



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 2273 OF 2012

PAUL IRUNGU KOGI CLAIMANT

VERSUS

SKYTECH COMMUNICATIONS RESOURCES LTD ... RESPONDENT

JUDGEMENT

Kubai Musyoka & Co Advocates for the Claimant

J. Maluki & Co. Advocates for the respondent

1. On 12th November 2012, the claimant, Paul Irungu Kogi filed this claim for his unpaid salaries and bonuses against the respondent Skytech Communications Resources Ltd (SCR). On 20th March 2013, the respondent filed their defence and admitted owing the claimed salaries but denied owing any bonuses as claimed. At the hearing, the claimant gave his sworn evidence while the respondent called one witness, Tole Mwakidedi. At the close of the hearing, both parties agreed to file their written submissions dated 7th June 2013 and 5th September 2013 for the claimant and respondent respectively. Parties also attended court to highlight these submissions.

Claimant's case

2. In the memorandum of claim, the claimant states that he was employed by the respondent as a Sales Executive on 1st may 2004 who are engaged in the business of audio visual, broadcasting, communications and ICT supply in various outlets in Nairobi and Mombasa. The claimant was issued with a contract for two years with terms that he was on a fixed monthly salary of Kshs.14, 697.00 with kshs.10, 197.00 as basic salary and a house allowance of Kshs.4, 500.00 and a gratuity benefit of 15%. The contract also provided that where the claimant met sales target at kshs.4,200,000.00 per year or Kshs.350,000.00 per month, the same would earn him a commission at a structured rates based on a scheduled done by the respondent. Further where sales exceeded Kshs.4, 200.000.00, the same was to earn him a commission as per the agreed schedule. Where the claimant reached the threshold target, he was to earn 5% bonus of sales.

3. Based on the set monthly threshold of Kshs.350, 000.00, the claimant earned commissions of kshs.21, 000.00 per month in October, November and December 2004 while in October 2004, the claimant made total sales of kshs.4448, 750.00 and the excess was kshs.98, 756.00 and based on the Kshs.350, 000.00 threshold, he earned commission of Kshs.21, 000.00 and a further bonus of Kshs.4, 938.00, which was over and above the basic and house allowance pay. This practice of earned commissions, bonus, salary and house allowances were paid used on the same formula in subsequent months.

4. As a result of the claimant's good performance, he was promoted in 2005 where the salary increased to Kshs.18, 542.00 inclusive of house allowance. The commissions remained at the same rate. In December 2004 the claimant was transferred to Mombasa office, in June 2006 he was promoted and a new commission matrix was also issued based on the changed status and promotion. This made the salary to go up to kshs.25,900.00 inclusive of housing and the annual target bonus increased to kshs.504,000.00 to be earned through sales target of Kshs.14,000,000.00 per year as well as meeting other objectives. The new target of kshs.504, 000.00 translated to kshs.42, 000.00 per month and that the claimant had an opportunity to extend that target bonus to a maximum of kshs.604, 800.00. In this regard, the bonuses due were to be paid quarterly based on sales performance.

5. The claimant was also issued with a bonus matrix which had a progressive schedule based on his realization of the target of kshs.14 million sales and an annual salary of Kshs.310, 00.00 which translated to kshs.25, 900.00 per month. The claimant would therefore earn his salary together with commissions/bonuses on the 14 million annual target this being 40% of sales and anything exceeding this being 60% of set target, the claimant would earn an additional bonus based on the matrix given in a multiplier. The matrix extended up to a multiplier of 100% and using the same formula, the claimant could extend this upward based on annual sales to claim his quarterly commissions.

6. In 2006 the claimant was transferred back to Nairobi. In December 2007 the claimant outlined his sales for the year and using the given matrix, he had reached a target of Kshs.26, 201,367.33 which was beyond the 14 million target and using the matrix multiplier was 125% that attacked a multiplier of 450% translating to Kshs.2, 408,700.00 commission due at kshs.200, 752.00 per month and thus the total commissions due were amounting to kshs.6, 651,120.00. for the claimant to arrive at this figure, he had worked on a contract with Kenya Airports Authority [KAA] valued at kshs.22,535,851.00 where 40% had been paid and the balance was paid after a certificate of completion was issued on 5th February 2009. In 2009 the claimant got a tender with digital language laboratory system with Kenya Meteorological department of Kenya, valued at kshs.7,970,720.00 where 50% was deposited and by the end of 2009, the new bonus due was at kshs.490,968.00. That by 2010, the unpaid bonus all amounted to kshs.6, 340,320.00 but the respondent stated that they would only pay kshs.2, 097,900.00 less tax leaving a net due at Kshs.1, 527,409.50 but this was also never paid.

