



**Adoo v Panafrican Trucks & Equipment (K) Ltd (Cause  
1989 of 2014) [2022] KEELRC 28 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 28 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1989 OF 2014  
SC RUTTO, J  
APRIL 28, 2022**

**BETWEEN**

**MARK GORI ADOO ..... CLAIMANT**

**AND**

**PANAFRICAN TRUCKS & EQUIPMENT (K) LTD ..... RESPONDENT**

**JUDGMENT**

1. The claimant vide a Memorandum of Claim dated 5<sup>th</sup> November, 2014, brought into this Court the instant a suit through which he avers that the respondent owes him sales commission in the sum equivalent to JPY 4,091,928.45. He avers that he earned the sales commission when he sold 33 units of equipment on diverse dates between the year 2008-2009 to various companies, in his capacity as a sales executive of the respondent.
2. The respondent opposed the claim and averred that the sales through which the claimant seeks the commissions, were carried out directly hence he was not eligible for any payment.
3. The matter proceeded for hearing on 30<sup>th</sup> November, 2021 and each side called one witness.

**Claimant's Case**

4. In his testimony before court, the claimant stated that he worked as a sales executive for the respondent with effect from 17<sup>th</sup> July, 2000. That he was paid through commissions at the rate of 5% of the profit margin earned by the respondent. That the profit margin would be ascertained by the chief accountant. That he sold 33 units of equipment and he knew the prices since he is the one who initiated the proforma invoices. That he sold the said units of equipment to Kundan Singh Construction Ltd, Kabuito Contractors Ltd and Kajulu Holdings Ltd.
5. That he did the sales and marketing of the equipments before raising the proforma invoices. That the equipments were sourced from Komatsu Limited, Tokyo Japan. That as such, the equipment was



paid for directly. He averred that the sales of the equipment were not direct since he marketed the products and issued the proforma invoices to the customers. That in fact, he was acting on behalf of the respondent when he negotiated with the customers hence he is entitled to the commissions arising from the sales.

### **Respondent's case**

6. The respondent called oral evidence through Mr. Gregory Jackson who testified as RW1. He adopted his witness statement and bundle of documents filed on behalf of the respondent to constitute part of his evidence in chief. RW1 told Court that he was the Managing Director of the respondent for the East Africa region from December, 2012 till February, 2020. That he is aware of the facts giving rise to the claimant's case despite not being at the respondent company at the material time. He stated that the sales personnel are assigned accounts and paid a percentage of the profit as commission. That the respondent's policy on payment of commissions was well known to the sales representatives, including the claimant. That the claimant ought to have produced proof of sale of the machines through a quotation, finance documents, invoices, delivery and payment.
7. It was his further testimony that the summary of the sales commissions submitted by the claimant are not valid as the commissions paid by Komatsu Ltd are not gross profit on the sales. That from the amount, the respondent has to cover the cost to assemble, commission and transport the equipments as well as perform scheduled maintenance by sending technicians to the customer job sites.
8. That the sales executives would earn a commission on products that have been sold through them and not through direct sales as the case herein. That other sales persons would be paid a commission if they initiate a sale and push it through. He averred that in the instant case, the claimant was not entitled to any commission as the same were as a result of direct sales.
9. RW1 further that the commission agreement with Komatsu Ltd constituted direct engagements hence the claimant was not eligible for a commission. That the email from the respondent's sales manager confirms that the claimant was not entitled to any commission as the sales were direct hence the sales executive did not put any effort to ensure the sale materialised. That the claimant was informed that the sales between Kundan Singh Ltd and Kabuito Construction Ltd, were direct sales. That he was further advised that the sales that were finalised between the respondent and Kajulu Holdings Ltd were submitted by Komatsu Ltd as tenders and the evaluation was done in Japan and the UK. That in as much as the claimant signed the quotations, the same were concluded by Komatsu Ltd hence were direct sales. That the commissions were received by the respondent for direct sales of the equipment by a Japanese Trading House known as Marubeni Corporation for machines sold to the customer by direct sales by crown agents.

