



**Okumu v Airtel Networks Kenya Ltd (Cause E4 of 2020)
[2022] KEELRC 3973 (KLR) (8 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3973 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E4 OF 2020**

S RADIDO, J

JUNE 8, 2022

BETWEEN

LEWIS OCHIENG OKUMU CLAIMANT

AND

AIRTEL NETWORKS KENYA LTD RESPONDENT

JUDGMENT

1. Lewis Ochieng Okumu (the Claimant) sued Airtel Kenya Ltd (the Respondent) on 28 September 2020, alleging unfair, unlawful, constructive dismissal and breach of contract.
2. The Respondent filed a Response on 23 October 2020, wherein it asserted that the termination was lawful.
3. The Claimant filed a reply to the Respondent's Defense on 11 March 2021.
4. The Cause was heard on 7 December 2021 and 21 March 2022. The Claimant and an employee in the Respondent's Human Resource Department testified.
5. The Claimant filed his submissions on 20th April 2022, and the Respondent's submissions were filed on 8 June 2022 (should have been filed and served by 21 May 2022).
6. The Court has considered the pleadings, evidence, and submissions.

Unfair termination of employment

Procedural fairness

7. The Claimant was issued with a notice to show cause on 4 June 2019, in which the allegations were:
 - i. In an email correspondence sent from June 2018 to April 2019 (see attached), you submitted the following data in relation to Narok Shivam and Rymas with reference to the infrastructure



that these Channel partners in your assigned territory had and would be used for their categorisation and commission payout;

- ii. It has now been established through a market visit by the Sales and Distribution Director and verification by the newly appointed Zonal Sales Manager, Hussein Muhammed, that the data for Narok Shivam and Rymas channel partners was indeed falsified. As a result, Shivam Supermarket and Rymas enterprises were overpaid in commissions by Kes 508,521 and Kes 2,755,744 respectively in the period between June 2018 to April 2019. Refer to the attached payment analysis for the two.
8. The notice requested the Claimant to provide a formal written response to the allegations on or before 7 June 2019.
9. The Claimant responded in writing on 6 of June 2019, and was after that called through a letter dated 11 June 2019, for a disciplinary hearing on 14 of June 2019.
10. The Claimant attended the hearing accompanied by a witness and tendered his defence.
11. During the oral hearing, the Claimant was requested to provide certain documents (Permanent Journey Plan), (One Time Pin) and Reconciliation books for the 11 Narok Shivam DSRs (Direct Service Representatives).
12. The Panel indicated that the records would absolve the Claimant from blame on the allegations of falsification of data.
13. The Claimant agreed to submit the documents by the end of the day (14 of June 2019). He did not provide the records.
14. The Respondent thereafter issued the Claimant with a termination letter on 26 June 2019, to which he appealed vide a letter dated 1 July 2019.
15. The Respondent again gave the Claimant 7 days from 11 July 2019 to provide the records.
16. The Claimant did not provide the records, and on 27 September 2019, the Respondent notified him that the termination had been upheld.
17. From the foregoing, it is safe to say that the Respondent was in substantial compliance with the requirements of procedural fairness for the reason that it issued a notice to show cause to the Claimant, which outlined the allegations to confront and afforded him an opportunity to make a written response and also invited him to an oral hearing where he made representations accompanied by a colleague.
18. The Respondent also entertained an appeal by the Claimant.

Substantive fairness

19. In terms of sections 43, 45 and 47(5) of the *Employment Act*, 2007, the onus of justifying or proving the reasons for termination of an employment contract lies with the employer.
20. The ground given for the termination of the Claimant's employment was gross negligence leading to loss of trust. The particulars were not accurately reporting information from your assigned territory ... leading to losses as commissions paid.
21. The letter also indicated that the Claimant had failed to provide proof of the existence of some 11 Direct Sales Representatives and One time Pin for the 11 Direct Sales Representatives.



