



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 246 OF 2017**

***(Before Hon. Justice Mathews N. Nduma)***

**JACKSON OKOTH .....CLAIMANT**

**VERSUS**

**WELLS FARGO COURIER LTD .....1<sup>ST</sup> RESPONDENT**

**WELLS FARGO LTD .....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The suit was filed on 11<sup>th</sup> June 2017 by the claimant seeking a declaration that the termination of his employment was unlawful and unfair and that he be compensated. The claimant further prays for payment of terminal benefits including: -
  - a. Gratuity
  - b. Payment in lieu of leave
  - c. House allowance and
  - d. Various commissions earned.
2. The claimant testified as CW1 and adopted a written statement dated 9<sup>th</sup> June 2017 as his evidence in chief. CW1 testified that he entered into a contract of employment with the 1<sup>st</sup> respondent on 1<sup>st</sup> December 2015, as a sales Executive at a monthly salary of Kshs. 38,850. That he worked continuously for a period of eight months. However, in August 2016, the respondent reduced his salary to Kshs. 18,750.
3. That on 1<sup>st</sup> December 2016, the claimant received a letter of termination of employment and was not paid any terminal benefits including gratuity, leave pay, house allowance, arrear salary and commissions.
4. That the termination was unlawful and unfair since the 2<sup>nd</sup> respondent was not the employer of the claimant who was employed and worked for the 1<sup>st</sup> respondent. That the 1<sup>st</sup> respondent be held accountable for the unlawful termination.
5. The letter of appointment was produced as exhibit 'I' in terms of which the claimant was appointed as a sales Executive for a specified term.
6. In terms of schedule 'I' the sales Executive was to be paid commissions computed in terms of the provisions of the agreement and on contracts signed by the Sales Executive.
7. The commissions were payable within 10 days of the end of the third month from the date of signing the contract provided the customer was paid for the first two months of service.
8. The sales commission rates were to be calculated at the rate of 20% on the total of the first three (3) months billing revenue. The commissions were based on stated service including courier logistics, archiving and others.
9. The Sales Executive was to sell as appropriate wells Fargo services to his Fargo Courier clients and commission on the same were to be calculated as per the terms and conditions applicable at Wells Fargo Ltd.

10. Furthermore, where a customer increases his expenditure for the same account effective from Kshs. 10,000 for the first month of billing to Kshs. 100,000, bonus on the increased amount would be paid to the Sales Executive at the end of the billing year at 5%. New business was however payable at 20% commission.

11. The claimant was to be paid a monthly retainer fee of Kshs. 30,000 and overtime/transport of Kshs. 10,000 payable at the end of every month. The retainer is payable provided the Sales Executive met 80% of his/her sales targets.

12. In terms of the contract schedule 'I' if the Sales Executive failed to meet targets consecutively in the three months period the contract would be terminated after 6<sup>th</sup> month period and retainer would be granted as per percentage set out in the contract. The claimant produced bank statements showing payments of his retainer.

13. The claimant also produced the letter of termination dated 17<sup>th</sup> December 2016 written by Mr. S. K Kange the Human Resource Manager to the claimant.

14. The letter refers to a letter dated 29<sup>th</sup> August 2016, written following a performance improvement meeting. The letter states that the performance of the claimant had continued to be below expected standards and no improvement had been observed despite the letter of 29<sup>th</sup> August 2016.

15. The claimant was given one-month termination notice effective 31<sup>st</sup> December 2016. He was to be paid upon clearing and signing of all the necessary discharge.' Salary for days worked up to 31/12/2016.'

16. The claimant wrote a demand letter to the respondents vide his advocates dated 20<sup>th</sup> February 2017 which was not heeded by the respondents hence the suit.

### **Defence**

17. RW1 Willies Ayieko Onyango testified for the respondents. RW1 adopted a written statement dated 8/5/2018 as his evidence in chief. RW1 testified that he was the Human Resource Director of the respondent companies being the 1<sup>st</sup> and 2<sup>nd</sup> respondents. That there was no employer and employee relationship between the claimant and the respondent and the court lack jurisdiction to determine the suit.

