



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 703 OF 2015

LAWRENCE MUSYIMI NGAO CLAIMANT

v

LIQUID TELECOM KENYA LTD RESPONDENT

JUDGMENT

1. Lawrence Musyimi Ngao (Claimant) was employed by Kenya Data Networks Ltd from 21 May 2013 as a Sales Manager. Liquid Telecom Kenya Ltd (Respondent) took over/purchased Kenya Data Networks Ltd at some point in the course of the Claimant's employment.
2. On 4 October 2013, the Respondent wrote to the Claimant to inform him that his probation was being extended for 3 months effective 6 September 2013 to 5 December 2013.
3. However, on 5 December 2013 the Respondent informed the Claimant that he would not be confirmed because of below par performance, and directed him to handover.
4. The Claimant was dissatisfied and he instituted legal proceedings against the Respondent on 28 April 2015 alleging *breach of contract* and *unfair termination of employment*.
5. The Respondent filed a *Response*, witness statement and documents on 23 October 2015. Further documents were filed on 22 February 2016 and a substitute witness statement was filed on 11 January 2019.
6. The Cause was heard on 16 October 2018 when the Claimant testified and closed his case and on 30 January 2019 when the Respondent's Human Resources Officer testified and closed its case.
7. The Claimant filed his submissions on 21 February 2019 while the Respondent filed its submissions on 26 February 2019.
8. The Court has considered the pleadings, evidence and submissions and condensed the Issues in dispute as
 - (i) Whether the Respondent was in breach of contract
 - (ii) Whether the termination of the Claimant's employment was unfair and
 - (iii) Appropriate remedies/orders.

Breach of contract

Car mileage

9. The Claimant sought Kshs 121,244/- in respect of car mileage for the months of August, October and November 2013.
10. Although the Claimant's contract and Respondent's *Human Resources Policies and Procedures Manual* did not expressly provide for mileage allowance, the Respondent filed in Court a *Mileage Payment Approval schedule* for the Claimant.
11. A copy of a cheque for Kshs 48,586/- drawn in favour of the Claimant and which was said to have not been paid were also filed.
12. The Schedule indicate that the Claimant was owed Kshs 37,975/- mileage allowance for October 2013 and Kshs 11,696/- for November 2013.

13. The evidence on record, in the view of the Court establish that there was a practice and/or custom by the Respondent to pay mileage allowance.

14. The Court will therefore allow the mileage allowance in the sum of Kshs 49,671/- being the total amount approved for October and November 2013.

Sales and Retention commission

15. The Claimant sought Kshs 1,722,036/30 on account of retention commission for Quarter 2 and 3 of 2013.

16. In seeking the retention commission, the Claimant relied on clause 3(a)(ii) of the employment contract which provided that

The company shall pay the employee in arrear monthly: **Sales and Retention commissions based on company commission structure that shall be communicated by your immediate manager.**

17. The Respondent however countered that the provision relied on by the Claimant was not part of the contract and produced its own version of the employment contract which provided at clause 3(a)(ii)

a basic salary/wage of **Kshs 300,000/=** plus **Kshs 100,000** commissions which amount shall be subject to all statutory deductions for the next three months.

After three months you will be enrolled into the approved company commission structure for your commission compensation in addition to your basic salary and which amount shall be subject to all statutory deductions and other deductions required or agreed to.

18. The Court has two versions of the employment contract.

19. The version relied on by the Claimant provided for payment of *Sales and Retention commission* based on company commission structure as communicated by the immediate manager.

20. The Claimant produced a copy of the *Sales Commission Policy*.

21. The clause on eligibility for payment of the commission provided that a participant had to sign a copy of *An Annual Targets and Compensation Structure*.

22. The Claimant did not disclose whether his immediate manager communicated with him that he had met the targets for payment of commission.

23. The Claimant did also not produce a signed copy of the *Annual Targets and Compensation Structure*, or issue a notice to produce to the Respondent if he signed such a document.

24. What the Claimant produced was a copy of an *unsigned schedule* indicating names of some employees and sales achieved which he had prepared for his own use.

25. In the view of the Court, the unsigned document was not sufficient to demonstrate that the Claimant was entitled to *Sales and Retention* commission in the period in question.

New sales commission

26. Under this head, the Claimant sought Kshs 3,448,633/- but he did not draw the attention of the Court to the foundation for the head of claim. It was not proved and is therefore declined.

Pension

27. The Claimant was contributing to a *pension scheme* and he sought Kshs 180,000/- being his contributions towards the scheme.

28. The rules of the *pension scheme* were not filed in Court, and therefore the Court declines to make any findings on this head of claim.

29. The Claimant may wish to pursue the pension in accordance with the applicable rules and law.

Extension of probation

30. The copy of the contract produced by the Claimant did not have a provision on probation while the version produced by the Respondent provided for 3 months' probation with possibility of extension for a further 3 months.

31. The Respondent wrote to the Claimant on 21 August 2013 informing him of the extension of probation. The Claimant signed a copy of

the letter accepting the extension of probation. Another letter of extension was issued on 4 October 2013.

32. In the view of the Court, and considering that the Claimant signified acceptance of extension of probation, it is more probable that the contract produced by the Respondent was the genuine contract.

33. If indeed the contention by the Claimant that the extension of probation was in breach of contract was to be believed, he would have raised queries thereon immediately when the probation was extended, and not wait up to the institution of these proceedings.

34. Having come to that conclusion, and considering that section 42(2) of the Employment Act, 2007 envisages extension of probation up to 1 year, the Court finds that the Respondent was not in breach of contract or law when it extended the probation.

Unfair termination of employment

35. In terms of section 42(1) of the Employment Act, 2007, a hearing is not a requirement when termination of contract occurs during the probation period. All that the section requires is a minimum of 7 days' notice or pay in lieu of notice.

36. The Claimant's contract provided for a notice period of 2 months without specifying whether such notice applied during probation.

37. The Court will therefore find that the Claimant was entitled to enjoy the generous contractual 2 month notice rather than the 7 day notice in the Act.

38. For the failure to give notice, the Court finds the Respondent was in breach of contract, but only in respect of notice, and for which the Claimant is entitled to the equivalent of 2 months' pay in lieu of notice.

Certificate of Service

39. A *certificate of service* is a statutory right and the Respondent should issue one to the Claimant within 15 days.

Conclusion and Orders

40. The Court finds and holds that the Respondent was in breach of contract in respect of *mileage allowance* and failure to give notice and awards the Claimant

(a) Mileage allowance Kshs 49,671/-

(b) Pay in lieu of notice Kshs 600,000/-

TOTAL **Kshs 649,671/-**

41. Certificate of Service to issue within 15 days.

42. Claimant is awarded costs.

Delivered, dated and signed in Nairobi on this 15th day of March 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Ondieki instructed by Mungai Kalande & Co. Advocates

For Respondent Mr. Masese, Senior Legal Officer, Federation of Kenya Employers

Court Assistant Mercy/Lindsey