could be terminated by either party upon giving one week notice.

7. That the claimant commenced work in earnest and secured assorted Advertisement business for the respondent and the recruited clients placed various advertisements in the Star Newspaper set out under paragraph 9 to 12 of the Statement of Claim in Kisii, Nyamira and Migori Counties.

8. That the claimant invoiced the respondent for payment of commission at 20% Less Pay As You Earn tax. The total commission payable in respect thereof was Kshs 1,664,400 Less Kshs 496,980 tax leaving a balance of Kshs 1,165,080.

9. That the claimant had also procured and invoiced for contracts in which he was entitled to 20% commission of Kshs 1,450,751.73 Less 20% tax leaving net payable commission of Kshs 927,236.

10. That the claimant therefore demands commission due and owing from the respondent in the sum of Ksh 2,092,316 with interest and costs.
11. The claimant attached documentation evidencing the claim made including invoices issued by the respondent and the County Government of Kisii, Nyamira and Migori and one issued in favour of Rongo University College. The claimant produced a Demand notice by the claimant to the respondent dated 19<sup>th</sup> October, 2015 and letter acknowledging the demand notice by the Respondent dated 28<sup>th</sup> October, 2015.
12. The respondent filed a Memorandum of Response to the suit dated 3<sup>rd</sup> May, 2018 in which a Preliminary Objection is raised that, the claimant was not an employee since the contract before Court shows that the contractual relationship between the parties was one of a commercial agent and not an employee as provided under the Employment Act, 2007.
13. That what is claimed is not unpaid salary but commission for commercial services rendered. That the Court lacks jurisdiction to entertain the suit and it be struck out.
14. That in the alternative the respondent contends that the claims made by the claimant are in respect of amounts not collected by him since the contract provides that claimant would be paid commission only on **Collected amounts**.
15. That furthermore, the invoices rendered by the claimant could not attract commission, the same having been rendered after 150 days in contravention of the Respondent's commission structure.
16. That for the first four months of the contract, only a retainer of Kshs 25,000 and scratch card to cater for business calls was payable to the claimant and thereafter, claimant was to be paid 20% commission on realized amounts.
17. The respondent called one **Benjamin Otido** who testified under oath and produced a witness statement dated 1<sup>st</sup> January, 2018 as his evidence in Chief. R.W.1 also produced list of documents marked exhibits '1' and '2'.
18. R.W.1 testified that the proposed commission structure by the respondent signed by the respondent's Managing Director on 27/7/2015, automatically nullified all earlier commission rates including the 20% in the claimant's contract.
19. The said new structure was effective on 1<sup>st</sup> July, 2015 and all uncollected old debts would be subject to the cut off dates in the new structure. That all sales executives were informed accordingly.
20. Based on the new structure, executives were only paid commissions for payments collected in good time and/or before they were considered overdue as per the collection cut off days. That this was applied to the claimant's accounts in the same way it was to other sales executives accounts that were overdue.
21. That in respect of Nyamira County, the claimant was therefore paid commission for one invoice for which he collected payment within stipulated period. That the payslip shows that the claimant was paid.
22. That the other invoice was not paid because it was overdue as per the terms of the commission structure.
23. That with respect to Kisii County, the first 4 invoices set out in the Statement of Claim were overdue and therefore could not be paid.
24. That the 5<sup>th</sup> invoice was paid the 20% commission because the claimant paid on time in May, 2015 before the new commission structure was implemented.
25. That in respect of invoices 6 and 7, they were settled by the claimant more than 300 days after due date for payments. They were therefore extremely overdue and the claimant is not entitled to commission on them.
26. That in respect of invoices 8 and 9, they were not settled by the claimant after due dates for payments. They were therefore extremely overdue and the claimant is not entitled to commission on them.
27. That for invoice 11, the respondent admits owing the claimant the Kshs 1050 only.
28. That in respect of invoices 12 and 13 they were not settled by the claimant after due date for payment. They were therefore extremely overdue and the claimant is not entitled to the commission on them.
29. That in respect of the claims for Migori County, they were not paid timeously as stated with respect of other invoices.
30. Under cross-examination, RW.1 stated that the claimant was a freelance under a contract of engagement. R.W.1 admitted that the contract referred to the claimant as an employee. R.W.1 states that he was an accountant and was not best placed to explain if the respondent and the claimant had an employment relationship. R.W.1 admitted that the claimant was entitled to 20% commission on all collected sales.
31. R.W.1 admitted that the contract did not provide that the claimant was responsible for the collection of amounts due after advertisement deals have been concluded. R.W.1 admitted that the contract did not provide the timelines within which the payments due should be made for commissions to be payable to the claimant. R.W.1 admitted that the cut of date of 150 days was handwritten in a subsequent document

by the Managing Director. R.W.1 admitted that this was not part of the contract earlier signed by the claimant and respondent.