18. That the claimant and 1<sup>st</sup> respondent had a contract for provision of services and not an employment contract and so the claimant was engaged by the 1<sup>st</sup> respondent as an independent contractor. That the 2<sup>nd</sup> respondent was not a party to that contract and ought not to have been sued.

19. That the claimant was never paid at any time salary but was instead paid a monthly retainer as an independent contractor in terms of schedule I of the compensation agreed by the parties. That the retainer was paid upon presentation of an invoice by the claimant to the 1<sup>st</sup> respondent. The copies of invoices were produced by RW1 in the respondents' bundle at pages 1 – 8.

20. The retainer was subject to withholding tax as per income Tax Act where fees are paid to independent contractors at 5%.

21. That the variation in the monthly payment of the claimant was in accordance with the provisions of the schedule I based on claimant's performance.

22. That the termination of the claimant's contract was in terms of the general condition 8(d) of the General conditions annexed to the agreement between the claimant and the 1<sup>st</sup> respondent as seen at page 14 of the respondents' bundle.

23. That the termination was due to the failure by the claimant to meet the targets as set in the agreement and as evidenced by the purported list of customers annexed to the claimant's bundle which indicates that the claimant brought in lower income than the monthly retainer paid to him with the highest value client brought in being Kshs. 15,000 as seen at page 24 of the claimant's bundle.

24. RW1 concluded that the termination of the independent contractor relationship between the claimant and the 1<sup>st</sup> respondent was in terms of the contract between the parties and was lawful and fair. The respondents pray the suit be dismissed with costs.

### **Determination**

25. The issues for determination are: -

- i. Whether there was an employee/employer relationship between the claimant and the 1<sup>st</sup> respondent.
- ii. If the answer to (i) above is in the affirmative, whether termination of the relationship was lawful and fair.
- iii. Whether the claimant is entitled to the reliefs sought.

### **Issue I**

26. The respondent relies on the case of **Owners of the Motor Vessel “Lilian ‘S’” –VS- Caltex Oil (Kenya) Ltd (1989) KLR** in stating that where an issue of jurisdiction is raised by a party, the court should determine the issue in the 1<sup>st</sup> instance and if it finds it has no jurisdiction it should not take any further step.

27. In terms of Article 162(2)(a) read with section 12(1) (a) of the Employment and Labor Relations Court Act, the E&LRC has jurisdiction only on matters founded on an employer and employee relationship and no more.

28. The respondents emphasized that the relationship between the claimant and the 1<sup>st</sup> respondent was to be strictly construed in terms of the four corners of the agreement signed by the parties including schedule I there to.

29. In **Trendrick Byakilo –VS- Mutiso Menezes international Unlimited (2010) eKLR**, the employment court stated:

30. *“ On the question whether the claimant was an employee the employment Act, Section 2 define who an employee is. Such definition sets clarity with regard to the payment of salary or wage. Any employee is thus paid a wage or salary. Where parties have reduced terms and conditions regulating the relationship into writing such is to be given importance with reference as such form the basis and intentions of such parties.”*

31. In the case of **Zachariah Keraum Maosa –VS- British American Insurance Co. (K) Ltd (2015) eKLR** , Justice Ndolo stated:

32. *“ Jurisprudence has however grown to accommodate changes at the work place and as held by kimondo J. in Everest Aviation Limited –VS- Kenya revenue Authority (2013) eKLR, the two tests of control and integration are no longer conclusive. The court must go further and examine the intention of the parties as expressed in the documents of engagement and evidenced in the fundamental behavior of the parties.”*

33. Furthermore, in **Kenya Hotel & Allied workers Union –VS- Alfaljin Villas (2014) eKLR** , quoted with approval in **Vitalis Oliewo K’omudho –VS- AAR Health services Ltd (2016) eKLR** the court stated:

