



**Amenya v Urysia Limited (Employment and Labour Relations Cause
964 of 2016) [2022] KEELRC 13391 (KLR) (6 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13391 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 964 OF 2016
JK GAKERI, J
DECEMBER 6, 2022**

BETWEEN

PATRICK OCHIENG AMENYA CLAIMANT

AND

URYSIA LIMITED RESPONDENT

JUDGMENT

1. The Claimant initiated this suit by a memorandum of claim dated May 25, 2016 and filed on the same date alleging non-payment of salaries and other dues owed to him.
2. The Claimant prays for:
 - a. Salary for the unpaid period of time between March, April, May and part of June 2014 which amounts to Kshs 1,400,000/=.
 - b. Refund of Kshs 100,000/= being expenses incurred on behalf of the Respondent.
 - c. Sales incentives for selling 300 units in the month of May as per the contract amounting to Kshs 9,000,000/=.
 - d. Costs of this suit
 - e. Interest on the above at court rates; and
 - f. Any other relief that this Honourable court may deem fit and just to grant.

The claimant's case is pleaded as follows:

3. The Claimant avers that he was employed by the Respondent as a General Sales Manager for an unfixed term commencing February 1, 2014 at a monthly salary of Kshs 400,000/= less deductions. He was



also supposed to paid sales incentives which would be graduated as per the contract and paid per unit of motor vehicle sold.

4. The claimant further avers that he diligently and professionally carried out his duties and obligations until June 15, 2015 when he lawfully terminated his contract of service with the Respondent due to its failure to pay his salaries on time.
5. It is the Claimant's case that upon resigning from employment, the Respondent did not furnish him with records and proof of pension contributions, PAYE and all other statutory deductions not paid his salaries from March to May and 15 days of June 2014.
6. The claimant states that during the month of May, he signed a deal for the Respondent with the National Police Service where 300 units of motor vehicles were supplied. As a result of this, he was entitled to be paid Kshs 30,000/- per unit amounting to Kshs 9,000,000/- which amount the respondent refused to pay.

Respondent's case

7. The Respondent on the other hand denies all the allegations and averments by the claimant. It acknowledges that the claimant was indeed employed in the company as a General Sales Manager on February 1, 2014 and was confirmed on August 8, 2014.
8. The Respondent further avers that the claimant breached the terms of his contract by deserting his duties and working with a competitor, CMC Motors. That he applied for 30 days annual leave under the guise of going to visit his children in Canada only to be discovered that he was working with CMC Motors whose offices are in close proximity to the respondent.
9. The respondent avows that the claimant did not tender a resignation letter and is shocked to find one attached to his pleadings. It maintains that the claimant deserted his work place in early May 2015 by taking leave and not returning to its premises only to send a demand letter dated May 10, 2016 from his advocates.
10. It also avows that the resignation letter is actually in breach of the terms of the contract as it gave a two-months' notice instead of three.
11. The respondent states that the claimant, despite his managerial position left his employment in reckless abandon with no notice and further failed to clear with his employer with respect to his responsibilities, reports and company property as is required of him under the company Rules and Regulations.
12. It denies the Claimant's claim for unpaid salary and failing to provide him with proof of payment of Statutory and Pension deductions. It further denies the claimant's claim for sale incentives for selling 300 units and further denies that the claimant ever procured and secured the contract with the National Police Service in the month of May 2015.
13. It instead states that the contract with the Police was negotiated and signed in the month of November 2014, long after the claimant had already deserted and left his employment with the Respondent and was working for a competitor.
14. In counter-claim, the Respondent prays for the following:
 - a. Notice pay for three months of Kshs 1,200,000/-
 - b. General damages for breach of contract, confidentiality and restraint on future employment.
 - c. Costs of the suit, and



- d. Interest on (a) and (b) at court rates from the date of action
 - e. Any other or further orders the court may deem fit to grant.
15. The Respondent avers that due to the breach of contract by failing to give notice of termination of contract, the Claimant owes the respondent amounts in lieu of notice.
16. In addition, it further avers that the Claimant breached the terms of the Appointment letter and the Respondent suffered loss as a result and prays for general damages against him for breach of confidentiality agreement and breach of terms of contract.