32. R.W. 1 admitted that there were new proposed terms for payment of freelance sales executives. R.W.1 stated that he did not have an approved document by the Managing Director of the proposed common structure.

33. R.W.1 admitted that he prepared the sales computation relied upon by the claimant and same were computer generated. R.W.1 stated that the claims made by the claimant were straightforward but the respondent communicated to the claimant why 20% commission was not paid on the basis of the new structure within cut of dates for payment.

34. In re-examination, R.W.1 confirmed that the claimed commission do not relate to the first 4 months of the contract since the claimant earned a monthly retainer for the period.

### **Determination**

35. The parties filed written submissions and the issues for determination are:-

**(i) Whether this Court has jurisdiction to entertain this suit.**

**(ii) Whether the claims made by the claimant have merit.**

36. The Court has carefully considered the testimony by the claimant and that by R.W.1 including oral testimony and documentary evidence. The Court has also considered the pleadings filed by the parties.

37. It is apparently clear from the express words of the contract between the claimant and the respondent that the claimant was hired by the respondent as a Freelance, Advertising Executive, with a monthly retainer of Kshs 25,000 per month in the first 4 months with telephone allowance and thereafter to be remunerated on commission based at 20% of the total sales made as per the respondent's common structure. The claimant was given a set target of Kshs 800,000 and was required to comply with company policy. That he was not eligible for leave and the contract was terminable upon giving of at least one week notice.

38. The contract goes on to provide:-

**“It is a condition of your employment that any confidential information, which may come into your possession by reason of your appointment with this company, be treated as such and may not be divulged, without proper authority, to any person outside the company or to other company.”**

39. The contract went on to provide:-

**“The company reserves the right to modify or cancel any of its plans, policies or terms of service at any time without notice or reference to the employee.**

**..... However, in such event due consideration will be given to any benefits which any employee has accrued up to the time of modification or cancellation (emphasis mine).**

40. From the plain reading of the Contract of Service between the parties duly signed and dated 3<sup>rd</sup> April, 2014, the parties expressly, referred to the claimant as an employee of the company under the title Advertising Executive (**freelance**).

41. It is manifestly clear that the claimant was remunerated on a monthly basis and was given monthly targets initially vide a retainer and later on by a 20% commission.

42. It should be understood that mere payment of commission to an employee as opposed to a salary does not make an employee cease to be one, where the express terms of the contract clearly indicate that the appointment was that of an employee. This Court clearly has jurisdiction to hear and determine this suit in terms of Section 12 of Employment and Labour Relations Act, 2014 read with Article 162(1) of the Constitution of Kenya, 2010.

43. From the express terms of the contract between the parties, reproduced in this judgment, any changes to the terms and conditions of service which came to effect after conclusion of this contract between the parties were not applicable to the claimant.

44. It is therefore no defence at all for R.W.1 to rely on changes in the commission structure of the respondent after the engagement of the claimant to the legitimate claims by the claimant in this suit.

45. There is no doubt that the claims made by the claimant were founded on genuine sales made by the claimant for advertisement space in the counties of Kisii, Nyamira and Migori. R.W.1 did not dispute that the sales were indeed concluded by the claimant except some of the payments were made after the 150 days limit introduced in the commission structure of the respondent by the Managing Director after the claimant had already sealed the deals.

46. Clearly, the respondent has no defence at all to the claims of 20% made by the claimant in this suit.

47. The claimant has proved that he is entitled to be paid by the respondent in respect of the concluded Advertisement sales for the benefit of the respondent, in respect of which payments have not been expressly denied.

48. In the final analysis, the claimant has proved his case on a balance of probabilities and in terms of section 107 and 108 of the Evidence Act, Cap 80 laws of Kenya.

49. The Court therefore enters judgment in favour of the claimant as against the respondent as follows:-

**(a) Payment of Kshs 2,092,316 of Sales made by the claimant for the benefit of the respondent.**

**(b) Interest at Court rates from date of filing suit till payment in full.**

**(c) Costs of the suit.**

**DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2022**

**MATHEWS N. NDUMA**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this Judgment has been delivered to the parties online with their consent. 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 18 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.

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances:-**

Mr. Ochwangi for claimant

Mr. Ouma for Respondent

Chrispo: Court Assistant.