



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 302 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

ROSELINE OHANYA.....CLAIMANT

VERSUS

EMERGENCY PLUS MEDICAL SERVICES.....RESPONDENT

JUDGMENT

By her memorandum of claim dated 11th August and filed on 12th August 2015 the claimant avers that the respondent unlawfully terminated her contract and failed to pay her dues. She prays for the following remedies –

a)... 10% commission x 540,00 x 12 months x 2 years..... Kshs.12,960,000

b)... Less paid..... (Kshs.81,000)

c)... Balance due..... Kshs.12,879,00

Add

d) Kshs.28,025

e) Kshs.28,500

Total Kshs.12,935,525

f)... Damages for wrongful and unlawful termination.

g)... Costs

h)... Interest

The respondent in its statement of response under protest denies the averments in the memorandum of claim and prays that the same be dismissed with costs.

At the hearing, the claimant testified that she is a pharmacist by profession and was trained as Emergency Medical Technician, Kenya Red Cross Society Training School. She testified that the respondent, Emergency Plus Medical Services (E-Plus) is a subsidiary of Kenya Red Cross Society and offers emergency services. That she was offered a contract to market the respondent’s ambulance services by contract dated 16th May 2013. The respondent was to cover her expenses of airtime, internet and bus fare and in addition pay her a commission of 10% of all cash sales within a given month. Her work involved marketing to all companies and corporates with no limitation of the territorial jurisdiction.

The claimant testified that she looked for business in all organisations within Migori, Homabay and Kisii, explaining the benefits to the potential customers. That she made a sale to Kisii County Government for a lease of ambulances for a period of three years. She testified that she went to Kisii County Offices, met the Minister for Health and explained what she was doing of E-Plus. She later held discussions

with the Health Committee who agreed to take up the service at a price of Kshs.600,000 per ambulance per month. She facilitated a meeting with E-Plus to finalise the deal. The deal went through after discussions with the Operations Manager and General Manager of E-Plus and a contract was signed for two years at Kshs.5.4 million per month. Her share as per contract was 10% and she was expecting Kshs.12,960,000. However, the respondent's General Manager wrote her a letter offering her a token of 1.5% being Kshs.72,900.

On 24th February 2014, her contract was revoked. When she complained to the General Manager she was informed that the only sales she made was Kshs.13,825. She was paid Kshs.81,000. When she followed up she was informed that she would be paid after Kisii County Government made payments.

The claimant reported to the Ministry of Labour who attempted to resolve the matter but the interventions of the Labour Officer did not bear fruit. She thereafter instructed counsel who filed the instant suit.

The respondent called two witness; RW1 SUSAN NGONGA, employed by Kenya Red Cross Society as Managing Director of Emergency plus Medical Services; and RW2 EMMANUEL OWAKO, a former employee of Kenya Red Cross Society engaged as Regional Manager for West Kenya Region based in Kisumu between 2012 and 2014.

RW1 testified that the claimant was a freelance sales person sourcing for business on behalf of the respondent. She testified that the claimant's allegation that she sourced for business at Kisii County is not correct as the engagements with the County Governments were initiated by Kenya Red Cross Society after devolution following amendment of the Kenya Red Cross Act in 2012 that gave the Society an auxiliary role to the National and County Governments. That the relationship started in the year 2013. She testified that the Society had a taskforce in place to spearhead discussions in the counties, with a mandate to ensure Kenya Red Cross Society was strategically positioned in each county and tapping into the resources at county level. That the task force was to facilitate the process of discussions and negotiations with counties in the area of partnerships and development of contracts, and the signing of Memorandum of Understanding. She testified that the task force was assisting counties in developing Fire and Rescue Bills and County Emergency Bills. That E-Plus falls under Fire and Disaster Management Bill. She testified that E-Plus which was only three years old was leveraging on the brand of the Kenya Red Cross Society on the basis that the society had already initiated communication with the Governor of Kisii County via letter dated 23rd August 2013. That they followed up with a formal proposal detailing the services to be offered to the county. The proposal was followed up with a meeting that lead to a presentation and negotiation and finally, to the official engagement and launch of the services as well as the signing of the contract. Both the signing and launch were done on 22nd October 2013.

She testified that the claimant did not launch the ambulance contract, that her claim for two years' commission is not valid as the contract signed on 22nd October 2013 was for only one year up to 22nd October 2014.

That after the launch no suggestion was made to the claimant that she would be paid for the Kisii contract. RW1 testified that the letter dated 18th December 2013 offering the claimant an appreciation of 1.5% of the monthly income did not ignore the claimant's right to commission.

RW1 testified that she communicated to the claimant that the Ambulance contract involved high-level consultations but her input would be recognised. That the claimant was aware as early as 7th November 2013 that she was not entitled to commission on the ambulance contract.

She maintained that the claimant was paid her rightful dues.

