



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT NAIROBI**  
**CAUSE NUMBER 885 OF 2011**

**BETWEEN**

**LILLIAN ATIENO ONDIGO ..... CLAIMANT**

**VERSUS**

**ULTIMATE SPA AND BEAUTY PARLOUR ..... RESPONDENT**

*Rika J*

*CC. Leah Muthaka*

*Lilian Atieno Ondigo the Claimant in Person*

*Mrs. Kuria holding brief for Ms. Wamaitha instructed by Wamaitha Kang'ethe & Company Advocates  
for the Respondent*

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**ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION**

**AWARD**

1. Lilian Atieno Ondigo filed her Claim in Person on 8<sup>th</sup> June 2011. The Respondent filed its Statement of Reply on 21<sup>st</sup> June 2011, and an Amended Statement of Reply on 25<sup>th</sup> January 2012. The Claimant testified and closed her case on 18<sup>th</sup> February 2013. The Respondent testified and closed its case on 6<sup>th</sup> May 2013, through its Accountant/ Manager Anne Wangare Ndung'u. The dispute was last mentioned in Court on 5<sup>th</sup> June 2013 when the Court confirmed receipt of the Parties' Closing Submissions and advised Award would be delivered on notice.
2. The Claimant told the Court she was employed by the Respondent Beauty Parlour as a Hair Braider on 21<sup>st</sup> July 2010, at a basic salary of Kshs. 15,000 plus 50% commission of the total money collected at the Parlour per month. The Claimant worked diligently up to 6<sup>th</sup> March 2011, when the Respondent terminated her contract of employment.
3. Subsequently on 15<sup>th</sup> April 2011, the Claimant wrote to the Respondent demanding to be paid Kshs. 35,000 made up as follows- one month salary in lieu of notice at Kshs. 15,000, March 2011 salary at Kshs. 15,000 and commission of 5,000- total Kshs. 35,000. The Respondent did not pay, necessitating the filing of this Claim in which the Claimant seeks-

- a. Reinstatement to the previous job without loss of benefits;
- b. Without prejudice to [a], the Claimant be paid her full salary and allowances for the period under dismissal;
- c. The Claimant be paid terminal benefits;
- d. The Respondent be ordered to compensate the Claimant in the equivalent of 3 months' salary for unfair termination;
- e. Any other suitable order the Court may deem to grant;
- f. The Respondent be compelled to issue the Claimant her certificate of service;
- g. The Respondent to pay costs of the suit and interest.

4. In cross-examination, the Claimant told the Court she earned a salary of Kshs. 15,000, and commission at 50% of the monthly collection. The Respondent agreed these were the terms of employment. She could not recall the last day worked. It was not true that she was to be paid Kshs. 15,000 for the first 6 months worked, and settle on commission payments after she had built her own clientele base. She was not given any letter of termination. She received Kshs. 5,500 from the Respondent on termination. This was commission and salary for 6 days worked in March 2011. It was not in full and final settlement. She did not go back to work after this. She claimed Kshs. 35,000 in her demand letter in April 2011, and claims a sum of Kshs. 60,000 in Court among other claims. There was notice pay of 3 months that was left out of the demand letter, but included in the Claim before the Court. Hezron Onuon'ga who is not an Advocate, witnessed the Claimant receive Kshs. 5,500. The gentleman did not introduce himself to the Respondent as the Claimant's Advocate.

5. Anne explained that the Respondent business opened operations in July 2010. The Claimant was employed from 21<sup>st</sup> July 2010. She was employed as a Braider, through a verbal contract. She was to work for 3 months, at a salary of Kshs. 15,000, and commission of 50% of her total collections made for the business every month. There were a total of 17 employees. Only 2, including the Claimant, were on salary and commission. Commission earning clients had their own clientele, and would make as much as Kshs. 40,000 in a month. The Claimant was given special consideration because she did not have her own clientele at the beginning to sustain herself on commission; she was therefore placed on both commission and salary at the beginning, for a period of 3 months. After 3 months she had not established her own clientele. The period was extended by 5 months to February 2011. At the end of February, she was told she would now switch fully to commission agency. She was unhappy and absconded. It was not true that the Respondent terminated her contract of employment. The Respondent was ready to continue employing her on commission. She went early in May 2011 with a witness Hezron Onuong'a and agreed to be paid for 6 days worked in March 2011, at Kshs. 3,000 in salary and Kshs. 2550 - total Kshs. 5,550. She left work voluntarily. On cross-examination, the witness testified she was aware the Claimant was advised she would only receive salary and commission for the first 3 months. The Respondent urges the Court to dismiss the Claim.

#### *The Court Finds and Awards:-*

6. The evidence offered by the Claimant was shaky and not convincing; it does not justify the grant of any of the prayers sought. The Court finds the evidence given by the Respondent credible. The Claimant was engaged as a Braider by the Beauty Parlour. She was placed on a monthly salary of Kshs. 15,000 and commission of 50% of the total money collected by her each month. The arrangement was to accommodate her lack of a clientele base. She was given the leeway to build for herself a base, with the Respondent extending her grace period by 5 months, during which she still did not create for herself anything. Other employees, almost entirely, were commission agents.

7. The Claimant did not show any material that would suggest her contract was terminated at the instance of the Respondent. She left of her own volition, after finding the exclusive commission agency proposal unattractive. She has no reason to seek reinstatement, notice pay or compensation. The claim for salaries and allowances for the period out of employment had no justification. She negotiated her way out, and received dues for March 2011 in the presence of her witness Hezron Onuong'a. It was only after she received this amount of Kshs. 5,550, that she came to Court claiming a multiplicity of prayers. Notably she had demanded Kshs. 35,000 from the Respondent in her letter of 15<sup>th</sup> April 2011. There was no

demand of such amount when the Claimant received payment of Kshs. 5,500 in the following month. She claimed the full salary of Kshs. 15,000 for March 2011, while she only worked for 6 days. Lastly, she altered the amount claimed in the demand of Kshs. 35,000, to Kshs, 60,000 [among other prayers]. The Claimant was neither consistent, nor truthful in her evidence. IT IS HEREBY ORDERED-:

***[a] The Claim is hereby rejected in its totality with no order on the costs.***

Dated and delivered at Nairobi this 16<sup>th</sup> day of January 2014

James Rika

Judge