



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 290 OF 2014

REGINA AJWANG'.....CLAIMANT

VERSUS

FREE HOLIDAY LIMITED .....RESPONDENT

JUDGMENT

INTRODUCTION

1. This is a Claim for Kshs.652720 being compensation for unlawful termination of the Claimant's employment by the respondent on 5.5.2014. The claimant avers that she was employed by the respondent on 7.6.2013 as sales and marketing coordinator for a monthly salary of Kshs. 40,000 but in February 2014 the parties agreed to change the mode of payment from monthly salary to Kshs. 5000 commission for every client she registered into the respondent's company. The effective date of the new terms was March 2014. It is the claimant's case that the respondent breached the newly agreed contract by failing to pay commission in respect of 24 clients registered between March and April 2014 and verbally terminated her employment on 5.5. 2014.
2. On the other hand the respondent has denied the agency relationship for payment of commission allegedly entered into February 2014 and maintains that the claimant was a salaried employee for a fixed term contract running from 20.6.2013 to 20.6.2014. She avers that the claimant's salary was Kshs.20000 per month and denies the claim for accrued commission. In addition, the respondent avers that the claimant absconded work from 2.5.2014 and never returned to hand over property and work records belonging to the respondent and as such prayed for the Suit to be dismissed.
3. The Suit was heard on 16.9.2014 and 9.2.2015 when the client testified as CW1 and the respondent called Mr. Ananel Adim as RW1. Thereafter both parties filed written submissions.

CLAIMANT'S CASE

4. CW1 was employed by the respondent on 7.6.2013 under a verbal contract as a Sales and Marketing Coordinator. Her appointment was on permanent basis. Her duty was to sell a trip to Israel to members of Bandari Sacco, churches and any other person interested to visit Israel. Her salary was Kshs.40000 of which Kshs.20000 was recorded in the payroll while Kshs.20000 was to be paid to her secretly through RW1 so that the secretary would not know and raise complaint that a new staff was earning more than her. The said pay arrangement of the Kshs.40000 was followed in July and August 2013 but in September 2013 things changed. CW1 was signed for the

- Kshs.20000 in the office usual but RW1 paid here only 10000 out of the 20000 secret pay and promised to pay the balance later, which was never paid. From October to Cw1 was not paid her salary because RW1 told her that the respondent had low income.
5. As a result of inability to pay salary, the two parties herein agreed to change the mode of payment from salary to a commission of Kshs.5000 for every client CW1 causes to sign for the trip to Israel but just like the previous contract, the new contract was never written down. That however never deterred CW1 who recruited 28 members from Nyali Baptist plus another one from the Stannic Bank. Out of the 29 recruits, 24 had fully paid for the trip by April 2014 for which she was entitled to kshs.120000 commission. However cw1 was only paid Kshs.20000 as salary and RW1 refused to pay the commission as agreed. CW1 continued with her work until 5.5.2014 when RW1 told her that she was not working well and dismissed her without any prior notice or fair hearing. CW1 maintained that she performed well and denied even deserting work. She therefore prayed for Kshs.400000 being compensation for unfair termination, commission arrears of Kshs. 100,000, Kshs. 40,000 being salary in lieu of notice and refund of Kshs.2200 and 3520 being the remitted NSSF and NHIF deductions.
  6. On cross examination by the defence counsel, CW1 maintained that she was employed under an oral contract which was entered into while CW1 and RW1 were driving from Nkrumah Road to the Port of Mombasa. She maintained that her salary was Kshs.40000 plus Kshs.5000 for airtime and transport. She further maintained that her contract was for permanent employment and not short term. She denied existence of any agreed sales targets. She denied knowledge of the written contract that was filled by the defence. She further denied the signature thereon. She stated that she gave Mary Warui copies of her KRA PIN Certificate, National Identity Card and Diploma Certificate. She also gave her NHIF Card, NSSF Card and Bank Account number to Beryl. CW1 maintained further that RW1 used to pay the secret kshs. 20000 at his office of Aroma Cafe 2 to 3 days after receiving the other Kshs.20000 in the office. CW1 denied receiving any pay in April 2014. She further denied that she was an agent of the Respondent and maintained that she was at all material times an employee. She confirmed that although she was promised commission from February, 2014 she continued to receive the half salary only.
  7. She denied service of any warning letter and denied the signature which acknowledged receipt of the letters. She denied even being absent on duty until 5.5.2014 when she was dismissed verbally by the RW1. She contended that her net salary after deductions of NSSF and NHIF was Kshs. 20000/-.