34. *‘A true independent contractor is that the contractor will be a registered tax payer, will work his own hours runs his own business.’*

35. In the present case the claimant was appointed as a Sales Executive with terms well defined in a signed agreement and complimented in schedule –I on compensation also signed by the parties. The salient features of the relationship may be summarized as follows: -

- i. Claimant was to do sales of products in a defined territory.
- ii. The agreement was for an indefinite term.
- iii. Claimant was to be paid a monthly retainer fee of Kshs. 30,000 and Kshs. 10,000 airtime and transport allowance at the end of each month, provided the sales are 80% of the Sales Executive’s monthly sales target.
- iv. If the Sales Executive failed to meet the sales target consecutively for a period of 6 months then the relationship would be terminated.
- v. The claimant was to be paid commission on sales at rate of 20% on the total sales of the first three calendar monthly billing revenue (excluding VAT).
- vi. The respondent was to refer 5% withholding tax on any commission paid to the claimant.

36. It is clear from the four corners of the agreement including schedule I signed freely and voluntarily by the parties that the claimant worked as an independent Sales Executive with territorial limitation of his performance.

37. The claimant’s retainer and commissions was solely based on his performance in any given month and was therefore not a fixed wage or salary by the 1<sup>st</sup> respondent.

38. Though the relationship was for an indefinite period confirmation of it was solely based on achievement of agreed sales targets between the parties for the first six months.

39. The parties freely and voluntarily agreed that failure to meet the set sales target continuously would not only result in a reduced retainer, it would also lead to termination of the contract after the six months of failure to meet the targets.

40. The relationship between the parties falls within the jurisdiction set out under section 12(1)(a) of the Employment and Labor Relation Courts Act as follows: -

41. *“ 12(I) The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in according with Article 162(2) of the constitution and the provisions of the Act or any other written law which extends jurisdiction to the court relating to employment and labor relations including –*

- a. *Disputes relating to or arising out of employment between an employer and employee.*

b. ....”

42. The agreement in this matter is silent on whether a Sales Executive was an employee or an independent contractor but it is clearly a “contract of service” within the meaning set out under section 2 of the Employment Act 2007 which provides: -

43. “Contract of Service” means an agreement, whether oral or in writing, and whether expressed or implied to employ or to serve as an employee for a period of time and includes a contract of apprenticeship and indentured apprenticeship but does not include a foreign contract of service to which part XI of this Act Applies”.

44. It is manifestly clear therefore, that the relationship between the parties herein involved and included provision of human service of sales for an indefinite period subject to conditions stated in the agreement.

45. Provision of human service is related to employment and labour and any dispute between the contracting parties in a human service relationship is a dispute related to employment and labour matters and therefore is a dispute in respect of which the court has jurisdiction to hear and determine.

46. However, it is apparent and the finding of the court that the contract of service between the parties in the present case is not one to be determined in terms of the provisions of section 36, 41, 43 and 45 of the Employment Act, since it does not entail *strictu sensu* an employment contract.

47. The lawfulness, fairness or otherwise of the conduct of either party to the contract is to be constructed from within the provisions of the contract itself and applicable law relating to interpretation of contracts.

48. The claimant has therefore, failed to prove on a balance of probabilities that the contract of service between him and the 1<sup>st</sup> respondent was unlawfully and unfairly breached by the 1<sup>st</sup> respondent.

49. To the contrary the respondents had demonstrated that the contract was lawfully and fairly terminated in terms of the provisions of the agreement signed between the parties.

50. Accordingly, the suit lacks merit and is dismissed with no orders as to costs given that the suit was neither frivolous nor vexatious but entailed interpretation of a serious point of Law.

**Dated, Signed and Delivered at Nairobi this 17th Day of September 2020**

**Mathews N. Nduma**

**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 15<sup>th</sup> March 2020, this ruling 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**

**Appearance**

Mr. Siganga for claimant

Mr. Omimo for Respondent

Chrispo: Court Clerk