



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1427 OF 2012

(Before Hon. Justice Hellen S. Wasilwa on 6th December, 2018)

RITA MWENDE MUTUNE.....CLAIMANT

VERSUS

GIGI MOTORS LIMITED.....RESPONDENT

JUDGEMENT

1. The Claimant herein filed her Memorandum of Claim on 21/8/2012 in person alleging unfair dismissal from employment. The Claimant later appointed Oduor Henry John Advocate to represent her who filed his notice of change on 20/8/2013.
2. The Claimant's case is that she was employed by the Respondent as a Saleslady in the year 2010. She avers that she served the Respondent diligently and faithfully. She avers that her salary was 100,000/= per month.
3. She avers that in February 2012, the Respondent verbally and unlawfully terminated her services. She seeks payment of her terminal benefits amounting to 3,871,600/=.
4. She attached copies of her salary voucher, which shows she was paid monthly commissions. She also attached a letter dated 26th May 2010 addressed to Barclays Bank of Kenya indicating that she was an employee of the Respondent and had worked for the Respondent for ten years.
5. The Respondents on their part filed a Reply to the Claim on 25.6.2013 through K.N Mburu and Associates Advocates. They aver that the Claimant was engaged as a Saleslady/Commission Agent and was paid on commission basis but was never an employee of the Respondent.
6. They admit they suspended the Claimant from acting as a Saleslady for 2 weeks in February 2012 but never dismissed her. That following the warning and suspension, the Claimant never reported back to work.
7. They aver that the letter written to Barclays Bank of Kenya was for purposes of Account opening only.
8. The Respondents called 2 witnesses who state that the Claimant was paid 20% commission on sales and that was dependent on sales made and that is why the amounts payable deferred from month to month.
9. The Respondents produced a document dated 1.7.2010 which shows that the Claimant was a commission agent.
10. The Parties herein filed their respective submissions. I have considered the evidence and submissions filed herein. From the evidence in Court, the issues for determination are as follows:-
 1. ***Whether the Claimant was an employee of the Respondent or a Commission Agent.***
 2. ***If an employee, whether Claimant's services were fairly terminated.***
 3. ***Whether Claimant is entitled to remedies sought.***
11. On the first issue, the Respondent submitted an agreement dated 1.4.2010 between the Claimant and Respondent and signed by Claimant which at paragraph 12 states as follows:-

“Independent Commission Agent –

This Agreement shall not render the Commission agent an employee, partner, agent of, or joint venture with the company for any purpose. The Commission agent is and will remain an independent commission agent in (his or her) relationship to the company. The company shall not be responsible for withholding taxes with respect to the Commission agent’s compensation hereunder. The Commission agent shall have no claim against the Company hereunder or otherwise for vacation pay, sick leave, retirement benefits, social security, worker’s compensation, health or disability benefits, unemployment insurance benefits, or employee benefits of any kind.”

12. The Commission Agency was terminable by giving 10 days’ notice period. There are similar agreements indicating that the agreement entered into by the Claimant and the Respondent was a Commission Agency one.

13. The Claimant was also paid commission as per salary vouchers annexed. The amounts payable also vary from month to month. This is an indication that what was being paid was commission depending on sales done every month and not salary because salary could not keep varying every month.

14. In answer to issue No.1 therefore, my finding is that the Claimant was not an employee of the Respondent but a Commission Agent.

15. On the issue of termination of this commission agency, the Claimant’s position is that she was dismissed verbally. The Respondents aver she absconded. If indeed the Claimant absconded after suspension as alleged, there is no letter of suspension annexed. If at all the Claimant had also absconded, the Respondent should also have proceeded to give notice of 10 days for termination of the Agency as envisaged. This was never done.

16. It is my finding that the Respondents terminated this agency verbally without notice and therefore the termination was done without following the procedure envisaged and was therefore unfair.

17. On the issue of remedies sought, the Claimant seeks payments of commission on vehicles sold. She has not however proved that she sold the vehicles in question nor that she was entitled to the commissions claimed.

18. In the circumstances, the remedies the Claimant is entitled to is as follows:

1. 10 days’ notice period = $10/30 \times (100000)$ – approx. commission = 33,000/=

2. 3 months commission as compensation for unfair termination of commission = $3 \times 100000 = 300000/=$

Total = 333,000/=

3. The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 6th day of December, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kinyoli holding brief for Miss Ndungu for Respondent – Present

Miss Ndirangu holding brief Oduol for Claimant – Present