



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**CAUSE NO. 179 OF 2016**

**ROSSLYNE NJOKI KAMAU.....CLAIMANT**

**VERSUS**

**EMOMENTUM INTERACTIVE SYSTEMS LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 3<sup>rd</sup> November, 2017)

**JUDGMENT**

The memorandum of claim was filed on 29.08.2013 through Kihang'a & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) Unpaid salary and commission arrears Kshs. 720, 000.00.
- b) Unpaid salary from June 2015 to November 2015 suspension period Kshs. 1, 235, 000.00.
- c) 18 days unpaid leave Kshs. 148, 200.00.
- d) Gratuity at one month's salary for every year worked at Kshs. 247, 000.00 for 2 years making Kshs.494,000.00.
- e) 12 months compensation under section 49 of Employment Act, 2007 Kshs. 247,000.00 x 12 making Kshs. 2, 964, 000.00.
- f) Loss of future income for 15 years being 15 x 12 x 247, 000 making Kshs. 44,. 460, 000.00.
- g) Total Kshs. 50, 021, 200.00.
- h) NHIF, NSSF, and PAYE arrears since April 2013 to date.
- i) Certificate of service.
- j) Certified pay slips.
- k) Costs of the suit.

The memorandum of response was filed on 11.11.2016 through Coulson Harney Advocates. The

respondent prayed that the claim be dismissed with costs.

The **1<sup>st</sup> issue** for determination is whether there existed employer-employee relationship between the parties.

The claimant pleaded that on or around 01.04.2013 she was employed by the respondent as an accounts manager with employee number EIS067 and reporting to head of sales and was subsequently posted to the respondent's head office. It was her further case that she was later promoted to sales manager reporting to the directors effective July 2013 and subsequently as sales director in January 2015 owing to her outstanding performance. She further pleaded that her terms of service per letter dated 01.04.2013 were permanent and pensionable with all benefits and she was confirmed in appointment because of her demonstrated excellent service. It was her case that she held the position of sales director from 01.01.2015 till her termination from employment

The respondent denies in the response that the parties were in employment relationship. The respondent pleaded that the claimant had never been its employee. It was the respondent's case that it engaged the claimant as a consultant as inferred from the consultancy agreement between the respondent and Zardan Consultants, a consultancy firm managed by the claimant. The respondent further pleaded that the claimant had no employee number as was alleged and that the claimant was paid by cheques and was never on the respondent's payroll like other staff. Further, the claimant collected the cheques on behalf of the said Zardan Consultants. Further by the letter dated 04.11.2013 the claimant wrote to request that the cheques be issued in her name because she had problems with her KCB Bank account. It was the respondent's case that henceforth, the cheques were issued in the name of the claimant and not the name of Zardan Consultants while parties retained the consultancy arrangement, never concluding employment relationship. Thus, the respondent stated that the claimant had never been its permanent and pensionable employee and was never promoted as was alleged because she had never been an employee but a consultant. The consultancy agreement provided for terms of remuneration per clause 3 thereof including a monthly retainer of Kshs. 130, 000.00 payable last working day of each month and to be reviewed after the first three months and thereafter every six months. Thus the formula resulted in increase of the claimant's monthly retainer fee. The respondent further pleaded thus, **"13. 5% commission was to be paid on net profitability of all deals. An accelerator of and extra 5% on commission was to apply where the consultant exceeded sales target by 40% or higher."**

So, were the parties in employment or consultancy arrangement?

The claimant's testimony was as follows. That she worked for the respondent on full time basis from April 2013 as an Account Manager at Kshs. 130,000.00 per month. In June 2013 she was given a new role of Head of Sales and her salary was reviewed upwards to Kshs. 170,000.00 per month. The promotions were verbal. In December 2014 she was promoted to the role of Sales Director and the salary was not reviewed but she was given benefits being house allowance Kshs. 40,000.00 per month, and children school fees allowance of Kshs. 106, 300.00 per three months and paid directly to the school her children attended. As Account Manager she had benefits such as medical cover for self and children, company telephone with Kshs. 5, 000.00 telephone allowance per month, and transport allowance refundable per month based on receipts tabled in that regard.

The claimant further testified that prior to the employment by the respondent she worked with Zardan Consultants which a firm was offering consultancy services to the respondent. In February 2013, the respondent offered the claimant the role of Account Manager. It was a verbal agreement and she started the employment on 01.04.2013 – by serving a termination notice to Zardan Consultancy Services and moving to the respondent's offices at 5<sup>th</sup> Ngong Avenue from the Consultancy offices at Parklands in Nairobi. It was her case that she reported to work at 8.00am and left at 5am and her supervisor was James Mureithi, the Sales Manager. The claimant filed bank statements showing she had been paid every month by the respondent effective 01.04.2013. She had duties such as approving other employees' leave application, approving quotations, and approving staff travel requests. The claimant relied on an email dated 14.03.2013, by the respondent's one Ng'ang'a Mathu and copied to the claimant, to explain and demonstrate how she joined the respondent as an employee. The email stated that the claimant had agreed

to join the respondent effective 01.04.2013 and she was to undertake an orientation between 14.03.2013 and 01.04.2013 to facilitate her joining the respondent's sales team and to be mainly focussed on large corporate deals which the respondent had lacked a person to spear head.

