



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO. 144 OF 2016 CONSOLIDATED WITH CAUSE 145 OF 2016**

**MICHAEL MUGWE NYAMBURA.....1<sup>ST</sup> CLAIMANT**

**JOHN OTIENO ONYANGO.....2<sup>ND</sup> CLAIMANT**

**-VERSUS-**

**KIGANJO BAKERY LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 17th March, 2017)

**JUDGMENT**

The claimants filed their respective statements of claims against the respondent on 23.06.2015 through Peter M. Muthoni and Company Advocates.

The 1<sup>st</sup> claimant's case is that he was employed by the respondent as a salesman in February 2015 at a monthly Commission of Kshs.20, 000.00. The 2<sup>nd</sup> claimant's case was that he was employed in 2008 at a monthly commission of about Kshs. 20,000 as a salesman. Like in the case for the 2<sup>nd</sup> claimant, the 1<sup>st</sup> claimant's further case was that the respondent's cashiers were the ones required to calculate the commission at end month based on the claimants' respective cash summaries, sales sheets and the loading and offloading sheets. The claimants' case was that they were not given annual leave, off duty or rest days, they worked overtime, and they were not paid house allowance.

The claimants prayed for a declaration that the claims were valid and that they were technically or legally in the respondent's employment and costs of the suit.

The 1<sup>st</sup> claimant prayed for Kshs.240,000.00 being salary or commission accrued from February 2015 to February 2016, one year's due annual leave Kshs.20,000.00, 11 hours overtime for 15 days a month Kshs.484, 242.00, ten public holidays worked but not paid Kshs. 13, 355.00, 3 months' pay in lieu of notice Kshs.60,000.00, and a certificate of service.

The 2<sup>nd</sup> claimant prayed for Kshs.1,920,000.00 being accrued salary or commission to date, annual leave pay for each of the 8 years of service Kshs.160,000.00, overtime pay across all the period of service Kshs.2, 641, 320.00, pay for public holidays over the period of service Kshs. 106, 840.00, and a certificate of service.

In each of the cases the respondent filed a defence through Kinyua Kiama & Company Advocates. The respondent prayed that the claims be dismissed with costs.

The respondent's case is that each claimant entered into a salesmanship contract with the respondent

under which each claimant was to market and sell the respondent's product on a commission basis whereby the respondent provided the means of transport and the claimants were paid the earned commission on monthly basis.

The **1<sup>st</sup> issue** for determination is whether the parties were in employment relationship. It is submitted for the respondent that the parties were not in employment relationship because the claimants were salesmen paid on commission basis so that they earned no salary or wage. Section 2 of the Employment Act defines an employee as a person employed for wages or salary and includes an apprentice and indentured learner. The Act does not define wage. **The Black's Law Dictionary, 9<sup>th</sup> Edition** defines wage as payment for labour or services based on time worked or quantity produced and for which the employer must withhold income tax. A commission is obviously a pay based on production or service rendered. The court returns that a commission being a wage, it did not render the relationship to fail the test for a contract of service. The court has perused the copy of the salesmen contract filed for the 2<sup>nd</sup> claimant and is clear that the duty was to deliver bread to customers and collection of money from the customers. The remuneration was based on agreed commission as agreed with the employer. Further, the claimants were responsible for any shortages and, **"Any unlawful act against the company will result to instant dismissal without prior warning"**. In view of the contract, the court returns that the respondent was clearly in a contract of service with the claimants.

The **2<sup>nd</sup> issue** for determination is whether the claimants are entitled to the remedies as prayed for. The 1<sup>st</sup> claimant says he was not paid for 12 months he served and the 2<sup>nd</sup> claimant says he was not paid for 7 years and 10 months served. The claimant's testimony is that they never demanded that pay in writing. The respondent's evidence is that all the commissions were paid as was agreed. The 2<sup>nd</sup> claimant testified that Kshs.20,000.00 was salary and commission was based on crates of bread sold. The claimants claim that they worked overtime, on public holidays without annual leave and without rest days.

The court has considered the evidence. The court finds that on a balance of probability, the claimants were paid all the agreed commissions. It cannot be that they worked continuously and for long hours on daily basis without payment as they would fail to justify their economic subsistence or survival over such long periods of alleged work without pay. In any event, the court finds that the claimants have failed to show the agreed rate of commission and awarding of the claimed Kshs. 20,000.00 per month over the period as prayed would be purely speculative and without basis.

As the payment was based on commission and the court has found that the claimants were paid, the court finds that they were paid for work allegedly performed on off days, overtime and public holidays. Similarly, the court finds that if annual leave was not given as claimed, it must have been due to the claimants' voluntary understanding that they were making a maximum benefit on the commissions as was agreed.

The court has considered the long silence on the part of the claimants in making grievances to the respondent or the labour officer or the court about the claims and finds that the claims were incredible.

The court has considered that the respondent substantially contributed to the ensuing predicament and suit by failing to maintain proper employment records as was the employer's statutory duty to do. In such circumstances, the court returns that each party shall bear own costs of the suit.

In conclusion, the claimants' respective suits are hereby dismissed with orders that each party shall bear own costs of the proceedings.

**Signed, dated and delivered** in court at Nyeri this **Friday, 17<sup>th</sup> March, 2017.**

**BYRAM ONGAYA**

**JUDGE**