Evidence

17. During the hearing, the claimant gave an oral testimony in support of his case. He adopted the witness statement and adduced evidence in chief the documents attached to the memorandum of claim.
18. During cross examination, he testified that he indeed had resigned although the resignation letter had no acknowledgment of receipt by anyone from the Respondent's office. He however acknowledged that the contract required him to give 3 months' notice but he had given 2 months instead.
19. As for the alleged sale incentives and the sale of 300 Units of Motor vehicles to the National Police Service, the claimant testified that the Police had issued a public tender to which he put together a team and they acquired the tender.
20. During re-examination, he clarified that the vehicles were sold to LETCO EA which in turn leased them. He testified that the Respondent imported the vehicles and sold them to LETCO LTD. who leased them to the Respondent who in turn leased them to the National Police Service.
21. On the resignation letter, he stated that he had given a 2 month notice because he had accrued leave days for one month and the total summed up to three months. He stated that he had requested to use his leave days as part of his notice.
22. He testified that his resignation letter was sent to the Managing Director and that he served the letter by hand and by email.
23. The claimant also called upon one Steve Macharia, who appeared as CW2 who adopted his witness statement as his evidence in chief.
24. Mr Macharia testified that he was a workshop supervisor who offered support to the sales team. He stated that he had heard about the sales incentives although he was not benefit from the scheme.
25. He further testified that he was aware of the tender for the 300 vehicles and had been part of the committee that was formed to prepare the tender documents. In addition, he stated that he used to go to the office of the respondent and the National Treasury as he dealt with the tender specifications.
26. As for the sale incentives, he stated that he was not entitled to any but the sales team was entitled to.

Respondent's evidence

27. The respondent called Jacqueline Chele, its Human Resource Manager as RW1. She adopted her witness statement as evidence in chief and produced documents as exhibits.
28. She testified that she was not aware of any refund to the claimant or any claim and no receipts had been filed.



29. She further testified on sale incentives and stated that the same was payable to sales staff depending on the volume of individual sales. She stated that the same was discretionary and not payable in tenders as tenders were not treated as individual sales due to the involvement of various departments and employees.
30. Ms Chele stated that the claimant's resignation letter was not received by their office. In addition, she testified that the claimant left in breach of his employment contract.
31. During cross examination, the witness testified that she had no evidence that the respondent tried to reach the claimant on email or phone when he failed to show up. In addition, she stated that no action was taken against him for leaving without notice and the respondent did not claim anything from the claimant.
32. On re-examination Ms Chele testified that before she joined the Respondent, it had no operational Human Resource Department and the Personal Assistant to the Managing Director handled all Human Resource functions.

Claimant's submissions

33. The claimant submitted that the respondent, on noticing that the Claimant had allegedly deserted duty did not follow up with him by issuing a notice to show cause or even the issuance of a termination letter for gross misconduct.
34. Counsel further submitted that there was no requirement for the stamping of the resignation letter in the employment contract. That he was simply meant to issue a notice which he avers was done to the Managing Director through his personal assistant.
35. He submitted that the counter claim should be dismissed as there was no evidence tendered that the Claimant had absconded duty. It was urged that without any evidence, the respondent's averments were mere allegations not proved and urged the court to fully disallow the said counter claim with costs to the Claimant as the same was an afterthought only intended to deny the Claimant his dues.

Respondent's submissions

36. The Respondent submitted that the claimant had breached the terms of his appointment and ought to have been summarily dismissed as he offended the provisions of Section 44(3) of the *Employment Act*, 2007.
37. In addition, it submitted that the claimant had offended the terms of Clause 19 of his Appointment Letter and Section 36 of the *Employment Act*.
38. It was argued that the claimant had breached the basic fabric of trust and respect contained in the terms of his letter of appointment and left the respondent struggling to come to normalcy after his dishonourable and deceitful desertion despite the enormous responsibility and reciprocal attractive benefits bestowed upon under his contract of employment.
39. The court was urged to find the Claimant's claim was baseless, a sham with no merit and dismiss it with costs and uphold the Respondent's claim and award the same with interest.