The claimant testified that between 01.04.2013 to June 2013 her pay was made to Zardan Consultancy Services – it was her evidence that the respondent asked her to get Zardan Consultancy Services to pay her and that was done. On 01.06.2013 she was promoted to Head of Sales till December 2014 but she was not given a letter as she was told that the human resource system was being worked on. The respondent's first pay to her account was 06.11.2013 per bank statements on record.

The respondent did not call a witness.

The court has considered the parties' respective positions. The respondent did not provide evidence to show that the claimant owned or held equity in Zardan Consultancy Services. The court finds that by the email dated 14.03.2013 the respondent clearly set out to employ the claimant and the claimant left employment of Zardan Consultancy Services and she was employed by the respondent effective 01.04.2013. By her evidence which was not opposed, and there is no reason to doubt, the claimant was integrated in the respondent's staff establishment. She was bound by the respondent's prescribed working hours and was supervised by the relevant respondent's staff. Further she was paid on monthly basis. It was clear from evidence that she did not meet her own costs in serving the respondent but that the respondent provided all the claimant's needs as they were incidental to the employment such as office accommodation, employee commuter costs and other costs of obtaining the claimant's labour. The court returns that such was clearly unlike in a contract for service. Accordingly, the court returns that she was an employee as defined in the Employment Act, 2007 because she was engaged to earn a salary. In any event, the suspension letter quoted later in this judgment further confirms, and expressly so, that the parties were in a contract of employment. To answer the 1<sup>st</sup> issue for determination the court returns that the parties were in a contract of service.

The 2<sup>nd</sup> issue for determination is whether the termination of the claimant's employment was unfair. The claimant's evidence was that she was employed effective 01.04.2013 until she received on 19.06.2015 the suspension letter dated 25.05.2015. The suspension letter addressed to the claimant stated as follows:

**“Dear Madam,**

**REF: SUSPENSION FROM DUTY**

**Further to the media expose, we have been notified by the Parklands CID of your charges and arrest for alleged defrauding 11 individuals of their money amounting to 5 million Kenya Shillings.**

**It is also understood that this you did outside of your Consultancy employment with eMomentum Interactive Systems Limited.**

**While the latter might be the position, your role in eMomentum Interactive Systems Limited to which you were in charge of the Company's Sales department did put you in direct contact with eMomentum's sensitive clients.**

**It is with this regard that the company would like to express its disappointment with the state of affairs as this situation brings the company in direct disrepute considering your ongoing criminal case.**

**Your employment contract with eMomentum Interactive Systems Limited is therefore Suspended for 3 (Three) Months WITHOUT PAY starting this day 25<sup>th</sup> May 2015 pending the outcome of the case further to which appropriate action will be considered by the management.**

**Kindly take note.**

**Yours sincerely,**

**FOR: EMOMENTUM INTERACTIVE SYSTEMS LTD**

**SIGNED**

**Kagume Chiuri**

**Managing Director**

**Cc: Personnel File**

**Marketing department”**

The claimant testified that the allegations in paragraph 1 and 2 of the suspension letter came about in a dispute between a company (Absolute Investment Stocks Limited) the claimant was involved with and the Capital Markets Authority (CMA). The CMA had reported that dispute at Parklands Police Station in Nairobi. The issues had been outside her employment with the respondent and had not affected the respondent's business or property at all as per claimant's testimony. She had notified the respondent's managing director and the business management director about her predicament. The suspension without pay followed meetings at which the claimant had explained to the respondent's management the problems she had with CMA and the said investment company she was involved in.

The claimant's case was that the 3 months of suspension ended on 25.08.2015 but the same was not lifted. The suspension ended on 03.11.2015 when she received the letter of termination. The letter stated as follows:

**“Dear Madam,**

**Reference is made to our letter to you dated 25<sup>th</sup> May 2015 where we suspended your consultancy pending your settlement of the on-going criminal case.**

**The company on humanitarian grounds gave you three months to which this should be done. There has been no communication from you on the same hence we assume that your case is still on-going.**

**The company therefore would want to terminate your consultancy contract forthwith based on the fact that you have not communicated on the case plus not reported on duty since 25.08.2015 when your suspension expired.**