22. The Respondent had an obligation to prove in Court that the Claimant falsified records/data and that the falsification led to the payment of undeserved commissions or loss of revenue.
23. And because the Respondent required the Claimant to produce certain records in the course of the disciplinary hearing, the Court will look at the materiality and impact of the failure to produce the records, on the validity and fairness of the dismissal.
24. It is not in dispute that the best evidence where documents are involved would be the documents themselves.
25. The Respondent asserted that the Claimant had falsified records relating to two of its partners, Shivam Enterprises and Rymas.
26. However, the Respondent did not place the documents before the Court. In the best-case scenario, the Respondent should have confronted the Claimant with the documents in Court and demonstrated how they were falsified.
27. To be false, the entries in the documents would not have been in consonance with other records. Even those other records were not introduced into evidence.
28. The Respondent also alleged that it suffered loss because it paid undeserved commissions to the partners due to the false records submitted by the Claimant.
29. The Respondent did not put before the Court any evidence that it made any payments to the 2 partners due to the falsified data submitted to it by the Claimant.
30. The Respondent's witness statement, which was adopted as part of the evidence, was vague and bare as to the falsification of documents and any revenue lost.
31. During oral testimony (examination-in-chief), the witness did not equally give credible evidence of falsification of data or loss of revenue.
32. The witness also admitted that an audit was conducted and that a copy of the audit was not given to the Claimant. A copy was not produced in Court.
33. The Court finds that the Respondent did not discharge the burden imposed on it by the [Employment Act](#), 2007 to prove and prove as valid and fair the reasons for the dismissal of the Claimant.
34. During the disciplinary hearing, the Respondent allowed the Claimant an opportunity to produce certain records.
35. Although the Claimant did not produce the documents within the agreed timeline, he informed the Respondent in his appeal letter dated 1 July 2019 that the partner had declined to supply him with the contracts of the Direct Sales Representatives because the contract in place between it and the Respondent did not contemplate it (partner) providing such records.
36. The Claimant implored the Respondent to directly seek the documents from the partner.
37. The Claimant also explained that he could not provide One Time Pin because the Direct Sales Representatives had not attained the minimum target of 15 OTP for the same to be listed. He also asserted in the letter that OTP was still under trial and therefore there had been no official communication.
38. The Respondent did not controvert the Claimant's explanations.



39. The Court will in the circumstances find the reliance on failure to produce records as a reason to dismiss the Claimant as not valid or fair.

Compensation

40. The Claimant served the Respondent for about 1-year and in consideration of the length of service and circumstances of dismissal, the Court is of the view that the equivalent of 2-months gross pay as compensation would be appropriate (gross salary in June 2019 was Kshs 230,974/-).

Salary in lieu of notice

41. The Claimant's contract provided for 1-month or pay in lieu of notice. The Claimant will award the equivalent of a 1-month basic salary in lieu of notice (Kshs 85,000/-).

Breach of contract

Unpaid leave allowance

42. The Claimant did not lay an evidential or contractual foundation for this head of the claim, and relief is declined.

43. The Court notes that the Claimant was paid accrued leave days (different from leave allowance).

Pension benefits

44. The Claimant was paid his pension benefits, and nothing turns on this head of the claim.

Service pay

45. The Claimant is not entitled to service pay by dint of section 35(5) and (6) of the [Employment Act, 2007](#), as he was a member of a pension scheme.

Conclusion and Orders

46. The Court finds and declares that the Respondent did not discharge the burden imposed on it by sections 43, 45 and 47(5) of the [Employment Act, 2007](#), hence the summary dismissal of the Claimant was unfair.

47. The Claimant is awarded:

- i. Compensation Kshs 461,948/-
 - ii. Pay in lieu of notice Kshs 85,000/-
- Total Kshs 546,948/-

48. The decretal amount to attract interest at court rates from the date of judgment if payment is not made within 30 days.

49. The Claimant to have costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS DAY 8TH OF JUNE 2022.

RADIDO STEPHEN, MCIARB

JUDGE



Appearances

For Claimant Hussein B. Indimuli, Advocate

For Respondent Ako Advocates LLP

Court Assistant Chrispo Aura