Determination

40. From the documents on record, it is not in dispute that the Claimant was employed by the Respondent as a General Sales Manager on February 1, 2014 at Kshs 400,000/= per month with a 6



- months probationary period. The contract provided for performance bonus dependent upon annual performance of the company and performance appraisal. The Claimant was also entitled to 25 working days annual leave and had a detailed job description.
41. From the evidence on record and submissions by counsel for the parties, the issues for determination are;
- i. Whether the Claimant resigned or deserted the workplace.
 - ii. Whether the Claimant is entitled to sales commission for selling 300 units in May 2014.
 - iii. Whether the Claimant is entitled to the reliefs sought.
42. As to whether the Claimant resigned or absconded duty, the starting point is an explanation of the two terms.
43. According to *Black's Law Dictionary, 10th Edition*, Resignation means;
- ' The act or an instance of surrendering or relinquishing an office or position; an official announcement that one had decided to leave one's job or organization, often in the form of a written statement.'
44. Desertion on the other hand denotes;
- ' The wilful and unjustified abandonment of a person's duties or obligations.'
45. In the often cited South African decision in *Seabolo V Belgravia Hotel (1997) 6 BLLR 829 (CCMA)*, the court sought to distinguish desertion from unauthorised absence as follows;
- ' Desertion is distinguishable from absence without leave in that the employee who deserts his or her post does so with the intention of not returning, or having left his or her post subsequently formulates the intention not to return.
46. Parties have adopted contrasting positions. While the Claimant alleges that he resigned from office by letter dated April 15, 2015 addressed to the Managing Director, the Respondent maintained that the Claimant deserted the workplace to work for a competitor.
47. In his alleged letter of resignation, the Claimant appreciated the opportunity he was accorded by the Respondent as Head of Sales and the strides the Respondent had made and indicated that his focus had changed to other interests and the last date of service would be June 15, 2015.
48. Regrettably, the letter had no acknowledgement or receipt stamp or any indication that it was indeed dispatched to the Respondent, a fact it contested in court. The Claimant confirmed on cross-examination that the letter had no acknowledgement stamp. Although he testified that he delivered it by hand, as well as email, he did not provide a copy of the email to which the letter was attached.
49. Relatedly, the letter makes no reference to pending dues or salary.
50. According to the RWI, the Claimant requested for leave by word of mouth in April or May and did not return to the work place and was working for a competitor, but had no evidence to establish the allegation.
51. Needless to emphasize, it behoved the Claimant to demonstrate that the alleged resignation letter was actually delivered to the Respondent and as such evidence was not forthcoming, the court was not persuaded that the alleged resignation letter actually reached the Respondent for its action. This



reasoning is reinforced by the testimony of RWI that the Claimant did not even clear with the Respondent and the Claimant's evidence made no reference to a clearance process for purposes of final dues.

52. Did the Claimant desert duty as alleged by the Respondent?
53. The Respondent contended that the Claimant absconded duty disguised as leave but the witness had neither a leave application form nor the date when leave was taken or when he was due to report back. However, the Claimant acknowledged the fact that indeed he had requested for leave.
54. On the alleged desertion, RWI testified that the Respondent took no steps after the Claimant failed to report to work. She testified that she had no evidence that the Respondent made any attempt to reach out to the Claimant by phone or email. RWI confirmed on cross-examination that no action was taken against the Claimant for having left without notice and no claim was made.
55. On this issue, the court is guided by the sentiments of the court in [*Felistas Acheba Ikatwa V Charles Peter Otieno \(2018\) eKLR*](#) as follows;
- ' The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.'
56. Similar sentiments were expressed in [*Boniface Francis Mwangi V BOM Iyego Secondary School \(2019\) eKLR*](#), [*Simon Mbithi Mbane V Inter Security Services Ltd \(2018\) eKLR*](#) and [*Joseph Nzioka V Smart Coatings Ltd \(2017\) eKLR*](#).
57. In the absence of evidence to show that the Respondent took any action towards ascertaining the whereabouts of the Claimant, the court is satisfied that the defence of desertion as alleged by the Respondent is not sustainable in this case.
58. As to whether the Claimant is entitled to commission for selling 300 units in May 2015, the homeport is the evidence on record.
59. The Claimant testified that in May 2015, he signed a deal under which the Respondent supplied the National Police Service with 300 units of motor vehicles.
60. The Claimant relied on a sheet of paper entitled 'Sales Incentives For Sales Managers' which stated inter alia
- ' Managers are not entitled to commission.'
61. The single page document which had no authentication by anyone had a single signature in the middle and a date January 8, 2014 but no name and a part from the date inserted by hand, it had no date. The document had neither an addressor nor addressee and appeared incomplete. It is not expressed as an addendum and had no company logo.
62. The document lacked authenticity and the court so finds.
63. The Claimant testified that he was the one who put together the team that worked on the Tender for the 300 motor vehicles for the National Police Service.
64. CWI, Mr Steve Macharia, the Workshop Supervisor testified that he was looped in to support the sales team specifically on the specifications and the Tender documents were prepared by a committee.



