



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 1441 OF 2013**

**GEORGE MUTETI.....CLAIMANT**

**VS**

**EXPRESS DDB KENYA.....RESPONDENT**

**AWARD**

**Introduction**

1. George Muteti, the Claimant in this case worked for the Respondent as Marketing Manager from 15th November 2011 up to 22nd July 2013. He has brought this action seeking compensation for unfair termination as well as payment of terminal dues. The Claimant's claim is contained in a Memorandum of Claim as amended on 11th October 2013. The Respondent filed a Memorandum of Defence on 27th September 2013 which was amended on 17th October 2013.

**The Claimant's Case**

2. The Claimant pleads that he was employed by the Respondent in the position of Marketing Manager by an employment contract dated 15th November 2011. The Claimant was entitled to a monthly net salary of Kshs.30,000.00 in addition to commission on business procured through his marketing efforts. The commission was to be based on net profit.

3. On 15th November 2012, the Claimant was issued with a new contract which was backdated to 15th November 2011, the commencement date of the Claimant's employment. The Claimant states that under his contract of employment, he was entitled to commission at the rate of 20% of net profit.

4. He was required to deposit the sum of Kshs.20,000.00 with the Respondent as security. This amount was recovered in twenty equal monthly installments of Kshs.1,000.00 each.

6. In the month of June 2013, the Claimant lodged a claim for accrued commissions in the sum of Kshs.449,513.00. He states that as he pursued payment of his earned commission, he was issued with a revised employment contract reducing his commission rate to 2.5 % and upon his refusal to sign the revised contract, his employment was terminated.

7. The Claimant avers that the termination of his employment was unlawful and unfair. He claims the following:

- a. Accrued commission at 20% of net profit.....Kshs. 449,513.00
- b. Withheld salary for July 2012.....30,000.00
- c. One month's salary in lieu of notice.....30,000.00

d. 17 days' leave.....	17,000.00
e. Compensation for unfair termination.....	360,000.00
f. Security deposit.....	20,000.00
g. Service pay.....	60,000.00
h. General damages	
i. Certificate of service	
j. Costs and interest	

### **The Respondent's Case**

8. In its Memorandum of Defence filed on 27th September 2013, the Respondent admits having employed the Claimant by contract dated 15th November 2011. The said contract lapsed on 15th November 2012 and the parties entered into a new one dated the same day. Under the new contract, the Claimant was entitled to commission based on 20% of net profit on each job procured through his marketing efforts.

9. It is the Respondent's case that the Claimant did not earn any commission during the period in issue. The Respondent denies the Claimant's claim that he was coerced into signing a fresh contract lowering his commission to 2.5%. The Respondent also denies terminating the Claimant's employment and states that it was in fact the Claimant who deserted duty from 20th July 2013. The Respondent avers that the Claimant was only entitled to Kshs.19,020.70 in final dues.

### **Findings and Determination**

10. The following are the issues for determination before the Court:

- a. The contract terms applicable to the Claimant's employment;
- b. Whether the Claimant deserted duty or was terminated and if he was terminated whether the termination was lawful and fair;
- c. Whether the Claimant is entitled to the remedies sought.

### **The Terms of the Claimant's Employment Contract**

11. The Claimant states that his contract of employment dated 15th November 2012 was backdated to 15th November 2011. The Respondent on the other hand sought to make a clear distinction between the terms contained in the two contracts with particular focus on the commission rate payable to the Claimant. In the contract dated 15th November 2011, the Claimant's commission was to be based on quantities and values attached to each order.

12. Significantly, the two contracts have 15th November 2011 as the commencement date and this is the point of contention. According to the Claimant, the terms of contract as contained in the second contract were backdated to 15th November 2011, the date of the first contract. On its part, the Respondent states that the commencement date of the second contract was 15th November 2012 which was also the date of the contract.

13. It was submitted on behalf of the Claimant that simple terms of a contract such as the commencement or effective date should not be subjected to complex construction. **Black's Law Dictionary (2nd Edition)** defines a commencement or effective date of a contract as the documented date when something is applicable or in effect. An effective date is not the same as the date of the contract nor is it the same as the execution date. It is therefore in order to have an effective date being much earlier than the contract date or the execution date

14. The two contracts have 15th November 2011 as the commencement date and I do not think this was accidental. Indeed, the Respondent's Chief Executive Officer, Mohan Singh Dhariwal told the Court

that he signed the second contract which pegged the Claimant's commission at 20% of the net profit because the Claimant had complained of the unfavourable commission rate provided in the first contract.

15. It seems to me that it was the intention of the parties that the terms of the Claimant's commission contained in the second contract dated 15th November 2012 be backdated to 15th November 2011, the date of the first contract. As a result, I reject the Respondent's averment that the commencement date of 15th November 2011 appearing on the second contract is a clerical error.

16. The role of the Court is to enforce the wishes of parties as evidenced in the terms of the contract and if they wish to backdate those terms and no law has been broken, then the Court will not interfere. As held by the Court of Appeal in *National Bank v Pipe Plastic Samkolit (K) Ltd & Another [2001] eKLR*, a court of law cannot rewrite a contract between parties who are therefore bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.

17. As far as employment contracts are concerned, the Court will check if there are any unconscionable clauses and if none exist and no law has been broken, the Court will confirm the wishes of the parties as evidenced in contract. I find nothing unusual, illegal or unconscionable in the Claimant's contract of employment dated 15th November 2012 and backdated to 15th November 2011 and will therefore proceed to enforce the terms as contained therein.