#### DEFENCE CASE

8. RW1 is the Director of the Respondent. His business is mainly to send tourist to break and his main clients are churches. He admitted that CW1 was his employee vide contract dated 26.6.2013 which she signed and witnessed by Mary Warui Mbogo. Her salary was kshs. 20000 plus transport, airtime and open bill of Aroma Cafe at the Port where she had a table. CW1 was not entitled to any commission. He confirmed that CW1 recruited 49 clients but only 3 successfully went to Israel. He contended that the agreed target was 50 clients per month and CW1's performance was poor. RW1 then wrote complaint letters on 9.9.2013 and 1.1.2014 about the poor performance and finally he dismissed her. In May 2014 CW1 deserted work after realizing that there misrepresentation regarding the actual number of clients recruited would be discovered. She did not report to work even after rw1 sent to her the letter dated 9.5.2014 through a relative.
9. RW1 denied the alleged salary of kshs.40000 alleged by RW1. He stated that NSSF and NHIF was not remitted for cw1 because she never availed National Identity card. He however took her identity card number during cw1's testimony in court and went to pay for all her NSSF arrears plus penalty.
10. On cross examination by cw1's counsel, RW1 stated that CW1 gave her account details to the accountant. He confirmed that the postal address indicated for the CW1 in the contract belongs to her advocate in this matter. He denied knowledge of how the advocate's address found its way into the employment contract and in all the subsequent correspondences written to CW1. He admitted that there were no agreed targets for the CW1 but maintained that she performed poorly. He admitted that NSSF deductions of Kshs.200 per month was made but it was never remitted due to lack of cw1's identity card.

## ANALYSIS AND DETERMINATION

11. After considering the pleadings, evidence and submissions, there is no dispute that CW1 was employed by the respondent from June 2013 as sales and marketing officer. There is also no dispute that CW1 was dismissed by the respondent in May 2014. The issues for determination are whether the termination of CW1's employment was unfair and whether she is entitled to the reliefs sought.

## UNFAIR TERMINATION

12. RW1 stated in evidence that he dismissed the claimant because she performed poorly in her sales duties and covered up the same by preparing a misleading report which led to cancellation of booking. RW1 however conceded that there were no agreed performance targets between him and CW1. CW1 on the other hand has denied the alleged poor performance and maintained that she recruited a considerable number of clients all of whom paid and traveled to Israel including members of Nyali Baptist Church, JCC, Stanbic Bank and Bandari Sacco. The evidence that she was dismissed without prior hearing and in breach of the Employment Act was not rebutted.
13. Under section 41 of the said Act, before an employer dismisses his employee on ground of misconduct and poor performance, he must explain to the employee the reasons for the intended dismissal and thereafter accord him a chance to defend himself. The said proceedings must be conducted in a language of the employees understanding and the employee must be accompanied by a fellow employee of his choice who must also be accorded a hearing. In this case the respondent did not follow the said procedure before dismissing the claimant on 5.5.2015. She has also not proved the reason for the dismissal. She did not prove that CW1 performed poorly in relation to some mutually agreed targets, absconded work and prepared misleading sales reports. Consequently the court find on a balance of probability that the dismissal of the claimant from employment was unfair within the meaning of section 45 of the Employment Act because it was grounded on an invalid and unfair reasons, and it was reached without following fair procedure.

## RELIEFS

14. Although the claimant has pleaded agency relationship between him and the respondent from February 2014, she denied such agency in her testimony and maintained that she remained an employee of the respondent upto 5.5.2014 when she was dismissed. The same position was maintained RW1 In his testimony. Consequently the court proceeds to deal with the reliefs sought on the basis that CW1 was an employee and not a commission agent. In addition, the claimant's contention that her salary was Kshs. 40000/= is dismissed for lack of evidence to disprove the employer's evidence that her net salary was Kshs. 20000 plus sundry allowances for airtime and transport. RW1 did not dispute the sum of Kshs. 5000 quoted by CW1 as her allowances for airtime and transport. The court will therefore access damages based on the 25000 gross monthly pay.
15. Under section 49 of the Employment Act, an unfairly dismissed employee is entitled to salary in lieu of notice, accrued benefits plus compensation of upto 12 months gross salary. The Claimant is therefore awarded kshs. 25000 as one month salary in lieu of notice. He will also get 1¾ leave days per month complete of service on pro-rata basis. CW1 served for 11 months and earned 19.25 leave days for which she is awarded Kshs. 12833.35. CW1's evidence that she was not paid her salary for October to February 2014 was not rebutted by employment records or at all. She is therefore awarded Kshs. 80,000 as prayed. She is also awarded 8 months gross salary as compensation for unfair termination being Kshs. 200,000. Lastly she will get refund of her NSSF and NHIF deductions which were never remitted to the respective agency. Although RW1 alleged that the deductions were remitted after CW1's testimony, no documentary evidence was produced as exhibits to support the alleged late remittance. The Claimant is therefore awarded Kshs.2200 and 3520 as refund of NSSF and NHIF respectively as prayed. The claim for commission is however dismissed in view of the finding above that CW1 was not an agent. In addition CW1 did not prove that she was entitled to both salary and commission.
16. For the reasons stated above, judgment is entered is entered for the claimant in the sum of Kshs.

323,553.25 plus costs and interest.

**Dated, signed and delivered this 15<sup>th</sup> May, 2015.**

**O. N. Makau**

**Judge**