



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 505 OF 2015

CHARLES KYALO MUNYWOKI.....CLAIMANT

VERSUS

GREENLIFE CROP PROTECTION AFRICA LIMITED.....RESPONDENT

JUDGMENT

1. The suit was filed on 11/3/2014, by the claimant seeking judgment against the respondent for:-

(a) Special damages in the sum of Kshs.1,471,776.38.

(b) Interest and costs.

2. C.W.1 the claimant testified that he was employed by the claimant by a written contract dated 15/5/2013 as a Sales Manager earning a gross salary of Kshs.80,000; field allowance of Kshs.56,000; maximum fuel allowance on official duty Kshs 30,000 and telephone allowance of Kshs 3000. He was also provided with a company car.

3. C.W.1 testified that the contract of employment provided for "A bonus of 1% on achievement of a maximum of Kshs 7.5 million sales per month.

4. That the failure by the respondent to implement the aforesaid bonus clause forms the basis of this dispute.

5. C.W.1 testified that he diligently undertook his duties resulting in realization of sales amounting to an aggregate sum of Kshs 147,177,638 between 15/5/2013 and 15/4/2014 thereby becoming entitled to 1% bonus thereto.

6. That in utter breach of the terms of the contract, the respondent reneged on the bonus clause and failed, refused and or neglected to pay to the claimant 1% of the total sales amounting to Kshs1,471,776.38.

7. The claimant produced list of documents including the contract of employment dated 15/5/2013, and documentation listed as exhibits '2' to '18' in respect of award of various tenders by County Government of Machakos, which the claimant testified were a result of his sales campaign and effort and in respect of which he claims 1% bonus in terms of his contract of employment.

8. The Claimant also produced statements from respondent's NIC Bank account No. 1001098957 from the period 1/11/2013 and 28/11/2013 and from the period 9/1/2014 and 10/1/2014 which according to him reflect the payments made by the Machakos County Government to the respondent.

9. The claimant prays to be awarded as prayed.

10. The respondent called R.W.1 Nicholas Muasya Kyule, the Finance Officer of the respondent and R.W.2 Rhode Njambi Ng'ang'a, the Human Resource and Administration Officer of the respondent in defence of its case.

11. R.W.1 testified that he was familiar with the facts of this case since during the material time between the years 2014 and 2015, he held the position of General Manager of the Respondent. Later in 2014, the designation of R.W.1 changed to Chief Finance Officer.

12. That in his capacity together with other senior managers, they monitor business performance through a computer system. That the monitoring included financial information including sales.

