



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 593 OF 2014

[Originally Nairobi IC Cause Number 115 of 2010]

BETWEEN

KAMLESH V. RAWAL.....CLAIMANT

VERSUS

ACHELIS MATERIAL HANDLING LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Asige Kiverenge & Anyanzwa Advocates for the Claimant

Wandabwa Advocates for the Respondent

JUDGMENT

Pleadings:-

1. This Claim was initiated at the Industrial Court in Nairobi, through a Statement of Claim dated 8th February 2010. The Claimant states he was employed by the Respondent Company, as the Branch Manager, Mombasa Office, on 2nd May 2003.
2. He was entitled to a monthly salary of Kshs. 122,500; Kshs. 300,000 annually in school fees; and 1% commission of the paid-up total sales at the Mombasa Office.
3. The Claimant resigned from his position effective 23rd February 2008, having issued notice of resignation, on 22nd January 2008. His position is that upon resignation, he was not paid all his dues, which included 1% overseas commission of paid-up sales. He was only paid Kshs. 184,660, which he acknowledged to have received.
4. He states the Respondent sold equipment to Kenya Ports Authority [KPA] and Kenya Ferry Services [KFS] amounting to Kshs. 1,234,107,998.50. His 1% commission amounting to Kshs. 12,341,079.99 was due and not paid, upon resignation. It was indicated in the Final Dues Computation that Lothar Denter, Respondent's Director, would advise on payment of overseas commission. No payment was ever made.

He prays the Court to grant the following orders against the Respondent:-

- a) Kshs. 12,341,079.99
- b) Interest on [a] above, at an interest rate of 20%, from March 2008 till payment is made in full.
- c) Costs of the Claim.

5. The Respondent filed its Statement of Reply on 9th June 2010. It is accepted the Claimant was employed by the Respondent on the terms and conditions of service stated above. His date of employment, the fact and date of resignation, are not disputed. It is denied that after payment of Kshs. 184,660, Lothar Denter was to advise on payment of overseas commission to the Claimant. The sum paid was the totality of the Claimant's terminal dues. The Respondent denies that the Respondent ever sold equipment to KPA or KFS. Alleged sale to KPA was by a Company called Hyster Europe, while alleged sale to KFS was by a Company called Schiffbau-Und Entwicklungesellschaft Tangermunde Mbh & Co. KG. (SET). The paid-up price for the equipment was not made to the Mombasa Office, or the Respondent. The Claim is misconceived, and should be dismissed with costs to the Respondent.

Hearing timelines:-

6. The Claimant testified on 26th June 2015 and 23rd October 2015 when he closed his case. Respondent's Group General Manager George Wahogo Rebo gave evidence for the Respondent on 10th February 2016, bringing the curtain down on the hearing.

7. Parties subsequently filed and exchanged Closing Submissions. They indicated to the Court they wished to highlight their Closing Submissions on a number of occasions, but this did not materialize, and on 14th October 2016 they informed the Court they no longer wished to highlight, adopting the Written Submissions in their totality. Judgment was reserved for 24th March 2017.

Claimant's Case:-

8. The Claimant testified Mombasa Branch sold equipment, and supplied parts. He was entitled to 1% commission based on the gross sales, which included overseas' sales. The Respondent was an agent of Germany-based Company (SET), which dealt with Ferries. The Respondent was also an agent of Hyster Europe, which was located in Holland and England, and dealt with forklifts. Hyster acted as an agent for other European-based Companies. The Respondent was similarly an agent of Terberg, a Company resident in Germany.

9. The Claimant dealt with Hyster, with respect to supply of Empty Container Handlers [Trucks] to KPA. KPA was the purchaser. Achelis could tender under Hyster, or tender directly. KPA was to buy 2 of these Handlers. KPA advertised tender. The Claimant was advised by Hyster to buy the tender documents. He bought the documents from KPA. The Respondent did the tendering process. The transaction was successful. The Handlers were purchased for Euro 320, 280, exchanging at Kshs. 31,867,860.

10. Other transactions with KPA included supply of 20 Terberg Terminal Tractors at Euro 1,549,555, the equivalent of Kshs. 154,180,723; 20 Seacom Skeletal Trailers at Kshs. 87,065,179; and 4 ton Hyster Forklifts and 5 ton Hyster Forklifts at GB Pounds 217,471, equivalent of Kshs. 25,694,236. The Claimant was instructed in these transactions by the Companies in Europe. The transactions were in the same vein in terms of process, instructor and consumer. The goods were supplied through the Claimant's Office. He spent endless time, in seeing the transactions through.