7. In April 2008 the claimant was again promoted and salary adjusted to kshs.36, 100.00 per month and this increased the matrix variable further. However on 31st July 2010, the claimant resigned from his position with the respondent by giving 30 days' notice and further made a demand for due bonuses, salaries not paid. On 16th August 2010, the respondent accepted the resignation of the claimant and stated that the bonus would be paid once full payments from the contracts were received from the clients while salaries would be paid together with others due to all employees. That by December 2010, KAA and Kenya Meteorological Departments had made their final payments but the claimant has not been paid his bonus and the salaries unpaid.

8. The claim is for;

- i. *the bonus due amounting to Kshs. 6,340,320.00 less tax balance due being kshs.4, 497, 092, 10 for 2007*
- ii. *Bonus for 2009 being kshs.617, 310.00 less tax and balance due being kshs.490, 986.00*
- iii. *Salary arrears due for May, June, July and August all totaling to kshs.144,400.00 less tax balance due being kshs.122,928.70*
- iv. *Interest on the sums awarded together with costs of the suit.*

9. In his evidence the claimant stated that he was employed by the respondent in 2004 and left in 2010 where he had a fixed salary that was increased from time to time and this was put into writing as attached in the memorandum of claim. To the salary there was a housing allowance and he was also entitled to bonuses that were calculated on a formula issued by the respondent from all the sales the claimant made. All his bonuses were paid apart from those that arose for sales in 2007 and 2009 and despite there being sales, the method to calculate the bonuses due is contested by the respondent. Some contracts that were sourced by the claimant have not been paid in full. There were unpaid salaries that have been admitted by

the respondent. The only outstanding contested issue is the bonuses entitled to the claimant.

10. The claimant further stated that he earned his bonuses where commissions were paid but the bonuses due for 2007 and 2009 were not paid on the grounds that he did not attain a consistent target for six (6) months. That the following commissions were paid;

- October 2004 a commission of Kshs.21,000.00 was paid and a bonus of Kshs.4,938.00 was not paid;
- November 2004, a commission of kshs.21,000.00 was paid but there was no bonus due;
- December 2004, a commission of Kshs.21, 000.00 was paid and a bonus of kshs.25, 345.50 was not paid.

11. The claimant was promoted to a Senior Sales Executive and the salary changed but the terms with regard to commissions and bonuses were not changed. These bonuses only accrued from new clients as the old clients were in a different category. The claimant was then transferred to Mombasa but his benefits did not change. He was promoted to Corporate Sales where his sales targets went up pegged on yearly sales at 14 million. The calculations were based on his fixed salary and the matrix for bonus calculations issued by the respondent. Where the claimant sold 60% of the 14 million, he earned bonus and anything above 65% had a bonus based on the multiplier increased from the matrix issued by the respondent.

12. In 2006, the claimant was transferred back to Nairobi office. In 2007 the claimant exceeded his sales targets by 80% where he made sales of Kshs.26 million before tax. He thus progressed the matrix issued by the respondent to arrive at the commensurate bonus. The claimant made so many sales and he had a long list of clients. Some sales related to old clients who had stopped making business with the respondent and so were needed back and therefore the claimant went out to them and he claims commissions on these sales. He made sales from KAA on a contract worth over 19 million and the total sales were all amounting to over 26 million shillings. The claimant thus asked the respondent to change the matrix to allow him calculate the bonus due for the year since his target had been 14 million which he had gone above. There was a meeting to discuss this issue, the claimant was asked to send an email with the details of his clients and how the amounts arose. The amounts sold were agreed but the bonuses due were not agreed. The respondent used a different calculation, which was different from the multiplier that the claimant used. The claimant extended the multiplier and based on his target of 14 million, his salary then and noting that it only went up to 125%, he used the same logic and his current sales of 26 million and arrived at a multiplier of 190% and using the variables of his salary the multiplier should have been at 1360% and the bonus amounting to Kshs.6,651,120.00 less fixed pay of Kshs.310,800.00 and the bonus due for 2007 was therefore Kshs.6,340,320.00 which the respondent failed to pay.

13. The claimant further stated that of the KAA contract the first payment of 40% was made but during the execution of the contract there were delays where the client sent to the respondent liquidated damages caused by the delay. This loss should therefore be borne by the respondent and not the claimant. His interests should not be affected. The claimant and the respondent discussed the issue where the respondent admitted to having received the 1st payment from KAA.

14. Another contract that the claimant handled was that to the Kenya Metrological Department that was worth Kshs.12, 900,537.76. 50% was paid upon supply and the balance was due upon completion. The first part was paid but before the second could be paid; the claimant had resigned from his position with the respondent. He thus claimants his bonus due. The unpaid bonuses relate to 2007 and 2009. The contracts with regard to 2007 have all been paid by the various clients.

