



**REPUBLIC OF KENYA**

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

**CAUSE NO. 75 OF 2016**

**PETER MWANGI**

**GITONGA.....CLAIMANT**

**VERSUS**

**DESERT OASIS RESIDENTS EMPOWERMENT PROGRAM  
(DEREP).....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 14<sup>th</sup> July, 2017)

**JUDGMENT**

The claimant filed the statement of claim on 14.04.2016 in person. He claimed that he was employed by the respondent on 24.04.2010 and was paid by commission for the respondent's livestock he sold thus, Kshs.5 for every day old chicks sold; Kshs. 10 for every one month old chick; and 5% for dairy cow or dairy goat or rabbit or Rhodes seeds per Kg sold. The claimant's further case was that the respondent unilaterally changed the rate of commissions sometimes in May 2010. The claimant testified that he complained in that regard but the grievance was not resolved. The claimant's further case was that he persisted to make the grievance leading to his verbal termination on 24.04.2013. It is the claimant's case that he was employed by the respondent and the change of the payment rates was without his consent or being consulted as per section 10 (5) of the Employment Act, 2007. The claimant prayed for judgment against the respondent for:

- a. A declaration that the termination of the claimant's employment by the respondent was unfair or unlawful.
- b. Payment of 12 months' compensation for the unfair termination.
- c. Finding that the respondent breached the contract of employment and to pay Kshs. 3, 002, 380.00 being the amount of commission not paid with interest at court rates.
- d. Any other relief the court may deem just to grant.
- e. Costs and interest.

The respondent filed the statement of defence on 06.05.2016 through M/S Wambui Ngugi & Company Advocates. The respondent prayed that the suit be dismissed with costs.

The **1<sup>st</sup> issue** for determination is whether parties were in a contract of employment. The respondent's case is that the claimant was a commission agent and was not an employee under section 2 of the

Employment Act, 2007 which defines “**employee**” as a person employed for wages or salary and includes an apprentice and indentured learner. Salary means a fixed regular payment made usually on monthly basis by an employer to an employee; wage means a fixed regular payment for work, typically paid on a daily or weekly basis; and commission means a sum paid to an agent in a commercial transaction (see **Concise Oxford English Dictionary, 12<sup>th</sup> Edition, 2011**). The court considers that the three words are not terms of art and they mean remuneration. Employees being ordinarily agents of their employers, their principals, commission is as well a pay to an employee.

The court has considered the opinion in the judgment in **Fredrick Ngari Muchira and 99 Others -Versus- Pyrethrum Board of Kenya [2013]eKLR** where the court stated thus, “**Subsection 40(1) (f) is clear that the payment is on the basis of at least one month wage. Wage is not defined under the Act. The Black’s Law Dictionary, 9<sup>th</sup> Edition defines wage as payment for labor or services based on time worked or quantity produced and for which the employer must withhold income tax. The meaning is elaborated when the phrase “minimum wage” is considered and which the Dictionary defines to mean lowest permissible hourly rate of compensation for labour. Thus, the court’s opinion is that wage as used in the subsection means the net price the employer pays for labour as a factor of production and whose traditional measure is the amount of time worked or the output of production attributable to the individual employee. It is the further opinion of the court that work-related expenses such as those for transport, medical care or housing that may be paid to the employee by the employer as allowances or imprests or other form of payment do not form part of the wage; such are costs that facilitate labour as a factor of production towards production and do not constitute the consideration of price paid for labour and called wage or salary or more precisely, basic salary.**”

In the present case, the commission was a pay based on the claimant’s production or level of service delivery and was therefore within the definitions of wage or salary. Commission was clearly remuneration for the claimant’s work or labour. Thus the court returns that the mere consideration that the claimant was paid by way of commission alone will not lead to a finding that there was no contract of employment and therefore the jurisdiction of the court in the suit would not be ousted.

While making that finding, the court further considers that even where parties are in a contract for service, the jurisdiction of the court would not necessarily thereby be ousted - but only that in “**the contract for service**” disputes the employment legislation such as Employment Act, 2007 may not apply as it applies to contracts of service. In other words, the court considers that its jurisdiction is not limited to only situations of contracts of service. In the instant case, the parties did not urge that there was a contract for service and the court will not delve into that consideration.

The **2<sup>nd</sup> issue** is whether the claimant was unfairly dismissed from employment. First there is no doubt that the claimant and the respondent were in a contract of employment. The respondent’s evidence was that the claimant was employed to bring customers to buy the respondent’s products and was paid by way of commissions at every month. The claimant used a shared office at the respondent’s head office. The respondent’s evidence was that the engagement with the claimant ended when he stopped bringing the customers to the respondent. He was paid Kshs.5 for every chick he had sold per respondent’s witness (RW) but who also denied knowledge of the written contract dated 20.04.2010. The claimant’s account was that he was sacked due to his persistent grievance about changed rates of the commissions and also about disputes on due payments. The court finds that the claimant’s evidence contradicted his pleading. In particular he pleaded that there was unilateral change in commissions’ rates but the particulars of that change were not pleaded and no evidence was provided; and instead, the claimant testified that he left employment due to disputes in calculations of commissions – and not the alleged unilateral change of commissions. In view of that contradiction, the court returns that the respondent’s account that the relationship ended when the claimant stopped to bring customers is credible. The court has noted the long time that lapsed from 24.04.2013 to filing of the suit on 15.04.2016. In any event the claimant has not made submissions on quantum of compensation as envisaged in section 49(1) (c) of the Employment Act, 2007. The claims and prayers for unfair termination and compensation are deemed to have been abandoned as unjustified and not established by way of evidence.

The **3<sup>rd</sup> issue** for determination is whether the claimant is entitled to the Kshs.2, 244, 801.00 being unpaid commissions. The suit was filed on 15.04.2016 and the termination was on 24.04.2013. The court finds that under section 90 of the Employment Act, 2007 the unpaid commissions amounted to a continuing injury and the relevant suit was to be filed within 12 months from the date of cessation of such continuing injury being on or about 25.04.2013. Thus, the court returns that the cause of action in that regard was time barred. The prayer will therefore fail. As the respondent did not urge that point, each party will bear own costs of the suit.

In conclusion, judgment is hereby entered for the respondent against the claimant for dismissal of the suit with orders that each party shall bear own costs of the suit.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 14<sup>th</sup> July, 2017**.

**BYRAM ONGAYA**

**JUDGE**