### **Submissions**

10. Both parties filed written submissions upon close of the hearing. The claimant submitted that he not only introduced the customers to the respondent but also negotiated for prices for the purchase of the units of equipment. That the respondent had breached the contractual obligations arising out of the employment contract by failing to pay the commission due to him. In support of the claimant's submissions, the cases of *Nixon Oduor Golla vs Augo Sueco Kenya Limited* (2016) eKLR and *Michael Njenga vs Rajmuk Investments Limited & 4 others* (2014) eKLR were cited.
11. It was further submitted that the claimant had not shown how he computed the sales within the parameters and percentages that the respondent company had set. To fortify its submission, the respondent cited the case of *Joseph Mutuku Musee vs Kenya Vehicle Manufacturers* (2018) eKLR, *Azmina MA Khan vs Vitoria Furniture Limited* (2018) eKLR; and *Sellers vs London Counties*



*Newspaper* (1951) All ER. That the claimant was unable to present and confirm the full sequence for the transactions he was claiming commissions on. That further, he did not produce evidence to show the transactions where he had been paid for successful sales that he had completed or what percentage he was paid of the profit margins for sales of equipment.

### **Analysis and determination**

12. From the pleadings, the evidence on record and submissions by both parties, this Court is being called to determine whether the claimant is entitled to the sales commissions.
13. The claimant has averred that he introduced the 3 customers who are at the centre of this dispute to the respondent and negotiated with them on its behalf and went ahead to issue the invoices.
14. The respondent in disputing the claimant's assertions, averred that the sales were direct and that for a sales executive to be entitled to a commission, there was need to produce; a quotation; finance documents; invoicing/costs; delivery and payment.
15. It is therefore imperative to analyse the claimant's claim against each of the sales claimed on account of the respondent's 3 customers.

### **Kajulu Holdings Ltd**

16. The claimant has alleged that he sold 4 machines to Kajulu Holdings Ltd being, 1 unit of Komatsu D 155AX-5 Bull dozer, 2 units of Komatsu PC450-7 Excavator and 1 unit of Komatsu WA420-3 Wheel loader. That the sales were not direct as alleged by the respondent. That Crown Agent lent the money to Kajulu Holdings Ltd to purchase the equipment. That the said money was sent to Somitomu Corporation on behalf of Kajulu Holdings Ltd who supplied the equipment to the respondent.
17. The respondent on the other hand avers that the claimant did not present the full sequence of documents required to support a claim for sales commission. That he would have submitted other supporting documents to show that he influenced the sale. That the transaction was a direct sale between Kajulu and Marubeni Corp House a Japanese Trading House.
18. The claimant has based his claim on the quotations he issued to Kajulu Holdings Ltd. It is notable that the quotations in respect of Kajulu Holdings Ltd opens in part: - "Further to your enquiry, we have the pleasure of submitting our offer for the above mentioned bulldozer..."
19. This is the only evidence connecting the claimant to the transaction with Kajulu Holdings. The opening statement of the said quotation implies that the customer had made an enquiry hence the communication by the claimant. It does not allude to the claimant initiating and pushing through with the transaction.
20. Simply put, there is no further evidence to link the claimant to the transaction. He did not dispute RW1's assertion that he needed further documentation to prove that he had finalised the sale. For the claimant to sustain a claim for sales commission, he needed more evidence to prove his role in the transaction beyond the quotation.
21. The fact that the claimant issued the quotation is not conclusive proof that he initiated and pushed through with the sale. Afterall, he was an employee of the respondent, hence he could have issued the quotation without necessarily initiating and pushing through with the sale to its finality.