**We wish you success in your future endeavours with the hope that you will solve the case amicably.**

**Yours sincerely,**

**FOR: EMOMENTUM INTERACTIVE SYSTEMS LTD**

**SIGNED**

**Kagume Chiuri**

**Managing Director**

**Cc: Marketing department”**

The court has considered the evidence and all material on record. It is not denied by the claimant that there were pending criminal justice matters she was involved in and that had led to her suspension. The suspension followed elaborate meetings and discussion between the claimant and the respondent's management. The claimant has not denied that at the end of the suspension period, she failed to report back on duty. The court finds that the correspondence and proceedings when taken together amounted to a fair procedure as envisaged in section 45 (2) (c) of the Employment Act, 2007. The reasons for termination are also found to have been valid in terms of section 43 of the Act, namely, as at time of the termination it is not disputed that the claimant had a pending criminal case, and, the suspension period having lapsed, she had failed to report back on duty. Her explanation was that at the end of the suspension she resumed duty but she was locked out on 20.05.2015 – but the court returns that 20.05.2015 was long before commencement of the suspension. The claimant had suggested that her trouble had started when she asked for payment of her outstanding dues. The court finds that to have been a mere afterthought because the demand letter dated 24.11.2015 by her advocates was clear that the reason for termination had been that the claimant had been engaged in “...unspecified or unsubstantiated criminal activity...”

Accordingly, to answer the 2<sup>nd</sup> issue for determination the court returns that the termination was not unfair. While making that finding, the court has taken the view that while the alleged crime was outside the claimant's employment, but as per the respondent's position, it amounted to a suspicion against the claimant and to a substantial detriment of the respondent as an employer as envisaged in section 44(4) (g) of the Act. The court has taken that view because the parties had discussed the issues at meetings and the claimant provided no material evidence to vitiate the respondent's position in that regard. The court has observed that whereas the claimant was objectionable to the termination, she offered no evidence of resistance to the suspension – and the court returns that the matters had been discussed and parties arrived upon an understanding that the pending criminal matter had an adverse consequence to the respondent in view of the then prevailing employment relationship between the parties.

The 3<sup>rd</sup> issue for determination is whether the claimant is entitled to remedies as prayed for. The court makes findings as follows:

a) Parties recorded consent in favour of the claimant for payment of unpaid salary and commission arrears **Kshs. 720, 000.00.**

b) The court returns that as the suspension and eventual termination has been found to have not been unfair, the claim for unpaid salary from June 2015 to November 2015 being the suspension period and for Kshs. 1, 235, 000.00 is hereby declined. The court follows **Grace Gacheru Muriithi –Versus- Kenya Literature Bureau (2012) eKLR**, in which the court stated thus, “**The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable. Accordingly, the court finds paragraph 6.2.4 of the respondent's Terms and Conditions of Service to be unfair labour practice to the extent that the provisions deny the employees payment even in instances where they exculpate themselves at the end of the disciplinary process. To that extent, the provision offends Sub-Articles 41(1) of the Constitution; it is unconstitutional.**” While making that finding the court recalls that parties have recorded consent for the respondent to pay the claimant Kshs.390, 000.00 as retention fee accrued over the suspension period. The court will not interfere with that consent.

c) The court returns that the claimant is not entitled to 18 days unpaid leave of Kshs. 148, 200.00 because the necessary evidence to justify that claim under section 28 of the Employment Act, 2007 was not provided at all. In any event no submissions were made in that regard. While making that finding the court returns that the claimant testified that she took leave on 51.05.2015 but no attempt was made to justify the claim for pay in lieu of leave. The prayer will fail.

d) The claimant prayed for gratuity at one month's salary for every year worked at Kshs. 247, 000.00 for 2 years making **Kshs.494, 000.00**. The court finds that in absence of alternative pension or separation service benefit, the prayer is allowed as reasonable service pay under section 35 (5) of the Employment Act, 2007.

e) As termination has been found not to have been unfair, 12 months compensation under section 49 of Employment Act, 2007 Kshs. 247,000.00 x 12 making Kshs. 2, 964, 000.00 is hereby declined.

f) The court finds that no evidence and submissions were made to justify the prayer for loss of future income for 15 years being 15 x 12 x 247, 000 making Kshs. 44, 460, 000.00 and the same will be declined. The claimant confirmed that she was engaged in some business and being an experienced professional the court returns that she has capacity to engage gainfully to mitigate her circumstances after loss of the employment.

g) The prayer for NHIF, NSSF, and PAYE arrears since April 2013 to date was not quantified and it was not clear whether the same was to be remitted to the relevant agencies. In absence of submissions, the prayer will fail as not justified at all.

h) The court returns that the claimant is entitled to a certificate of service as prescribed in the Act..

i) The court returns that the claimant is entitled to the certified pay slips per section 20 of the Act.

j) The claimant is awarded costs of the suit at 75% taking into account the margins of successful litigation in the matter.

In conclusion judgment is hereby entered for the claimant against the respondent for:

a) The respondent to pay the claimant **Kshs.494, 000.00** by 15.12.2017 failing interest to be payable at court rates from the date of this judgment till full payment

b) The respondent to deliver to the claimant all relevant certified pay slips and a certificate of service per statutory prescription by 15.12.2017.

c) The respondent to pay claimant's 75% costs of the suit.

**Signed, dated and delivered in court at Nyeri this Friday, 3<sup>rd</sup> November, 2017.**

**BYRAM ONGAYA**

**JUDGE**