



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.684 (A) OF 2014

RUTH WANJIRU MUNGAI KANG'ONG'OI.....CLAIMANT

VERSUS

COMMUNICATION ULTIMATE LIMITED (KUL).....RESPONDENT

JUDGEMENT

1. The issue in dispute is not set out by the Claimant save that the claim is for;

- a. *The sum of Kshs.267,000.00 and USD(\$) 117.60*
- b. *Interest on (a) above from the date of filing suit until payment in full.*
- c. *Exemplary damages as pleaded at paragraph 14-17*
- d. *Costs of the suit*
- e. *Any other relief that the Court may deem fit to grant.*

2. The claim is that the Claimant was employed by the Respondent Company which is a limited liability company and affiliated to and trades with CIO East Africa where the Claimant was also working. By a contract dated 17th January 2011, the Claimant was employed by the Respondent as a columnist with the role to pen 2 monthly online articles of 600 words each; write an 80-0 word column for the print publication; and to have additional content from any 'trendy news' as necessary. The monthly remuneration was USD \$200 and upon issuance of an invoice.

3. In a different contract dated 31st August 2011 the Claimant was employed by the Respondent as an Account Manager with the duties of advertising sales in magazine; advertorials and paid for supplements; online advertising; CIO related events such as the CIO breakfast series, CIO 100 symposium and award ceremony; customer service and communication with internal and external customers; and the role as a columnist was rolled over with the roles rights, benefits and payments made by the respondent. Under this contract the Claimant was entitled to Kshs.30, 000.00 while on probation which was to commence on 4th August 2011 and this was to be negotiated upwards after 3 months' probation period and was to be based on performance. The Claimant was also to be entitled to a 10% commission on sales made and any termination was to be on one month notice.

4. The Claimant was promoted to be Editor of CIO East Africa Magazine by a further contract dated 6th March 2012 with the duty to compile and produce the magazine and all correlated tasks. The new salary was kshs.70, 000.00 commencing 1st March 2011 and a commission on sales paid up at 10% and for any assignments abroad the Claimant had \$50 per diem.

5. The claim is also that on 30th august 2013 the Claimant gave notice to resign from the respondent. The notice was for one month as set out in the contract effective 30th September 2013.by email dated 3rd

September 2013 the Respondent Editorial Director accepted the resignation.

6. The Respondent has since withheld the claimant's 10% commissions and dues. This has caused suffering, loss and damage. The claim is for unpaid commissions from 29th July 2013 at Kshs.269, 600.00 and \$117.60. before resignation such commissions were being paid in full and at 10% on presentation of all claim forms to the accountant and the refusal to pay what is due as claimed from 29th July 2013 is not justified. This refusal to pay is in bad faith meant to cause the Claimant loss and damage. The Respondent has admitted owing these sums save for an arithmetic error which was corrected and to reduce the dues to 5% is to deny the Claimant her dues.

7. That the claims should be paid as set out with costs.

8. In reply to the defence, the Claimant sets out that all commissions were paid at 10% and never at 5% save that as an incentive an additional 5% was added to the CIO100 awards competition so as to get more delegates to attend. That the Claimant did not resign due to inability to qualify for a senior position and her application for the position of Business development manager had nothing to do with the due commissions earned and not paid.

9. In evidence, the Claimant filed her witness statement on 24th September 2014 and relied on it in her evidence. The evidence is that upon employment by the Respondent for various positions her terms were set out in each contract and agreed upon. All commissions payable were at 10%. The Claimant resigned on 30th August 2013 and before all commissions had been paid at 10% upon presentation of all claimant. On 29th July 2013 the Respondent admitted owing the Claimant save for an error that was corrected but the downgrading of the commissions due to 10% was not agreed upon. This was done since the Claimant was leaving the Respondent and well aware that such a commission had never been paid at 5%.

10. That for the various events that the Claimant was able to undertake the CIO100 annual awards competition, the Claimant as a sale representative was required to get sponsors and the revenue collected she was entitled to aq 10% commission but for this event the Business Development manager stated that as an incentive, the Claimant would get an additional 5% commission for every paid for delegate who attended the event. In this case therefore, the 10% commission was due and an additional 5% as added in incentive so as to make the event well attended. The Claimant was to be paid 15%.

11. The Claimant also testified that the information the Respondent has relied upon to deny her the dues owed relate to communications made between the Respondent and former employees before the Claimant joined the respondent. That emails sent to staff on 10th may 2011 were sent before the Claimant joined the Respondent on 4th august 2011.