Under cross examination RW1 confirmed the claimant's "good work" in bringing on board, Kisii County. She stated there was another project with Kisii County for which the claimant was recognised.

RW2 EMMANUEL OWAKO testified that in 2012 he was working with Kenya Red Cross Society as Regional Manager for West Kenya Region based in Kisumu from 2012 to 2014. He worked in different roles, at one time as Assistant Secretary General. He testified that while he was Regional Manager the claimant was a Marketing Agent for E-Plus, the respondent, though he personally did not work with her.

He testified that in 2013, a taskforce was established by Kenya Red Cross Society to spearhead adjustment of the Society to address devolution. He was a member of the taskforce. Part of the terms of reference of the taskforce was to ensure that the programs, services and potential partnership areas were communicated to County Governments.

He testified that E-Plus is a subsidiary of Kenya Red Cross Society established to deliver medical services and medical ambulance services including evacuation through ambulances and First Aid Training, kits and medical emergencies.

He testified that it is not true that the claimant initiated the relationship with Kisii County Governments. He testified that as Regional Manager, he together with the Second Deputy Governor of Kenya Red Cross Society, Mr. Samuel Nyairo, approached the Kisii County Government through the Minister for Health and lobbied for the provisions of medical ambulance, among other services that included disaster management operations and coordination, HIV/AIDS programs' activities and other programs that focussed on building capacity for the county on disaster response. That they initiated written communication with the Minister and prepared a proposal that included ambulance services. That his responsibility as Regional Manager was to scale the relationship to the technical team of ambulance services following which the technical team drew up the proposal specific on emergency medical services which was submitted to Kisii County through the Ministry of Health. That the lobbying and convincing was done between him and Mr. Nyairo with the Deputy Governor.

He testified that it is not true the claimant convinced the Minister for Health to take up the ambulance services. He testified that the only time the marketing team was involved in the process was in signing the Memorandum of Understanding (MOU).

Under cross examination he stated that he was not aware that the claimant played any role in the Kisii Ambulance contract, but was aware E-Plus staff were involved in the project. He stated that he would be surprised if the claimant was paid for her services in the contract. He

testified that Dr. Abbas Gullet signed the contract.

Determination

I have considered the pleadings and evidence on record. I have further considered the submissions on record.

It is not in dispute that the claimant was engaged as marketing agent for the respondent. It is further not in dispute that her contract provided for a commission of 10% commission on cash sales within the month.

It is further not in dispute that the claimant was involved in the contract for supply of ambulances to Kisii County. This is acknowledged by the respondent in the letter offering to pay the claimant a token of 1.5%. In the letter dated 18th December 2013, Susan Ng'ong'a, the General Manager, of E-Plus the respondent wrote to the claimant as follows –

18th December 2013

To:

Roseline Akinyi Ohanya

Mobile: 0714-383446

MIGORI

Dear Roseline,

SUBJECT: TOKEN OF APPRECIATION FOR KISII COUNTY BUSINESS.

*We write in reference to the above mentioned subject following an email communication, we are pleased to inform you that we are paying you 1.5% of the monthly income as a one off payment less withholding tax of 10%. **This is appreciating your hard work in bringing on board the Kisii County project.** Seeing your diligence, commitment and focus has been a source of motivation. We hope that this positivity flows into every day work and look forward getting into more projects.*

Enclosed is a cheque of Kshs.72,900/-, to support the same and thank you once again for all your effort. Kind regards.

Yours faithfully,

SIGNED

Susan Ng'ong'a

General Manager

Emergency Medical Services

[Emphasis added]

The only issue for determination is whether the claimant is entitled to 10% Commission on the Kisii contract.

It is not clear on what basis the respondent offered to pay the claimant 1.5% token, yet the relationship between the claimant and the respondent was for payment of Commission at 10%. The letter of engagement of the claimant does not provide for any other parameter for payment. No other agreement was made between the claimant and the respondent specifically on the Kisii contract. All through the process of acquiring the contract, in whatever role the claimant participated, she had the legitimate expectation to be paid commission according to her contract. If the respondent intended to engage her in any other capacity or terms, these should have been communicated to her to manage her expectations.

I therefore find that the claimant is entitled to 10% commission on the Kisii ambulance contract.

The other issue is whether she is entitled to two years commission. I am in agreement with the respondent that the contract signed was for one year. The claimant is therefore entitled to 10% commission on the contract for one year.

The respondent has not denied that the contract was for Kshs.540,000 per month. For one year this amounts to Kshs.6,480,000.

10% of this figure is Kshs.648,000 less Kshs.81,000 paid leaving a balance of Kshs.567,000/=.

I thus enter judgment for the claimant against the respondent in the sum of Kshs.567,000/-. The same shall attract interest at

court rates from the date of judgment.

The respondent shall also pay claimant's costs.

DATED AND SIGNED AT NAIROBI ON THIS 28TH DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 16TH DAY OF JULY 2019

MATHEWS NDERI NDUMA

JUDGE