- He testified that he attended meetings at the Office of the President and the National Treasury but was not entitled to any commission and offered technical support in the preparation of the tender documents. It was his testimony that sales incentives were only given to those in the sales department and the Claimant was entitled to a Commission. The witnesses however, provided no evidence of how the commission was payable to a group where a tender was involved or provide a document to that effect.
65. Documents on record revealed that the Tender for the leasing of motor vehicles for the National Police Service Transport advertised by the National Treasury was due by July 22, 2014 and the bid security was Kshs 1,000,000/=.
 66. The detailed tender document's opening paragraph stated as follows:

' The National Treasury invites sealed tenders from original motor vehicle manufacturers, motor vehicle dealers leasing companies, financial institutions and interested firms for provision of vehicles and transport services for the National Police Service through leasing.'
 67. Section V of the document was the Request for Proposals (RFP) leasing of motor vehicles where the Bidder was the lessor and the National Police Service as the lessee. The document made provisions for lease contract and concessions, new vehicles, insurance, identification, lease pricing and fleet management among others.
 68. The Respondent provided the requisite bond through Barclays Bank of Kenya Ltd on July 17, 2014.
 69. In addition, the Respondent notified the National Treasury that it had partnered with Rent Co Ltd, a leasing company and Vivo Energy for ease of access to service points for the National Police Service.
 70. The parties involved entered into a back to back leasing funding agreement under which the Respondent would operate the lease with the National Police Service while Rent Co Ltd would provide the motor vehicles by sale or lease and rentals were payable to the bank.
 71. The Respondent dispatched its proposal via letter signed by the Managing Director dated July 18, 2014 and the Master Operating Lease Agreement Reference No TNT/001/2014-2015 between the Respondent and the National Treasury dated November 30, 2015 was signed by the Principal Secretary and witnessed by Principal Administrative Secretary at the National Treasury on the one hand and the Managing Director of the Respondent, Mr Clause Mwendu and one Mr Mbugua Ngugi as a witness on the part of the Respondent. Under the agreement, the Respondent undertook to lease a total of 300 units for a duration of 4 years at Kshs 2,528,001,688.00.
 72. Subsequently, on December 3, 2015, the Respondent provided a performance bond of Kshs 1,000,000/= valid upto November 29, 2019.
 73. It is against this background, that I now proceed to assess whether the Claimant was indeed entitled to a sales commission on this transaction.
 74. It was the Claimant's case that the transaction between the Respondent and the National Treasury was a sale and he was thus entitled to a commission per vehicle. However, on cross-examination, he conceded that the agreement between the two bodies was a lease agreement which he also admitted was a different transaction. That it was the responsibility of the Respondent to procure the vehicles not the Claimant. The witness was emphatic that the commission was an incentive for sales and the document he was relying upon as the foundation of the commission had neither the company letter head nor signatures.