15. In response to the defence filed by the respondents, the claimant stated that he was never negligent in his duties and that he never met his targets as the big clients had not paid on their contracts and the small clients were negligible as they were part of the small lines and small boxes. That the claimant was not negligent and no such issue was raised before he resigned. The claimant is now seeking from the court to allow his extension of the respondent's matrixes to accommodation the sales that went above the set target noting that the variables were not supposed to stop at 450% and could be extended and thus the

bonus due in 2007 was kshs.6, 340,320.00 and the bonus for 2009 was Kshs.617, 310.00 and the admitted salary arrears all to be paid with interest and the costs of the suit.

16. In cross-examination, the claimant confirmed that his letter of appointment was specific to the extent that it stated that his efforts and abilities were to be recognized to the extent that he gave his best, which he did. In his use of the matrix, he took it as a dynamic tool that could be extended based on need and sales achieved for which he over-achieved his target and thus ought to have been allowed to extend. He signed the matrix and the respondent as well and that any alterations were to be agreed upon and in this case, the extension had not been approved. He was to consult if there was need for clarification. The bonus claims were not approved.

17. The claimant also confirmed that on the matrix *small hires* and *small boxes* were not part of the bonus schedule. That majority of 2007 sales were on *small hires* and *small boxes* and these were not supposed to attract a bonus. The claimant was not sure that the balance on KAA contract was paid or what was marked as receivables was an indication that payment had been received.

Defence case

18. In defence, the respondent stated that the said bonuses earned by the claimant were not by merit but were merely *ex gratia* given that the claimant did not meet the monthly sales targets consistently. That the claimant misinterpreted the terms of the footnote in the bonus table and matrix in that the same did not provide for a sales achievement over and beyond 125% and/or a multiplier of over 450%. The claimant was to earn bonuses and or commissions strictly within the annual target sales provided for by the bonus table and matrix only, which the claimant did not meet. The box sales and small hires were not part of the target sales and could not thus attract bonus and the claim for the claimant is largely based on these box and small hire sales and thus his analysis of bonuses due is wrong. The computation of the sales for 2007 less small boxes and small hires were kshs.2, 936,053.00 which fell below the sales achievement to attract bonuses under the matrix provided by the respondent.

19. The respondent further states that the extension of the matrix was never approved and the claimant's formula against the matrix dated 28th June 2005 was never signed by the respondent. The respondent also did not approve the bonus claim submitted by the claimant as the same was based on erroneous calculations. Further to the above the respondent stated that they have not been fully paid for the contracts under which the claim is based and the balances due are subject of an ongoing arbitration proceedings between the respondent and the client especially the Kenya Metrological Department and therefore no bonuses accrue. In 2009 the claimant total sales achievement were Kshs.1,839,100.00 which excludes box sales and small hires and thus did not qualify for any bonuses.

20. The claim on the salaries due is admitted save that the claimant filed the claim even as the respondent was planning to make these payments. That the same will be paid but not costs or interest should be awarded.

21. In evidence, the respondent witness was Tolle Mwakidendi, the Chairman of the respondent who stated that he was previously the chief executive officer of the respondent and worked closely with the claimant from 2004 to 2010 when he resigned. That by the time the claimant resigned the respondent had serious cash flow problems and could not pay salaries for several months and the respondent gave him a letter committing to pay the owed salaries but he replied claiming his salaries and bonuses with a threat to go to court if not paid. Before the issue could be resolved, the claimant went to the Ministry of Labour and before the same could be amicably resolved by the Labour Officer, the claimant filed this claim in court. The respondent has therefore not been able to pay the due salaries as the matter is in court, and in defence the respondent admit owing three months and a half (3 1/2) of salary to the claimant.

22. On the bonuses claimed, the witness stated that there was a compensation matrix based on a fixed salary and target sale of 14 million per year payable quarterly upon payment by the client. This matrix

was issued to the claimant together with his letter of confirmation of employment with the respondent in June 2005. There was provision that when sales of 5% of target were made, up to 60% the claimant would only get his salary for the month and any sales from 65% onwards, the claimant would get a bonus. The matrix was to end at 125% of target. Both parties signed these terms. The claimant was aware of the matrix level and there were meetings to clarify this matrix.

23. It was not possible for the respondent to use the matrix of the claimant as there was already an agreed matrix with fixed pay schedules and the claimant had his salary fixed for each month as well. The fixed *small boxes* and *small hires* were not covered by the bonuses as they fell under normal sales. In 2007 sales analysis done by the claimant is erroneous as the same was based on a wrong computation. Majority sales quoted related to sales of *small boxes* and *small hires* in that a *box sale* is – an individual item where there is no complexity of supply and delivery. On the other hand, *small hires* related to a small item and not a project sale – based on complex sales involving major installation. Complex equipment. The claimant list only had one major sale for 2007 with regard to Stanbic Bank.