Defence

12. In defence the respondents state that they are distinct from CIO East Africa Limited as they are two different legal entities. That the letter of employment as an Account manager is not signed and hence fake and no contract was signed with the Claimant on 31st August 2011 or 6th March 2012. That even though the Claimant was employed by the Respondent she resigned and it had been agreed that certain commissions would be paid at 10% and those brought via event sponsorship would attract a 5% commission. That the Claimant resigned upon failing to get a senior position with the Respondent as business development manager. The commissions due wee at 5% at Kshs.136, 971.00 which the Respondent has been willing to pay but the Claimant refused to accept. That all commissions previously paid are at 5% and what is claimed is meant to mislead the court.

13. The defence is also that the Claimant is not entitled to exemplary damages or the dues as set out and the suit should be dismissed.

14. In evidence, the Respondent called Andrew karanja who relied on his witness statement as

attached to the statement of defence. He testified that he is the Director of Communications with the respondent. That the Claimant was unhappy as she was not promoted and a dispute arose as to the payable commissions of 5% and 10% as the practice was to pay 5% based on the activity. 10% commission was paid based on advertising. That the Respondent had an unwritten rule to pay 5% for events sponsorship revenue and an assisted sale. That the basis for rewarding variation is on event sponsorship was due to the fact that even though the revenue was high the costs involved were also high and the other way to base rewards was to look at all costs and source from the surplus. This would result in less commissions as the Respondent had to look at the proportional allocation amongst the various sponsors. In this case the Claimant was discontent upon failing to get a senior position.

15. That commissions would sometimes be paid based on an understanding between the Claimant and the Respondent looking at how an event was done. The witness did a memo to this effect. The 10% the Claimant is seeking is based on an event the Respondent did in Rwanda and what was due was 5% as there were variations of the event which sometimes would be big or small and thus need for flexibility. For 9 years the Respondent has given commissions based on per event and where a dispute arose, this would be resolved amicably. The 5% due to the Claimant was the practice and the documents she has submitted in her claim are not signed to change what was due.

16. The witness also testified that In this case, events were not profitable as against advertising and the Claimant was paid. The Respondent is willing to pay the Claimant 5% as to pay at 10% would be contrary to the Respondent policy. This policy is the principle behind not paying the Claimant her demands.

17. In cross-examination the witness testified that for the CIO100 event, the payable commission to the Claimant was to be mutually agreed. That 10% commissions were only paid up and until November 2012. That the contract allegedly issued to the Claimant for the position of Account Manager is not from the Respondent but the Claimant had duties of an accountant based on mutual agreement. That some dues have since been paid dues owing from Compulynx Limited and the invoices have been settled. They related to delegates and sponsorship and have been settled as no dispute arose. That for each claim, the sales team had to look at an event and an arbitrary decision taken on whether to pay and based on discussions with the employee allocate the percentage like the claim with regard to Oracle 100.

18. The witness also testified that based on the claimant's case the Respondent has since put a policy on percentage payments. While the Claimant was employed there then policy was not being enforced. The Respondent has also developed a human resource policy. The payments then paid to the Claimant were based on mutual agreement. That the emails sent to employee with regard to the applicable policy were within durations the Claimant was not at the Respondent employment.

Submissions

19. The Claimant submitted that she was employed by the Respondent and had a contract of employment spelling her terms and dated 17th January 2011 and was promoted to accounts manager vide contract dated 31st August 2012. That the essence of a contract is to establish the intentions of parties and this must be approached objectively as held in **Savings and Loan Kenya limited versus Mayfair Holdings Limited**. That under section 112 of the Evidence Act the burden of proving or disproving a fact is on the party so alleging. Where the employment contract is not signed upon admission that the Claimant was an employee of the Respondent then duty to prove otherwise is on the respondent.

20. The Claimant also submitted that she is owed due commissions as at 29th July 2013. There was a binding contract and upon admission by the respondent, this should be paid as set out by the claimant. The rate applicable is that at 10% and only on one event was it agreed that there would be an additional 5% making the due commission at 15%. That by conduct and in paying previous commissions at 10% and indicating the additional 5% was due in the CIO100 event, the Respondent should pay the commission due. The Claimant has relied on the case on **Storer versus Manchester City Council [1974] 1 WLR** where the Court held that the conduct of parties is an important consideration and in the case of **Smith versus Cook [1891] AC 297** where the Court held that the Court must give the natural meaning to the

language of the deed [contract].

21. The Respondent on their part submitted that the claim is that the Claimant had 10% commission but could not explain how the 5% claimed arose. That the evidence that there were further contracts of employment to justify a claim for 10% is not supported by any evidence. Documents produced to support such claims are not signed by the Respondent or on their letter head and should be inadmissible. There was no evidence of any 15% commission that had been agreed upon in any documents produced.

22. The Respondent also submitted that they paid commissions differently at 5% for events and 10% for advertising on the basis that event costing had high costs and only from the surplus would commissions arise. The commissions set out by the Claimant relate to events at 5% and the Respondent is willing to pay KShs.132, 114.08. Some items have since been paid as they were for advertising. Some clients paid for different events and commissions due were thus computed but not on the basis that the Claimant was entitled to a 15% commission.

Determination

23. As set out above, the Claimant in drafting the memorandum of Claim has not complied with the provisions of Rule 4 of the Court Rules where it is a requirement to set out the issue in dispute. That notwithstanding what emerged at the hearing is the contested commissions due and owing to the claimant. The employment of the Claimant is also contested as well as the computation of the commissions claimed.

24. I should also set out here that in the submissions of the claimant, great reliance is on old legislation and foreign authorities or cases from the High Court. Employment and labour relations is now a right protected under the Bill of Rights pursuant to the provisions of article 41 of the constitution. With this right, the Court has created wide jurisprudence based on claimed under the Employment Act and the powers/jurisdiction of the Court under the provisions of the Employment and Labour Relations Court Act. The shift is now on the shift/change brought about with regard to what is fair or unfair in employment and labour relations as well as the new concepts now found in the Court decision with regard to wrongful and or unlawful labour practices.

25. The jurisprudence therefore espoused by the Claimant in the written submissions should be contradistinguished with the current context, the applicable law and noting the issue in dispute make reference to the challenge then posed. Such a find to be a good practice.

26. Section 10 of the Employment Act now make it mandatory upon the employer to give an employee a written contract of employment spelling out the terms and conditions of work and where this is not possible to be issued immediately, such a document should be issued within the first two (2) months of employment.

10. (1) A written contract of service specified in section 9 shall state particulars of employment which may, subject to subsection (3) be given in instalments and shall be given not later than two months after the beginning of the employment—

27. In the case of **Nixon Brown Adege versus Geo-Sat Solutions Limited, Cause No.417 of 2015**, the Court in addressing the importance of having a written employment contract held;

Such an employment contract/letter of appointment gives an employee the terms and conditions of employment and creates parameters within which an employer can be able to monitor the employee

28. This was also given much emphasis in the case of **Chacha Mwita versus KEMRI, Cause No.1901 of 2013** where the Court held that;

... Where there is a written contract between parties, this Court is to construe it in the terms and

conditions outlined as between the parties unless there is an illegality or a matter subject to interpretation. Where there is a fixed-term contract, parties are to outline the exact terms as required under section 10 of the Employment Act.

29. Where there is a contest as to whether such a document is issued or not, the employer has the duty to produce the employment contract issued to the employee with reference to section 73 read together with section 74 of the Employment Act. In this regard, the Respondent admitted that they employed the Claimant and had an employment contract but the document produced as a letter of offer or employment as account manager is not issued by them. In that case therefore, the Claimant had the burden to prove as to how annexure 2 to her claim, set out as an offer of employment letter dated 31st August 2011 was issued. This is on the simple reason that on 17th January 2011 the Claimant was issued with a contract of employment and the terms of such employment set out therein. This letter is signed for the employer save that the part of the Claimant is not signed. This letter is also on the letter head of the respondent, the employer. The contested appendix 2 is *offer letter as account manager* and such offer is not signed by the Respondent nor has the Claimant accepted the offer. This letter is also not on the letter head of the Respondent as the entity that was offering the employment. This is in contrast to annexure 3, which though not signed as confirmation to what is set out therein, it is on the letter head of the respondent. The Claimant does not explain why she has not signed both documents, the letter dated 31st August 2011 [offer letter as accountant] and letter dated 6th March 2012 [offer letter as editor].

30. What is left is the letter dated 17th January 2011. This was the contract of employment for the Claimant as columnist for CIO East Africa publication. Under this contract she was to pen 2 monthly online articles of 600 words; do an 800 word column for the print publication; and have additional content for a news publication. Appendix 1 is evidence of this employment.

31. I find no dispute with any issue with regard to this contract of employment.

32. The claim is that the Claimant was also employed by a Respondent affiliate CIO East Africa. A contract was issued dated 31st August 2011 for the position of Account Manager and where the Claimant was to engage and plan for revenue general activities by advertising sales; advertorials and paid for supplements; online advertising; run CIO events; customer service; and a columnist. I take it that it is from this role that problems arose.

33. To support the employment under contention is the unsigned contract and contested by the respondent. CIO East Africa though said that the Respondent was an affiliate, is set out as having separately contracted the Claimant under the unsigned contract. The signatory set out under this contract is Andrew Karanja, the witness called for the Respondent though his capacity therein is not stated.

34. Of interest is annexure 1 and 3 which are both on the letter head of the respondent. Annexure 1 is signed but the signatory is not indicated while annexure 3 is not signed and just like the other the person to sign is not stated. This seems to be the practice at the respondent.

35. However, annexure 2 is a complete difference. It neither has a signature of a letter head save that the person to sign is stated to be Andrew Karanja. Where the employee under this contract was to be the account manager for duties under CIO related work, the only Respondent herein is Communication Ultimate Limited. There is no nexus given to CIO East Africa.

36. Did the Respondent herein then fail to pay the Claimant her dues?

37. As set out above, the only valid document is the contract dated 17th January 2011. However this letter does not say much. What is clear is the evidence by the parties. The respondent's witness gave emphasis that they paid commissions at 10% and also paid 5% upon mutual agreement. That 5% was paid on events while 10% was paid on advertisement. This was challenged by the Claimant to the extent that the payable commissions had been agreed at 10% and only in one event the CIO100 annual awards competition, she was to be given an additional commission of 5% making the due commission 15%. In

the claimant's states at paragraph 11 she avers that;

... There has never been any time in the entire period of time I worked for CIO East Africa under Communication Ultimate Limited that I ever accepted or was paid a 5% commission for either an event sponsorship or an event. The 5% commission referred to above was a one-time added incentive for getting delegates to attend the event.

38. This averments and evidence is given credence by the respondent's witness when he testified that;

... The Respondent paid commissions at 10% until November 2012 ... the Claimant was an account manager based on a mutual and written contract... I have seen appendices under page 24 and 25 No. 2 Compulinx and No.3 Compulinx. These invoices were paid at 15% these were paid on demand. There was no dispute and the Respondent paid. We had no issues with these. The first invoice related to delegates and the second related to sponsorship.

39. This evidence, then gives great credence to the averments by the Claimant in that the commissions due were at 10%, there was a policy for such payment but since November 2012 the Respondent had not used it. The Respondent however failed to submit such a policy or the applicable policy when the then percentage policy was suspended what was in use. Equally, Mr Karanja's evidence is of the effect that indeed there were payments of 10% for sponsorship and 5% for delegates.

40. It then became imperative upon the Respondent to set out which payments out of the ones claimed by the Claimant related to events and or sponsorship and the percentage payable. Equally, the Claimant does not aid her case at all. The paid commissions as set out under annexures 5 from pages 17 to 25 are well articulated. These were paid at 10%. The commissions said to be owing at Kshs.267,600.00 is not set out for the Court to assess save for the claim for \$1117.60 set out at page 38 of the memorandum of claim as being due with regard to Mitsumi Distribution FZCO(R) Limited and which related to a full page advert on CIO Magazine October 2013 issue. Such then is a claim with regard to CIO East Africa work.

41. Where the Claimant was under two (2) contracts of employment and she felt aggrieved by the Respondent or its affiliate, noting the nature of employment and the two contracts, written or otherwise as set out in the claim, the two entities, the Respondent and CIO East Africa should have been listed as respondents. Being an affiliate does not remove the legal liability from either or confer the same on both. Where each contract as stated carried a different set of work, however linked or intertwined, then as a rule, both entities should have been listed as respondents.

42. Nothing is set out as owing from the Respondent to create the basis of an award against them. As such, for the Court to award under any head of the percentage commissions claimed would be a serious anomaly.

43. In conclusion and Save for what the Respondent has admitted as Kshs.132, 114.08 as payable, the claims set out are hereby dismissed.

Judgement is hereby entered for the Claimant for the sum of Kshs.132, 114.08. In the circumstances, each party shall meet its own costs.

Orders accordingly.

Delivered in open court at Nairobi and dated this 27th day of January 2016.

M. Mbaru

JUDGE