



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

**CAUSE NUMBER 1128 OF 2012**

**NICOLA MUNENE.....CLAIMANT**

**VERSUS**

**NEURAL DIGITAL BROADCASTING LIMITED**

**T/A RADIO UMOJA.....RESPONDENT**

**JUDGMENT**

1. The Claimant in this suit avers that she was employed by the respondent as radio station/program controller. There was no formal letter of appointment however she exhibited business cards and payslips issued to her by the respondent.
2. According to her, she discharged her responsibilities diligently, with integrity and professionally. On 30<sup>th</sup> September, 2011, she avers that the respondent without reasonable cause and justification wrote to her asking her to take a compulsory leave and intimated to her to write a backdated resignation letter as a condition precedent for payment of her terminal benefits. The Claimant avers that the respondent had made up its mind to replace her by designating her as program manager, a post she complains was non-existent within the respondent.
3. The Claimant further complained that the respondent subjected her to a hostile working environment making it impossible for her to discharge her designated duties. She lamented that the respondent did not expound or indicate any disciplinary issue that may have been raised against her or gave her any opportunity to be heard.
4. As station manager, the claimant avers that she undertook sales and marketing on commission. To this end, she states that she procured business on behalf of the respondent from Population Services International (PSI) for some Kshs.13,820,014.88 against which she claims she was entitled to 5% commission.
5. It was the Claimant's view that the conduct of the respondent was procedurally unfair, unjust, inequitable and unreasonable. As a consequence, the claimant seeks an order of this Court directed to the respondent to pay her terminal dues being unpaid salary of February through to April, 30 unutilized leave days, payment in lieu of notice, withheld commission and damages for unfair termination of employment.
6. The respondent on the other hand denied it employed the respondent and avers that the claimant was a consultant.

7. The respondent further averred that it was the claimant who absconded and abandoned the discharge of her consultancy services.

8. At the hearing the claimant attended and gave evidence. She reiterated the averments in the memorandum of claim. It was her evidence that around June, 2011 Ms. Odinga visited her office and introduced a gentleman by the name Oyier as the General Manager. She was asked to vacate her office for him and allocated an alternative office. She was further asked not to engage in sales work. She stated that she was given a new designation and issued with new business cards.

9. On 30<sup>th</sup> September, 2011 she stated that she was given a letter of compulsory leave but she refused to accept the letter. She was never paid fully for some months. It was her testimony that in the months of January to March, she was on half salary. Regarding leave she stated that she never went on leave for the one year and nine months she worked for the respondent.

10. Employment Act at section 9 obliges an employer to issue written appointment letter to every employee whose engagement in aggregate exceeds three months or whose performance of designated work cannot be reasonably expected to end in less than three months. The Act further provides under section 10(7) that if in any legal proceedings an employer fails to produce a written contract or the written particulars, prescribed, the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

11. Apart from mere denial and averment that the claimant was not an employee but rather a consultant, the respondent did not attach any document to vouch for these allegations. The claimant on the other hand exhibited business cards as well as payslips issued by the respondent to show that indeed she was employed by the respondent. To this extent the respondent has failed to discharge the burden of proof placed upon it by law.

12. Further under section 43(1) of the Employment Act, in any claim arising out of termination of a contract, the employer is required to prove the reason for termination and where such employer fails to do so the termination shall be deemed to be unfair.

13. The respondent in this matter filed a response to the claim through Ms. Nyachae and Ashitiva Advocates who by an order of the Court made on 20<sup>th</sup> February, 2014 were granted leave to cease acting for the respondent.

14. At the hearing on 24<sup>th</sup> November, 2014 the respondent, though served did not appear in Court to defend the claim. The matter therefore proceeded ex parte.

15. From pleadings, supporting documents, and the claimant's testimony in Court, I am persuaded that the claimant has on a balance of probability, proved her claim against the respondent and the Court awards her as follows:  
Kshs.

<b>(a) Unpaid salary for February to April 2010...</b>	<b>300,000</b>
<b>(b) Payment in lieu of notice .....</b>	<b>200,000</b>
<b>(c) Six months wages for unfair termination</b>	
<b>of Employment.....</b>	<b><u>1,200,000</u></b>
	<b><u>1,700,000</u></b>

15. The claim for withheld commission was not sufficiently proved and is hereby disallowed. This award shall be subject to taxes and statutory deductions. The claimant shall have costs of the

suit.

16. It is so ordered.

Dated at Nairobi this 18<sup>th</sup> day of February 2015

Abuodha J. N.

Judge

Delivered this 18<sup>th</sup> day of February 2015

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge