



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1524 OF 2012

ELVIS MUSENI MURULI.....CLAIMANT

VERSUS

NATION MEDIA GROUP LIMITED.....RESPONDENT

Mr. Mulu for claimant

Mr. Angwenyi for respondent

JUDGMENT

1. The suit was commenced vide a statement of claim dated 27th August 2012 on 30th August 2012.
2. The claimant was employed by the respondent on 1st July 2001 as as a territorial sales supervisor in the marketing and circulation department. The claimant's letter of appointment dated 6th June 2001, contained terms and conditions of employment that stated *interalia* that the claimant would serve in such other capacity as the respondent may from time to time determine.
3. The contract provided that either party may terminate the employment by giving three months' notice or payment in lieu thereof.
4. It is not in dispute that on 16th May 2011, the claimant issued a three (3) months' notice terminating his employment with the respondent.
5. On 17th May 2011 the respondent acknowledged the claimant's letter of resignation and discharged the claimant forthwith from employment upon terms that it would pay the claimant salary in lieu of three months' notice.
6. The respondent however failed to pay the claimant in lieu of notice on grounds that the claimant owed the respondent a debt of Kshs.416,469.50.
7. On 30th May 2007, the claimant was appointed as the distributor for the Thika region. The claimant was to be paid a commission on distributorship. The respondent failed to pay the claimant commission on distributorship for the period 1st June 2007 in the sum of Kshs.1,636,342.25 the claimant in the periods between 1st November 2009 to July 2010 acted as a regional team leader and in August 2010 to January 2011. The claimant was not paid for the latter period.

8. The respondent terminated a gratuity scheme for its employees on 31st December 2010 and did not pay the claimant his benefits from the scheme. Other employees were paid about Kshs.500,000.00 each which the claimant states is also entitled to.

9. The claimant seeks payment of;

- i. three months salary in lieu of notice in the sum of Kshs.214,677.15;
- ii. gratuity in the sum of Kshs.500,000.00;
- iii. unpaid acting allowance for the period August 2010 to January 2011 at a monthly rate of Kshs.16,951.60 totaling Kshs.101,709.10; and
- iv. distributorship commission in the sum of Kshs.1,636,342.25.
- v. arrear salary for seventeen (17) days worked in May 2011 in the sum of Kshs.52,948.20.

Total claim being Kshs.1,909,729.00.

Statement of response

10. In its statement of response the respondent denies having refused to pay the claimant in lieu of notice upon his resignation.

11. With regard to the claim based on distributorship agreement set in paragraph 12 of the statement of claim, the respondent raises a preliminary objection to the claim to the effect that the court lacks jurisdiction to enforce distributorship agreement.

12. The respondent admits that the claimant was entitled to an acting allowance for the period 1st November to July as a regional team leader.

13. With regard to the claim for gratuity, the respondent denies the claimant was entitled to the same since he had not worked for ten (10) years as required under respondent's gratuity scheme policy.

14. The claims for notice pay, unpaid acting allowance for period August 2010 to January 2011 are denied and also denies having introduced circulation allowance as claimed.

15. Subsequently and on 5th June 2011, the respondent filed a notice of preliminary objection dated 4th June regarding lack of jurisdiction of the court to entertain the claim based on commission on distributorship. It was agreed that the objection be dealt with during the hearing of the case.

16. The claimant filed witness statement dated 17th February 2015 on the same date and adopted the same as his sworn testimony before court. In the statement, the claimant explains in detail the essence of the claims set out in the statement of claim and in particular confirming the following;

- i. He resigned giving three months notice on 16th May 2011 but the respondent waived the notice period opting to pay in lieu of three months notice.
- ii. That his basic monthly salary at the time of resignation was Kshs.93,438.65 and was therefore entitled to payment of Kshs.280,315.95 in lieu of notice.
- iii. That he had worked for 17 days in May 2011 and was not paid the salary in respect thereof in the sum of Kshs.52,948.20. He sought interest on these two amounts with effect from 17th May 2011.
- iv. That on 31st May 2007, he was transferred from Mombasa to Thika was verbally instructed to take up additional duties effective 1st June 2007 and that he was to take up additional duties of a distributor. This he did for a period of five (5) months.
- v. That as a distributor he was entitled to a commission on the sales that was ordinarily paid to distributors who were externally contracted by the respondent. This amount is in the sum of Kshs.1,036,342.25 as claimed.