11. The Respondent was involved in purchase of Ferries. The same tender and supply process was followed. Rawal was instructed to do tender for the German Company SET. He bought tender documents from KFS. The deal went through. 2 Ferries were bought. There was a procurement dispute involving this transaction at the Procurement Review and Appeals Board, and at the High Court Nairobi. The Claimant

testified he attended hearings thereof, on behalf of his Employer. For good measure, he told the Court Counsel for the Respondent Mr. Wandabwa, was at the procurement proceedings, in Nairobi, with the Claimant. The Ferries were bought at a cost of Euro 9,400,000, exchanging at Kshs. 935,300,000.

12. The KPA and KFS transactions above amounted to Kshs. 1,234, 107,998 out of which the Claimant seeks 1% commission, at Kshs. 12,341,079.99.

13. He was paid Kshs. 184,606.80 as terminal dues. This is captured in the Final Dues Computation, at page 8 of Respondent's Bundle of Documents attached to the Statement of Reply.

14. The payment included local commission at 1%, based on a sale amount of Kshs. 1,997,537.59. Page 9 of the Respondent's Bundle reveals local sales at Kshs. 2,317,143.60, less VAT of Kshs. 319,606, total Kshs. 1,997,537.59. The Final Dues Computation shows the Claimant was paid Kshs. 19,975.40 as commission. This was with regard to January 2008. It is clear commissions were payable, as shown in these Documents from the Respondent.

15. Indent refers to overseas sales. The Claimant told his boss he could not sign the discharge without payment of his overseas commission of Kshs. 12,341, 079.99.

16. The Final Dues Computation form had space for details of overseas commission. The Respondent indicated 'LD TO ADVISE.' LD referred to Lothar Denter, Respondent's Managing Director. He was to advise. There was no advice given.

17. The Claimant spent considerable time writing Respondent e-mails, seeking the advice of the Managing Director. There was no response. The Claimant instructed his Advocates who made a demand upon the Respondent for payment. There was no response. This is the reason why the Claimant filed this Claim.

18. The Claimant testified he specified on receiving terminal dues, that he acknowledged payment, except for the overseas commission.

19. Cross-examined, the Claimant told the Court he resigned voluntarily. His Branch did sales and after-sale services. It was sale of machineries, where the Respondent was a dealer.

20. The Branch invoiced Customers from the Branch. It would not carry out sale for Nairobi. Respondent's Bundle of Documents at page 26 and 27, contain Mombasa Branch Invoices. Payments would be made at Mombasa. These payments were not what attracted 1% commission.

21. The Claimant calculated commission based on what was collected. His letter of appointment did not mention indent sale. Indent sale was necessary where the Respondent did not have some items in stock; it would have to import, and supply its Customers. The purchase price was paid directly to the dealer.

22. The Respondent was paid 0-45% commission of the purchase price. Claimant's commission was included in the commission paid to his Employer, not negotiated separately.

23. Commissions were paid every month, and factored in by the Managing Director from Nairobi. The e-mails from the Claimant to the Respondent came after he resigned. He testified he made other demands before resignation, but did not have access to the e-mails after resignation.

24. The Claimant conceded page 8 and 9 of the Respondent's Documents show the calculations. Page 9 showed indent at nil.

25. When the Final Dues Computation form was taken to the Claimant, it did not have the comments reserving Claimant's right to pursue overseas commission. He took the cheque after he had written the comments. He added his comments and took the cheque. The Director did not sign the copy with the Claimant's comments.

26. The contract for purchase of 2 Empty Container Handling Trucks, made on 19th October 2004, was between KPA and Hyster Europe; it did not mention the Respondent. The Claimant did not agree that the Respondent was a mere Handling Agent in the transaction.

27. He was familiar with the negotiations between Hyster and the Respondent. A local Company with capability is not barred from international tendering. The Claimant was not the contact Person, but told the Court he was instrumental in handling documentation and communication. He did not know what the Respondent was paid in commission, or whether it has been paid at all, to-date. The Respondent had a 0-45% commission set up. The Claimant told the Court the contract of 30th July 2004, similarly involved KPA and Hyster directly. Payments were made to the Manufacturers directly. He was not able to say what commission was paid to the Respondent

28. He did not know if the 4 transactions were carried out by Achelis Kenya, or Achelis Europe. He did not know the terms of engagement between the Companies in Europe.

29. On redirection, the Claimant testified his contract gave him 1% commission, based on local and overseas sales. It was not his concern what the Respondent agreed with its European Counterparts. The Final Dues Computation Form referred to local commission and overseas commission. Lothar Denter was to advise. He did not advise on overseas commission due to the Claimant. Nobody challenged the Claimant's demand until he filed the Claim. The letter of employment showed Achelis Kenya was an associate of other Companies in different Countries. What happened between the various entities was not the concern of the Claimant. It would not affect his commission. All transactions emanated from Mombasa Branch where the Claimant was the Manager.