### **Kabuito Contractors Ltd**

22. As regards Kabuito Contractors Ltd, the claimant avers that he sold 11 units of equipment being 2 units of Komatsu WA42-3 Wheel Loaders, 4 units of Komatsu GD623A-1 Motor grader, 2 units of Komatsu PC3000-7 Excavator, 2 units of Komatsu D75S -5 Dozer Shovel and 1 unit of Komatsu D65EX-15 Bulldozer.
23. In support of his claim, the claimant placed reliance on a quotation he issued with Mr. James Ikiara, the respondent's Sales Manager, who was also his supervisor. The quotation reads in part: -
- “Following the meeting between us and yourselves, we have the pleasure of submitting our special offer, as follows...”
24. Besides the quotation, there is no other evidence from the claimant to prove that he had initiated the sale from the start to the end. It is not clear why the claimant has laid basis to the sale when the piece of evidence he seeks to rely on, has emanated from himself and Mr. Ikiara.

### **Kundan Singh Construction Ltd**

25. The claimant claims a commission of 18 units of equipment being 12 units of Komatsu GD623A-1 Motor Grader and 6 units of Komatsu D65EX-15 Wheel loader.
26. In as much as the claimant relies on an email dated 18<sup>th</sup> July, 2008 in which he states that he visited the customer and held a meeting with Mr. Kundan Singh and Mr. Monie, it is notable that the local purchase orders annexed to the claim indicate that the same was issued by Komatsu Ltd directly to Kundan Singh. There is no further evidence to prove the claimant's participation in the sale.
27. It is not undeniable that in all the three transactions, the claimant had some level of participation. Be that as it may, is the same is not enough to constitute a basis for a claim for a commission on the sales.
28. From the record, there is no sufficient evidence in all the transactions, through documentary evidence, to prove that he initiated the sales and pushed with the same to the very end. It is also notable that the claimant did not controvert the testimony of RW1 that he was required to produce a quotation; finance documents; invoicing/costs; delivery and payment in respect of all the transactions in order to be entitled to a sales commission.
29. Over and above, Mr. Ikiara, the respondent's sales manager advised as follows through an email of 11<sup>th</sup> January, 2012: -

“Mark has raised issues on unpaid commissions relating to the following clients:

1. Kundan Singh Construction Company
2. Kabuito Construction Company
3. Kajulu Holdings

My comments are as follows;

For clients 1 & 2 these were direct deals between Komatsu and the clients with a predetermined dealer margin. There was very little effort from the sales executive, thus did not qualify for commission.



For client 3, the client was financed by crown agent and tenders were submitted by Komatsu and evaluation was done in Japan/UK with little or no effort from the sales executive to influence the process.

I made it known to Mark that since we did not influence the clients to get these deals, we did not qualify for sales commission. Regards....” Underlined for emphasis

30. RW1 in his testimony before court, stated that the sales manager would be paid part of the commission if the sale was initiated and concluded by a sales executive. To this end, Mr. Ikiara noted that he had advised the claimant that they did not influence the sales hence were not entitled to the sales commission. This appears to be a joint loss or gain on the part of both the claimant and Mr. Ikiara.
31. As such, if at all the claimant was entitled to a commission from the cited transactions, invariably Mr. Ikiara would be entitled to a commission as well.
32. Why then would Mr. Ikiara dispute that the claimant was entitled to a commission which he himself would have benefited from? This further lends credence to the respondent that the claimant was not entitled to a commission arising from the transactions herein.
33. In the circumstances, I find that the claimant has not proved on a balance of probability that he is entitled to the sales commission sought against the respondent.

#### Orders

34. In the final analysis, I find that the claimant is not entitled to the prayers sought hence I dismiss the claim in its entirety and make no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF APRIL, 2022.**

.....  
**STELLA RUTTO**

**JUDGE**

#### Appearance:

For the Claimant Mr. Munyua

For the Respondent Ms. Effendy

Court Assistant Barille Sora

#### 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 had 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.

**STELLA RUTTO**



**JUDGE**