13. That he negotiated employment contracts with potential employees to be employed. He also checked performance of sales staff, achievement of their sales targets or failure to do so.
14. That the company motivated sales staff by paying them bonus when sales targets have been achieved.
15. That R.W.1 negotiated a contract with the claimant providing for payment to him of 1% bonus of sales realized as per Clause 7 of his job description embedded and forming part of the said employment contract.
16. R.W.1 testified that sales realized means, a sale that has been paid for by the customer and for which no debt is outstanding. That the respondent's customers were allowed varying credit period and it was upon the sale person to pursue his customers to collect outstanding sales money.
17. That further the 1% bonus was strictly based on trials and adoption of the free samples of the respondent's products to farmers to try in their farms. That upon successful trial, adoption would follow, meaning that the farmer adopting company product and becoming a regular customer of that product.
18. That the claimant's work was mainly to look out for advertisements by potential customers and bring the information to the office for R.W.1 to constitute a team to work on the many documents needed for tenders, which the claimant could not obviously handle alone. Tender work was therefore not part of his docket since he was mainly a sales person based in the field.
19. That the claimant was a poor performer and his performance is reflected in a table produced by R.W.1. That the monthly target for the claimant was Kshs 7,500,000 per month and for the period May, 2013 to May, 2014 he did not achieve the sales target in any one month as reflected in the witness statement of R.W.1.
20. According to R.W.1, the claimant sold products worth Kshs 3,507,737 for a whole year and only collected Kshs 1,682,804. That he left bad debts of Kshs 1,824,932 which has never been collected to-date and will be written off.
21. That emails were written to the claimant to pursue the debts but he was either unwilling or unable to collect the same.
22. That apart from making the company lose 1.8 million, the claimant himself received salaries and other allowances worth over Kshs 2,000,000 during the period he was an employee of the respondent thereby making his employment relationship with the employer unbalanced and beneficial only to himself.
23. That the claimant resigned voluntarily from employment because he appeared unable to cope with the demands of the sales role.
24. That Charles brought cheques that bounced at times.
25. That the claim by the claimant is based on County Government tenders in the sum of Kshs 147,177,638, which claims have no merit at all since the claimant's role in obtaining government tenders was only administrative support including collecting and later submitting tender documents and was never part of his core job.
26. That Tender participation requires intense preparations, and normally includes a team of employees picked at random.
27. That the claimant participated in tender teams not as a sales person but as an ordinary employee and would sometime be sent to collect tender documents and return them by signing his name just like other employees including R.W.1 did
28. Tender business being not a regular business was not assigned to any particular sales employee but was a combined effort of office staff in coordination within any of the officers in the field.
29. That the claimant resigned from employment on 29/5/2021 whilst the Machakos County Project was still ongoing and none of the sites had been certified. That Certification of sites commenced from February, 2015. That since the claimant resigned, R.W.1 has continued with the project to-date. R.W.1 states that he is not entitled to any commission in respect of the said project.
30. That Kshs 42,500, 000 tender spread from 2013 to 2015. It was not a one month sales as it was a project running over several years and hence recognition would be after final certification that was by mid-2015.
31. That the other tender of figures 50,000,000 and 42,565,200 were all two year programmes and not specific to one month as alleged, and in any case were not realized.
32. That the tender process was not specific to the claimant. It was a tender to general public with an opening date where all tenderers were invited during opening. No negotiation was required, and a tender won could not be regarded as a sale, unlike where a sales person would sell a farm or big whole sale or distributor. That tenders are not regarded as sales in the company.
33. That the claimant had no authority to access the company banking details and statements.
34. That the respondent could not employ one person to deal with tenders since this is not regular business. This was team work not specific as alleged by the claimant or at all.

35. R.W.2 Njambi Ng'ang'a testified that she was a Human Resource and Administration Manager and hence part of her work was to assess performance of employees. That performance of sales and marketing staff is measured by whether they achieve sales targets. That customers receive goods first and then pay for them later after 30, 45, 60, 90 or 120 days depending on the arrangement they have with the company.

36. That it is upon the sales staff to ensure that the sales they make crystallise into money by collecting the payments as they fall due.

37. That the respondent uses a modern computer system to analyse country wide sales

38. That sales recorded in the system are not necessarily money until the sales staff collect that money and same goes into the bank. That at times, customers issue bad cheques which bounce.

39. R.W.2 states that it is wrong for the claimant to count sales on paper or the system as actual sales without confirming whether the sale finally translated into money in the bank.

40. That when the company participates in tenders, any sales staff is sent to pick/buy tender documents and bring them to the office for processing.

41. When tender documents are brought to the office, a team of four to six people was constituted, to put together the huge documentation required for tendering. After tender documents are ready, suitable staff member is picked to return the tender documents.

42. That no single staff can claim credit for winning the tender, since it is a team effort and tenders are not counted as mainstream sales like those done by the salesmen.

43. R.W.2 states that there is no letter in the claimant's file varying or changing his original terms of employment. The position of Chief Operating Officer and Chief Executive Officer mentioned in the alleged letter of variation did not exist in the company organogram. That the claim lacks merit and it be dismissed.

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

(i) Whether the claimant has proved the claim for payment of special damages.

(ii) What remedies if at all, is the claimant entitled to.

45. The claim before Court is one for breach of terms of a written contract of employment and in particular a clause which provided one of the terms of employment to include:-

“A bonus of 1% on achievement of a maximum of Kshs 7.5 million sales per month.”

The contract provided the job description of the claimant to be Sales Manager and his area of operation in terms of clause 5 of the Job description included “Government Tenders inter alia.

46. Clause 7 of the said job description provides “your activities should be geared towards realization of sales of Kshs 7.5 million per month after successful trials and adoption. On achievement of the target, you are eligible for 1% bonus of sales realized.