That the work of distributorship was performed by the claimant simultaneously with his normal duties.

This is the basis of the claim for commission that was applicable to all external distributors even though in his case, he performed the task while still an employee of the respondent.

vi. That on 1st November 2009, the claimant was appointed regional team leader which fact is not disputed by the respondent. That he was paid acting allowance for the months of 1st November 2009 to July 2011 in the sum of Kshs.16,951.60 per month but was not paid the same for the period August 2010 to January 2011. A period of six months. He seeks Kshs.101,709.50 in this respect.

vii. The claim for gratuity is with respect to a scheme terminated on 31st December 2010. Employees were paid their dues by the respondent upon termination of scheme. The claimant was however not paid hence the estimated claim of Kshs.500,000 and if respondent disputes the amount, respondent should state the correct amount due and owing.

17. The distributorship agreement was terminated while the account had a debit balance of Kshs.416,324.00. The claimant was transferred to Kisumu and a new distributor was appointed.

18. It was up to the respondent to follow up the account and the claimant does not owe this sum. No counterclaim has been made by the respondent. The respondent purported to deduct the said amount from the claimant's terminal dues to which it was not entitled to.

19. Claimant seeks interest from the date the claims accrued. The claimant attached a bundle of documents in support of these claims.

20. The respondent did not call any witness in support of its case and relies on written submissions. The claimant also filed written submissions.

21. Determination

- i. Whether the claimant has proved the various claims sought.
- ii. Whether the court has jurisdiction to entertain the claim for commission emanating from distributorship agreement.

Issue (i)

22. The court is satisfied that the claimant has proved on a balance of probability all the claims set out in the statement of claim and confirmed by cogent and reliable testimony of the claimant contained in his witness statement and oral testimony under oath except the claim for payment of gratuity which remains unsubstantiated by oral or documentary evidence.

23. The respondent did not offer any testimony in rebuttal of those claims.

24. It is the court's finding that the claimant is entitled to payment of;

- i. Three months salary in lieu of notice in the sum of Kshs.280,315.95;
- ii. Kshs.52,948.20 being seventeen (17) days salary for the month of May 2011;
- iii. Kshs.101,709.60 being unpaid acting allowance for six (6) months in the period August 2010 to January 2011.

Issue ii

25. It is clear and by admission of paragraph 3 of the statement of claim the respondent did not contest that the claimant was its employee at all material time between 1st July 2001 the date of employment until 16th May 2011, the date of resignation.

26. It is evident that, the distributorship agreement only added extra duties to the claimant.

27. The dispute on commission is therefore one between an employee and an employer and this court has jurisdiction to hear and determine the same in terms of Article 162(2) of the constitution of Kenya, 2010 as read with section 12 of the Employment and Labour Relations Act, 2011 (as amended).

28. It is not in dispute that commission was payable in terms of the distribution policy of the respondent and the use of the claimant to distribute as a stop gap measure entitles the claimant to payment of the requisite commission. The amount claimed has not been disputed specifically by the respondent.

29. The court finds that the amount for Kshs.1,036,342.25 commission has been proved on a balance of probability to be due and owing as claimant.

30. In the final analysis, the respondent is to pay the claimant as follows;

- i. Kshs.280,315.95 in lieu of three (3) months notice;
- ii. Kshs.52,948.20 being unpaid salary for seventeen (17) days worked in May 2011;
- iii. Kshs.101,709.60 being acting allowance as regional team leader for the period August 2010 to January 2011;
- iv. Kshs.1,036,342.25 being distribution commission for the period 31st May 2007 up to 1st November 2009;
- v. Total amount Kshs.1,409,729.00;
- vi. The amount is payable with interest at court rates from date of filing this suit till payment in full;
- vii. The respondent to pay the costs of the suit.

Dated and delivered at Nairobi this 22nd day of January 2016.

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE