



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CASE NO. 366 OF 2016

(Before Hon. Justice Mathews N. Nduma)

TOM OCHIENG ABONGO.....CLAIMANT

VERSUS

KENYA COACH INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

1. The claimant voluntarily resigned from working as a freelance salesman for the respondent on 20th September 2016.
2. The claimant filed suit on 9th December 2016 claiming the following reliefs:
 - (a) Salary arrears for the month of September 2016, Kshs. 25,450.
 - (b) Commission on direct sales Kshs. 169,860.
 - (c) Incentives (Dealer Principal) Kshs. 210,000
 - (d) Unpaid leave for the period 2012 to 2016 Kshs. 102,712.
 - (e) Three months' payment on consecutive leave days Kshs. 76,350.
3. The claimant testified under oath as CW1 and produced list of documents in support of his case including letter of appointment dated 2nd April 2012 in terms of which he was employed as a sales executive by the respondent at a monthly salary of Kshs. 25,000 during probation same to be increased to Kshs. 30,000 upon successful completion of the probation.
4. The Claimant was also entitled to fuel allowance of Kshs. 3,000 per month; Telephone allowance of Kshs. 2,000 and entertainment allowance on claims.
5. The contract also provided:

“You will also be eligible to sales commission on every unit sold as per the attached commission structure. Your sales target will be at least 4 units a month”
6. CW1 testified that he worked for the respondent until 20th September 2016, when he voluntarily resigned from employment. CW1 stated that at the time of resignation, the respondent owed the claimant salary arrears for September 2016 in the sum of Kshs. 25,450, commission on sales for Trucks and Buses sold in the sum of Kshs. 169,860.
7. CW1 stated that deal was closed upon asset financing. CW1 further stated that he was owed incentives (Dealer Principal) in the sum of Kshs. 210,000. CW1 said the dealer gave the claimant commission on each unit sold.
8. The claimant also claims unpaid leave days not taken for the period 2012 to 2016 in the sum of Kshs. 102,712. Claimant said he never went on leave and was entitled to 21 leave days per year.