75. Although the Claimant testified on re-examination, that the Respondent imported the vehicles and sold them to Rent Co Ltd which leased them to the Respondent for lease to the National Police Service, he adduced no evidence to that effect. RWI testified on cross-examination that the vehicles were owned by Rent Co Ltd as it was a back to back lease agreement and the Respondent was paid the amount due.
76. In addition, RWI confirmed on cross-examination that whereas incentives were given as a benefit, commission was payable for individual sales but not payable in cases of Tender and was discretionary.
77. RWI explained that in cases of a Tender, a Project Team would be constituted by representatives from various departments to prepare the documentation with each department bringing to bear its expertise and the proposal would be evaluated by the Tender Committee to ensure that all specifications had been met. It was her testimony that tenders were not treated as individual sales as they included staff from other departments and no commission was payable as CWII, who was involved in preparation of the tender document in question confirmed.
78. Similarly, an Internal Memo from the Managing Director to Finance dated March 18, 2016 stated as follows;
- Sales Commissions for Tender No TNT/001/2014-2015
- Dear Alex
- As per our company guidelines;
1. No Commission is payable for Tenders awarded to the company.
 2. Executive and House Sales may attract a handling commission at the discretion of management commissions will not be paid out in relation to this Tender.
- Signed
- Claude Mwende
79. RWI testified that the foregoing was a response to an inquiry made by the Accountant. The Memo was allegedly based on the Respondent's guidelines and explains the instances in which sales commissions was payable.
80. Finally, and as adverted to elsewhere in this judgement, the Claimant's contract of service with the Respondent made no provision for sales commission but provided for performance bonus but as the memo dated March 18, 2016 showed sales commission was payable in certain circumstances.
81. Having found that the primary document relied upon by the Claimant to urge the prayer for sale commission on the 300 units leased to the National Police Service in 2014/2015 lacked authenticity, and ownership, and his contract of service made no reference to sales commission and more significantly, the Claimant adduced no evidence that there was an actual sale between the Respondent and the National Police Service or the National Treasury or Rent Co Ltd and played an instrumental role, the court is satisfied that the Claimant has on a balance of probabilities failed to prove his entitlement to Sales Commission at Kshs 30,000/= per unit.
82. As regards the reliefs sought, the court proceeds as follows;
- i. Unpaid salary for March, April, May and part of June 2016
83. It requires no belabouring that salary is a basic element of a contract of service as evidenced by the definition of 'employee' in section 2 of the *Employment Act*. It is the duty of the employer to pay the



salary and non-payment amounts to a fundamental breach of the contract of employment as salary is a term that runs to the root of the contract.

84. In the instance case, the Claimant made no reference to when the salaries accrued as his resignation letter was silent on pending salaries or dues. Could it be that by 15th May, the salaries for March and April had already been paid?
85. To rebut the claim, the Respondent provided copies of the Claimant's payslip for February and March as well the payroll for March and April 2015 showing PAYE deductions and a credit slip of the KRA for the consolidated PAYE.
86. Copies of records of payment of NSSF and NHIF contributions up to April 2015 was also provided. To buttress its case, the Respondent's witness confirmed on cross-examination that staff salaries were paid through the bank.
87. In its totality, the documentary evidence before the court reveal that the Claimant's salary for March and April 2015 was paid and statutory deductions made and remitted.
88. The Respondent, however, led no evidence to demonstrate that the Claimant's salary for May and part of June 2015 as prayed for was paid and why it was not paid.
89. For the going reasons, the Claimant is awarded the salary for May 2015 and 15 days in June 2015, Kshs 600,000/=.
 - ii. Refund of Kshs 100,000/=
90. The Claimant placed no material before the court to demonstrate entitlement to the sum of Kshs 100,000/=. It is unclear as to how the expenses were incurred and on whose instigation and on what terms.
91. RWI testified that she was unaware of any refund claim by the Claimant as no receipts had been filed.
92. Neither the Claimant's written statement nor the oral testimony provided the necessary particulars.

The prayer is declined.

 - iii. Sales incentives for selling 300 units in May 2015
93. Having found that the Claimant failed to prove that indeed a sale took place between the Respondent and the National Treasury or any other entity and laid no contractual or other basis for its payment, the prayer is unsustainable and is accordingly dismissed.
 - iv. Costs of this suit
94. In light of the limited success, the Claimant is awarded 50% of the costs.

Respondent's counter-claim

95. Having found that the Respondent failed to establish that the Claimant deserted the work place or breached the terms of the contract of services, the court is satisfied that the counter-claim was not unproved and is accordingly dismissed.
96. In conclusion, judgement is entered for the Claimant against the Respondent in the following terms;
 - a. Salary for May 2015 Kshs 400,000/=
 - b. Salary for 15 days of June 2015 Kshs 200,000/=



- c. 50% costs of this suit.
- d. Interest on (a) and (b) at court rates from date of judgment till payment in full.

97. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 6TH DAY OF DECEMBER 2022

DR. JACOB GAKERI

JUDGE

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 15th March 2020 and subsequent directions of 21st 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 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 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.

DR. JACOB GAKERI

JUDGE