Respondent's Case:-

30. George Wahogo Rebo told the Court at Branch level, commission was paid based on paid-up sales within the Branch. A sale was normally paid-up fully, and commission paid the following month with the monthly salary. It related to sale made by the Respondent locally.

31. Commissions at international level would only arise if a Customer bought directly from the Parent Company. The individual Customer was free to contact the Parent Company directly. The Parent Company would ask for a pro-forma invoice, and pay commission.

32. With regard to the Hyster transactions, the Respondent would be involved at dealer, not commercial level. The Terberg Terminals were sold directly to the Customers. The Respondent was not the Seller.

33. The Final Dues Computation form, where the Claimant made his remarks, was not signed by the Managing Director. Achelis in Germany is a different Company from its Kenyan Counterpart. The Chairman of the German Company however, is a shareholder of the Kenyan Company.

34. On cross-examination, George testified Achelis Kenya is not a local agent of Joh Achelis, the German Company. George was not a party to the KPA and KFS transactions. He did nothing in the transactions. It is not true that Mombasa Branch dealt with the transactions. The Manufacturers dealt with the Buyers. The Witness was not able to say if this position was expressed in the Statement of Response. The Claimant was not entitled to overseas commission; he was entitled to 1% commission of local sales.

35. George was aware the Claimant was employed in 2003 as Branch Manager. He did not participate in making of the Claimant's contract of employment. Final Dues Computation form indicates Lothar Denter [LD], the Managing Director, was to advise on overseas commission. He did not advise. The Claimant wrote comments on the form, indicating he had not been paid overseas commissions. Lothar Denter relocated to Germany in May 2013. George confirmed Achelis Handling was in all cases, the Manufacturers' Representative.

36. Redirected, he told the Court Claimant's letter of appointment referred to 1% of Mombasa Office paid-up sales. Indent sale required the individual to claim commission through pro forma invoice. The 3rd

form of commission would be payable to the Manufacturers' Representative.

Final Submissions

37. **Claimant's**: He submits he was involved in procurement, processing, coordination and completion of the KPA and KFS contracts, valued at Kshs. 1,234,107,958. His contract entitled him to 1% of these paid-up sales, translating to his claim for Kshs. 12,341,079.99. Lothar Denter was to advise on payment as indicated in the Final Dues Computation form; he did not advise. Respondent unequivocally recognized liability, deferring payment with the rest of terminal benefits. LD would advise.

38. The Claimant relies on this ***Court's decision in Cause Number 118 of 2012 between Transport and Allied Workers Union v. Comarco Properties [EPZ]***, where the Court concluded a commission promised to an Employee, by the Employer, was payable, the Employer having given his input in procurement of the Lamu Jetty Project in favour of the Employer.

39. **Respondent's**: Respondent submits the Claimant was only entitled to 1% commission of the Mombasa Office paid-up total sales. This was restricted to day-to-day sales. The Claimant testified Mombasa would not carry out sales for Nairobi. His contract did not mention indent sales. This was confirmed by the evidence of George.

40. The commission claimed relates to sales made directly by Manufacturers to Customers in Kenya. They were not sales by the Respondent. Commissions on indent sales were not payable under the letter of appointment. Lothar Denter did not have to advise further. He stated in the Final Dues Computation form, that payment made upon the Claimant was in full and final settlement. His refusal to respond to the Claimant's demands, in effect, was a denial of the validity of the Claimant's prayer for overseas commission. The Claimant testified he did not know what commission was paid to Achelis Kenya. He did not know if the transactions were carried out by Achelis Kenya or Joh Achelis Germany. Achelis would only be involved at dealer, not commercial level. Lastly it is submitted for the Respondent that the claim for overseas commission was in any event time-barred under Section 90 of the Employment Act 2007.

Issues in dispute:-

- i. Is the Claimant entitled to a commission of Kshs. 12,341,079.99?
- ii. Is he entitled to costs, and interest at the rate of 20% per annum?
- iii. Is the Claim time-barred?

The Court Finds:-

41. The facts in this dispute are largely not in dispute: the Claimant was employed by the Respondent Company on 2nd May 2003 as Branch Manager Mombasa; his monthly salary was Kshs. 122,500; he was entitled to among other benefits, Kshs. 1% commission of Mombasa Office, paid-up total sales; he resigned voluntarily on 22nd January 2008; he was paid terminal dues shown in the Final Dues Computation form, at Kshs. 184,606.80 after deductions; it was indicated by the Respondent on the Computation form that LD [Managing Director Lothar Denter] would advise on overseas commissions; and lastly, it is common ground that no overseas commission was paid to the Claimant. Parties agree also, that KPA and KFS were sold equipment worth Kshs. 1,234,107,998 billion, by certain European Companies. These are uncontested facts.