9. CW1 produced his pay slip for the month of June 2016 which shows payment of basic salary of Kshs. 25,450, House allowance of Kshs. 3,750 and commission on sales of Kshs. 88,849 totaling Kshs. 118,049.
10. He also produced August 2016 pay slip where he was paid total earnings of Kshs. 60,450 including Kshs. 31,250 commission on sales. CW1 testified no salary was paid for September and was owed arrears of commission on sold units.
11. In his resignation letter, the claimant undertook to administer all pending sales deals to successful closure hence the claims he is making for payment of commission on sales.
12. CW1 produced proforma invoice on sales dated 2nd February 2016, 12th July 2016 and 14th June 2016. CW1 also produced KCB approval for asset financing dated 22nd June 2016, 23rd August 2016 and from Family Bank dated 7th March 2016.
13. The claimant wrote a demand letter to the respondents for the claims set out in the suit vide his advocate Ouma Anyumba and company Advocates dated 29th November 2016. The claimant prays to be paid as claimed.
14. RW1 James Okoth Omondi testified for the respondent. He stated that he was the Human Resource Manager of the respondent and knew the claimant. RW1 stated that the claimant was employed by the respondent on 2nd April 2012 and worked continuously until he resigned on 15th September 2016.
15. That the claimant had written to the respondent that he had difficulties closing sales deals and he should be designated freelance sales person. At the time the claimant was sales representative western Kenya.
16. That he earned Kshs. 30,000 basic salary a month; field trip allowance of Kshs. 40,000 a month; Airtime of Kshs. 3,000 and had a company car.
17. That on 20th September 2016, claimant was invited to a meeting to discuss the issue because there was no position of freelance sales person. That CW1 attended the meeting which was attended by the General Manager and Sales Manager.
18. That CW1 explained his challenges and the meeting resolved to transfer CW1 to Nairobi to enjoy a wider market and to be under close supervision.
19. That CW1 wrote letter of resignation upon receipt of the letter of transfer. RW1 testified that CW1 had no pending deals for closure then.
20. RW1 stated that procedure for claiming commissions was per paragraph 10 of the letter of appointment. That CW1 did not present any claim forms accordingly.
21. That the letters from KCB and Family Bank produced by the claimant and submitted to the respondent did not constitute closed deals. That there is nothing to show that these deals were closed by the claimant.
22. That the sales manager is also a sales representative. That pay slips for June, July and August show the claimant was paid salary and commission upon lodging claim forms. That there was no leave allowance pending to the claimant.
23. That the claimant had exhausted his leave up to the year 2015. That only prorata leave for the year 2016 was pending. That CW1 is not entitled to incentive claims. He only earned commission. That the incentive claim was a strange one and the claimant does not indicate the incentive was on which motor vehicles since there is no prove of sale of any motor vehicles.
24. RW1 stated that the claimant worked up to 20th September 2020 and was not paid salary for the month since resignation was in breach of his contract of employment. That non the less, the respondent presented a cheque for 20 days salary to the claimant but he had declined.
25. That CW1 did not clear from the company and did not return branded company materials except the company car which he left at Kisumu branch. RW1 stated respondent was ready to pay 20 days arear salary for September 2016. That the suit be dismissed.
26. Under cross examination by C.M Anyumba for the claimant, RW1 stated that he had no sample commission claim forms to show the court.
27. RW1 was also shown the various proforma invoices produced by the claimant for sale of motor vehicles where the sales person was the claimant and RW1 was unable to state whether commission had been paid to the claimant on those particular sales.
28. RW1 was also not sure if the customers had bought the said motor vehicles on which the claims are based. It was put to RW1 that KCB and Family Bank financed and paid for those particular transactions and RW1 admitted that the claimant was entitled to commission on the sales if payment was made by the banks.
29. RW1 did not produce evidence to contradict testimony by the claimant that the sales were concluded and the claimant was entitled to commission.
30. RW1 was also not aware whether the claimant had been paid commission on those particular sales he presented before court.

31. RW1 admitted that the documents CW1 presented from the banks were financing approvals for the motor vehicle sales and that the claimant was the sales person involved in those sales.

32. RW1 stated that the claimant was then entitled to payment of commission on those specific sales. RW1 stated he could not recall how much commission was outstanding.

33. RW1 however insisted that the only outstanding leave days for the claimant was for 2016. RW1 did not have leave approval forms in court but said the claimant went on leave. RW1 stated that only commissions were payable but there was no such thing as incentive payments.

Determination

34. The only issue for determination is whether the claimant has proved on a balance of probabilities that he is entitled to payment of the reliefs sought in the statement of claim.

35. The court has carefully evaluated the testimony by CW1 and that by RW1 and has come to the conclusion that the claimant has discharged the onus placed on him under sections 107 and 108 of the Evidence Act cap 80 laws of Kenya in respect of the stated claims for payment of 20 days arrear salary for September 2020; Prorata leave for the year 2016 and commission on sales. These claims have been proved by the claimant on a balance of probabilities.

36. The claim for leave days not taken between the year 2012 to 2015 have not been proved. The claimant has not proved that he was entitled to payment of incentives by Dealer Principal.

37. Accordingly, the court enters judgment in favour of the claimant against the respondent as follows:

(a) Kshs. 25,450 being arrear salary for the month of September 2016.

(b) Kshs. 169,860 being commission on direct sales.

(c) Kshs. 14,000 in lieu of leave days not taken for the month of September 2016.

Total award Kshs. 205,310

(d) Interest on the award at court rates from date of filing suit till payment in full.

(e) Costs to follow the event

Judgment Dated, Signed and delivered at Kisumu this 15th day of October, 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment 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

Appearances

Mr. Anyumba for claimant

M/S Okoth for respondent

Chrispo- Court clerk