18. Having settled the issue of the applicable commission terms, I will now deal with the actual commission payable. The parties expended a lot of effort trying to draw a demarcation of the clients towards whom the Claimant was to direct his marketing efforts and thereby earn commission. Towards this end, the terms '*prequalified*' and '*non prequalified*' meaning that the Respondent was or was not on the suppliers shortlist were used. However, after taking evidence from the parties, it emerged that as far as the Claimant's marketing efforts were concerned, what mattered was not the prior relationship between the Respondent and the clients but the level of marketing effort.

19. According to the Claimant's employment contract, he was engaged as *Marketing Manager, Below the Line*. The Respondent's Chief Executive Officer, Mohan Singh Dhariwal testified that the Claimant's job entailed marketing at the direct single sourcing level where the rigorous procedures of public procurement were not required.

20. The Claimant did not offer any evidence to counter the description of his position as presented by the Respondent and the Court found no reason to disagree. I therefore find that the Claimant was only entitled to commission for his marketing efforts below the line.

21. There was also disagreement on the meaning of '*net profit*' on which the Claimant's commission was to be based. According to the Claimant, he was entitled to commission at 20% of the profit earned on each job procured through his marketing efforts. The Respondent on the other hand held the position that in arriving at the net profit, overhead costs related to the specific job were to be discounted.

**22. Black's Law Dictionary (Ninth Edition) defines net profit as:**

***“Total sales revenue less the cost of the goods sold and all additional expenses.”***

23. In my understanding net profit also known as the bottom line is calculated by subtracting expenses from revenue. For a trading company such as the Respondent, each activity must necessarily carry its share of expenses with the difference being declared as net profit for the particular activity. It is from the figure of net profit per job procured that the Claimant was to earn commission at 20%. I do not know of any other way of calculating net profit.

### **The Claimant's Separation from the Respondent's Employment**

24. The Claimant told the Court that when he reported for duty on Monday, 22nd July 2013 he was locked out. Conversely, the Respondent stated that the Claimant deserted duty from Saturday, 20th July

2013. These dates are important because although Saturday was a working day at the Respondent Company, the Claimant testified that he had verbally been allowed not to attend work on that day as it was his day of worship.

25. From the evidence adduced before the Court, the Claimant never attended work on Saturday and for close to two years, the Respondent appears to have acquiesced to this arrangement thus giving a tacit approval to the Claimant to absent himself from work on Saturdays.

26. It seems to me therefore that the Respondent created a legitimate expectation in the Claimant that he could observe Saturday as his day of worship without inviting sanctions (see *Prisca Kemboi & 2 Others v Kenya Post Office Savings Bank [2014] eKLR*). Consequently, the Claimant's absence from work on Saturdays did not amount to desertion of duty.

27. The Respondent produced a litany of warning letters addressed to the Claimant on account of failure to report to work on Saturdays. The Claimant however denied receiving any of these letters and in the absence of documented acknowledgement of receipt, the Court could not verify whether the warnings were properly served on the Claimant.

28. If indeed the Claimant deserted duty, the proper course of action would have been to issue him with a notice to show cause why disciplinary action should not be taken against him. Granted that desertion of duty is a serious offence that renders an employee liable to summary dismissal, an employer who raises it as a defence in a wrongful termination action must show a disciplinary trail.

29. In the instant case, there was no evidence of any disciplinary process initiated by the Respondent on account of the Claimant's desertion. The Court therefore rejects the Respondent's defence in this regard and agrees with the Claimant's testimony that he was wrongfully terminated vide an unlawful lock out.

## Remedies

30. In view of my finding that the Claimant's employment was wrongfully terminated I award him four (4) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service as well as the Respondent's conduct in the termination process. I also award him one (1) month's salary in lieu of notice plus salary for days worked in July 2013.

31. The sum of Kshs.20,000.00 held by the Respondent which was variously referred to as security or staff welfare deposit was admitted and is payable to the Claimant. As no leave records were produced to counter the Claimant's claim for leave pay, the claim succeeds and is allowed. Additionally, I allow the Claimant's claim for accrued commission based on 20% of net profit as defined in this award on all *below the line* jobs procured through the Claimant's marketing efforts.

32. The Court found no basis for the claims for service pay and general damages which therefore fail and are dismissed.

33. Ultimately, I make an award in favour of the Claimant in the following terms:

- a) 4 months' salary in compensation for wrongful termination.....  
Kshs.120,000.00
- b) 1 month's salary in lieu of notice.....30,000.00
- c) Salary for 22 days worked in July 2013.....22,000.00
- d) Money held by the Respondent on Claimant's account.....20,000.00
- e) 17 days' leave pay (30,000/30x17).....17,000.00

f) Accrued commission based on 20% of net profit on all *below the line* jobs procurement through the Claimant's marketing efforts to be tabulated and agreed upon by Counsels for the parties within the next 14 days from the date of this award.

34. I further direct the Respondent to issue the Claimant with a certificate of service and to pay the costs of this case.

35. The award amount shall attract interest at court rates from the date of the award until payment in full.

36. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 13TH DAY OF NOVEMBER 2015**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Okemwa for the Claimant

Mr. Mituga for the Respondent