42. The letter of appointment dated 24th March 2003 contains the contentious clause on commissions. It states the Claimant would be paid 1% commission of paid-up total sales, Mombasa Office. Parties differ in their interpretation of the scope of this clause. Did it restrict the Claimant to commissions based on local sales? Did the clause cover indent sales?

43. 'Indent,' is described in Business Dictionaries as an order for goods, placed often through a local or

foreign agent, under specified conditions of sale, the acceptance of which, by the supplier or the agent, constitutes a contract of sale. As a means of entering markets which it may not have an established presence, a producer may contract with local agents to help it sell its products in the particular market. The agents are empowered to act as middlemen, and the sales done through the middlemen, called indent sales.

44. The Claimant states the Respondent was an agent, a middleman, for several European Companies who sold goods to KPA and KFS. Hyster Europe, and its associates, sold Empty Container Handlers and Forklifts to KPA; Terberg and Seacom sold Terminal Tractors and Skeletal Trailers to KPA; while the mouthfully named Schiffbau-Und Entwinclungs Gesellschaft Tangermunde [SET], sold 2 Ferries to KFS. The total purchase price paid by the 2 state corporations was Kshs. 1,234,107,998.50. These were indent sales made by the Respondent through its Mombasa Office. The Respondent was a middleman, an agent and liable to pay the Claimant 1% of the total purchase price as overseas commission, under his letter of appointment.

45. The Respondent's position is that it was involved in the transactions at dealer level, not commercial level. The Claimant did not know if Achelis Kenya or Joh Achelis Germany was engaged by KPA in sale of the goods. The contract was between Hyster Europe and KPA; it did not involve the Respondent. Terberg sold Terminal Tractors directly to KPA. Rebo testified the Respondent is not a local agent of the German Achelis, explaining however that the Chairman of German Achelis was shareholder of the Respondent. In general, the Respondent holds that it was not a middleman, a local agent of the European Companies which sold goods worth Kshs. 1.2 billion to KPA and KFS.

46. The Court believes the evidence of the Claimant that the Respondent was a middleman, and a local agent of the European Companies. The European Companies entered the Kenyan market, specifically the Port of Mombasa, through the Respondent. They tendered for business and procured business through the Respondent. The contracts concluded between KPA and Hyster were signed by KPA's Managing Director, and the Respondent's Director Mohamoud Ali for Hyster Europe. The European Companies did not make any direct bids for supply of the goods; they did not set foot in Kenya; and all business was conducted by the Respondent here in Mombasa. The Court is satisfied the Respondent was the middleman, and local agent of the European Companies. Goods sold by the European Companies to KPA and KFS were therefore in the nature of indent sales, made by the Respondent as an agent of the European Companies.

47. The details of the agency agreement between the Respondent and the European Companies; the commissions payable to the Respondent by the European Companies; whether these commissions were paid; are not matters which would be relevant to the Claimant's pursuit of his 1% commission of paid-up sales, Mombasa Office. These are matters between the principals and their agent. The Claimant's concession that he did not know what Achelis received after the transactions; whether transaction payments were made directly between the Customers and the Suppliers; and whether the transactions were carried out by Kenyan Achelis or German Achelis, does not affect his claim for commission against the Respondent. It is possible, as happens in international transactions, that different Companies associated with the Respondent, played certain roles in the transactions. The Claimant is concerned only with the role he played as an Employee of the Respondent. It is not therefore fair to expect the Claimant to know details of the roles played by other cogs within the wheel of these transactions.

48. The local and focal man in the transactions, the Court is convinced, was the Claimant. He purchased the tender documents; he processed tender; he oversaw the success of the transactions; and even when dispute on procurement of the equipment arose, was a witness for the Respondent. He stated he attended procurement proceedings in Nairobi, together with Mr. Wandabwa, Counsel for the Respondent herein. The Claimant did not overstate his role in the transactions.

49. The evidence by the Respondent, that 'paid-up sales- Mombasa Office,' was with reference to day-to-day local sales, restricted to Mombasa, does not seem to this Court to be a correct interpretation of the commission clause. It is not indicated to be restricted to day - to - day sales made locally. The Respondent dealt with local and international trade. The contract of employment did not state the Claimant would

only be paid commission for promoting local trade. The question should not be whether the contract of employment expressly included overseas commissions; the question, in the respectful view of the Court, is whether the clause expressly excluded overseas commissions. The Respondent was engaged in international business, and if there was no commission meant to accrue to the Branch Manager, for his involvement in that aspect of the Respondent's business, the exclusion should have been expressed in the contract of employment.