47. The claimant has testified that between the month of 15/5/2013 and 15/4/2014, a period of about one year, he helped the respondent realize sales amounting to an aggregate sum of Kshs 147,177,638 and therefore in terms of the contract of employment he was entitled but was not paid 1% bonus on the said sales amounting to Kshs 147,177,638. That this was a breach of Contract on the part of the respondent. That the Court should find so and award the claimant Kshs 1,471,776.38 as prayed for in the statement of claim.

48. The respondent has stated vide R.W.1 and R.W.2 that the claimant has failed to prove that he on any one given month attained the minimum target of Kshs 7.5 million sales which would have entitled him to 1% bonus in terms of clause 3 of the contract, as read with Clause 7 of the job description.

49. The respondent denies that tenders collectively made by the respondent in respect of the County Government of Machakos were individual sales of the claimant stating that tenders were collectively done by staff teams and any contracts and payments arising therefrom could not translate to sales by an individual as claimed by the claimant or at all,

50. That indeed, the projects cited by the claimant were ongoing works which did not generate the Kshs 7.5 million monthly target for the claimant or any other staff. Indeed the claimant did not demonstrate that he had collected a sum of Kshs 2.5 million from any customer, arising from the tenders he relies on.

51. **Section 107 of the Evidence Act Cap. 80 Laws of Kenya provides:-**

“Burden of proof

(i) Whoever desires any Court to give judgment as to Legal right or liability dependent on the existence of facts which he asserts

must prove that those facts exist.”

52. **Section 108 on the incidence of burden provides:-**

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

53. The Court has carefully analysed and weighed the truthfulness and veracity of the evidence adduced by the claimant *vis a vis* that adduced by R.W.1 and R.W.2 and has come to the conclusion that the claimant has not proved on a balance of probabilities that during the period he worked for the respondent and in particular the period between 15/5/2013 and 15/4/2014, he attained individual sales in favour of the respondent which amounted to Kshs 7.5 million in any one given month.

54. Indeed, the claimant did not offer any data to counter the monthly sales he had made between those months as provided by R.W.1 before Court.

55. Furthermore, the Court is not satisfied that the tenders made by the respondent in respect of projects advertised by Machakos County Government amounted to individual sales made by the claimant for the purpose of entitlement to payment of 1% bonus of the alleged monthly sales.

56. Not only did the claimant not demonstrate that these were indeed his sales within the meaning of his contract of employment, the claimant also failed to show that the said tenders generated payment of a minimum of Kshs 7.5 million to the respondent in any one given month.

57. In the case of **Orphanage –vs- Moninda - Court of Appeal at Mombasa, CIVIL Appeal No. 58 of 2014**, per A. Makhandia, W. Ouko and K. M’noti, JJA ,the Court stated:-

“Our Labour Laws are silent on issue of bonus payment. It would then appear that where a bonus dispute arises, such dispute is left exclusively to the prominence of the agreement between the parties. As such, bonus liability (if any) must be construed within the meaning and intent accorded by the parties under their contract.”

58. From the foregoing, the wording of the contract between the parties is clear and unequivocal that the claimant was entitled to 1% bonus if he achieved a minimum of Kshs 7.5 million sales per month. The claimant has fell short of adducing any such evidence to prove his case and his claim therefore lacks merit and must fail.

59. Furthermore, there is the dispute as to whether achievement of a minimum of Kshs 7.5 million sales per month, is limited to concluding the actual sales contracts between the respondent and a customer or this includes actual payment of the sum of Kshs 7.5 million into the respondent’s account. If this was the intention of the parties, nothing would have been easier than for the parties to expressly state so.

60. Achievements of sales per month means conclusion of sales contracts between the respondent and customers amounting in value of Kshs 7.5 million. The contract does not expressly oblige the sales person to collect the proceeds of the sales. That docket must lie elsewhere or collectively in the organization.

61. This finding however, takes the claimant no further having failed to prove on a balance of probabilities that he had personally achieved minimum sales contracts in favour of the respondent in the sum of Kshs 7.5 million per month.

62. Accordingly, the suit fails in its entirety.

63. This suit was filed in 2015 by the claimant upon resignation from work. The claimant had rendered commendable service to the respondent before his resignation. In consideration of the above, we deem this appropriate case for each party to bear their costs of the suit.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 21ST DAY OF OCTOBER, 2021.

MATHEWS N. NDUMA

JUDGE

Appearances

Mr. Mutiso for the claimant.

Mr. Gatore for the respondent

Ekale – Court clerk.