50. Section 9 [2] of the Employment Act makes it the responsibility of an Employer, to cause to be drawn up, a contract of employment. Section 10 requires the Employer to give details of among other things, the remuneration, scale or rate of remuneration, the method of calculating remuneration and details of any other benefits. It was incumbent upon the Respondent to supply to the Claimant clear details of his terms and conditions of employment, including on commissions. In event of ambiguity, in interpreting and enforcing the rights and obligations created by a contract of employment, the Court is obligated to resolve ambiguity in favour of an Employee. In this dispute, the scope of commission payable is in issue. The Respondent did not exclude overseas commissions, and the Court would have no reason to reject the Claimant's position, that the commission clause included overseas commissions.

51. This conclusion is supported further by the documents at pages 8 and 9 of the Respondent's Bundle of Documents.

52. Page 8 has a slot for 'Commissions Local' and a separate one for 'Commissions Overseas.' The inclusion of the latter is a strong indication that both forms of commission were contemplated under the commission clause in the contract of employment.

53. Page 9 refers to indent. Again this shows the item was real, and awardable under the contract of employment. That indent was shown as 'nil' for January 2008, does not mean overseas commission was under the contract un-payable or non-existent; it only means the commission was not earned for the month in question. There was no material showing the KPA and KFS indent transactions were completed and paid up in January 2008, so as for indent commission to be reflected in the Claimant's dues for January 2008.

54. It is indicated at page 8 of the Respondent's Documents, against the slot for 'Commission Overseas,' that LD [Lothar Denter] would advise. The local commission was computed and paid. Again this evidence strongly indicates overseas commission was real. The comment further suggests the Respondent acknowledged the item was payable to the Claimant. Any reasonable person would interpret the comment to mean, that Lothar would inform the Claimant if he had any pending overseas commission; the value of that commission; and the date it would be paid. In the alternative, Lothar would be expected to inform the Claimant that the overseas commission was not payable; would not be paid; and suggest reasons to the Claimant for these positions. It was not beyond the Respondent to indicate at page 8 of its Documents, against 'Commission Overseas,' 'Nil,' as had been indicated at page 9, if indeed no overseas commission was due. The other option was to leave the slot blank, and leave the Claimant speculating. Instead, the Respondent expressly indicated 'LD to advise.' The Claimant kept writing hundreds of e-mails to the Respondent. Lothar, or any of his Co-Directors, or Managers, did not respond to the Claimant advising on the item. At no time, in response to his e-mails, was the Claimant told his claim for overseas commission was misplaced. No one disputed the existence of the KPA and KFS transactions, and the value of those transactions. At no time was he advised, as had been promised by the Respondent. Lothar relocated to Germany, and left the Claimant dangling in the coastal winds.

55. The Court finds no persuasion, in the submission by the Respondent, that Lothar's silence was equivalent to a response stating overseas commission was not payable. The Industrial Relations Charter requires Employers and Employees to respond to all correspondences, initiated by either of them. Industrial relations are not conducted through silence.

56. The Claimant resigned on 22nd January 2008. He filed his Claim on 12th February 2010. The Claim was brought within 3 years allowed under Section 90 of the Employment Act. He is entitled to claim all benefits which accrued to him during the entire period of employment. The Respondent alleges the Claim

is time barred, without stating the date when overseas commission became due. The Court is satisfied the Claim was made within time, and the Claimant is not barred from recovering a benefit conferred upon him by the contract of employment, which accrued to him during employment.

57. The Claimant has shown he is entitled to overseas commission at 1% of the total indent sales value. He should not have been kept out of the proceeds of international trade. He should not have been barricaded by a wall of silence when he demanded for his rightful share of those proceeds. He merits the commission as prayed, and considering the time this benefit has been placed out of his reach; considering the number of times he sought redress from the Respondent to no avail; the Court grants him interest at 14% per annum from 12th February 2010 when he initiated action. He is granted the prayer for costs. ***IN SUM, IT IS ORDERED:-***

- a) The Respondent shall pay to the Claimant the sum of Kshs. 12,341,079.90 as commission.***
- b) Interest on the principal sum granted at 14% per annum from 12th February 2010, till payment is made in full.***
- c) Costs to the Claimant.***

Dated and delivered at Mombasa this 24th day of February 2017.

James Rika

Judge