24. That as a sales company, the respondent was seeking to sustain the company through the *small boxes* and *small hires* – a reactive process where a client would call and a delivery made. From these sales the respondent was able to meet their overheads and to pay the fixed monthly salary for staff. When it came to project sales, this related to where staff went out to have complex projects, installations and over and above the normal box sales and small hires, the client asked to have installations.

25. That once the sale was done, the commission due was at the discretion of the respondent and not an entitlement. In this case the claimant in 2007 did the following projects;

- Stanbic Bank service in July 2007;
- Safari Park Hotel in June 2007;
- KAA in September 2007, which remained incomplete and not paid for;
- New Apostolic Church in November 2007; and
- ACK Buru Buru in November 2007

26. These were the only projects done in 2007 and the others were *small boxes* and *small hires* for which the claimant was not eligible for bonuses as he had his fixed salary. Whereas in 2009 the claimant had the following projects;

- Kenya Metrological Department for 7 million which has not been fully paid and will not pay as they are seeking compensation and refund of the 50% deposit;
- PCEA Loresho for Kshs.505,500.00;
- VSO Jitolee for Kshs.447,200.00 who issued the Local Purchase Order [LPO] on 24th March 2009 and not an indication of a payment;
- On 15th May 2009 VSO Jitolee project at Kshs.653,600.00; and
- KIA project at Kshs.684, 88.00.

27. The witness further stated that the VSO Jitolee project was ordinarily not due for a commission as this was a repeat client and the idea was to have such repeat client sales. This therefore did not qualify the claimant for bonus.

28. In 2009 the sales target for the claimant was the same at 14 million and he did not attain it based on the payment matrix. All his total sales were 12 million which was inclusive of the taxes. Based on the agreement between the parties, the claimant failed to meet his sales target to make him eligible for any commissions.

29. In the KAA contract, the same has not been settled as the account only had 10 million. KMD project was mishandled and the 50% paid was to be refunded and the 50% due was never paid. This is a pending matter currently before arbitration.

30. In this case, the claimant is only owed his salaries for 3 ½ months. That respondent has in return

suffered damage due to how the claimant handled the projects where he was the contact person especially KAA and KMD projects. KAA has refused to pay due to mishandling of the project which was left incomplete.

31. In cross-examination, Mwakidendi confirmed that when the claimant was confirmed for employment, there was a matrix that he was supposed to use to arrive at his commission where, bonuses were to be paid quarterly based on sales performance, maximum bonus was not to exceed 75% per year; cumulated bonus was at 100% and was paid full upon reconciliation but the quarters were to be paid at 75%; targets set were based on sales of 60% which was catered for by the fixed salary even in cases where nothing was sold, the salary was to accrue. Therefore the claimant got a salary of Kshs.25, 000.00 and the bonuses were due from sales of 65%.

32. That on sales of 100% the commission due was Kshs.777,000.00 and the matrix defined the formulae that was to be used up to 125% which was sales of Kshs.17,500,000.00 and anything beyond this limit, it was upon the management discretion, performance measure, dimensions, accountability, discipline and other considerations. One could be a top performer but there were other considerations especially improving client's relations and based on this criteria then a bonus could be paid based on the discretion of management.

33. The respondent called the matrix a 'dynamic tool' and the compensation limited to one's abilities. Where an employee exceeded the 17,500,000.00 target, the compensation was based on discretion. The context was that the matrix was for inspiration where the respondent as a company had scales to inspire staff to meet targets and did not mean it was unlimited. That what the claimant did and extrapolated and expanded the percentage to 103%. Whereas it was the discretion of the respondent to decide on the bonuses due where an employee exceeded the matrix payable.

34. The respondent defined project sales as the amount realized upon major/serious installations and not the amounts realized in the process. When there were no sales, the claimant benefited with a salary and when he made sales from small boxes and small hires, he added to the overheads. That apart from KAA project sales the rest total sales were 4.1 million and the balance from the KAA project is not paid. This was not paid due to the mishandling of the project. This was done by the claimant who misinformed the client while he knew that he needed many cables but underquoted. The claimant needed to convince the client that the problem could be addressed as the project manager and the responsible person for and on behalf of the respondent in the KAA project. While Mr. Mwakidendi signed the KAA contract, the claimant was the contact person responsible for the tender, he was the Corporate Sales and Marketing officer and hence had the responsibility to the respondent to meet clients and complete work to enable them pay. The role of the respondent was to facilitate the staff in their work. Any liability was to the company and as the project manager and the sales person; the claimant ultimately should have taken responsibility to ensure the project was concluded. The evidence that the claimant mishandled the project is that the respondent was never paid due to poor work.

35. He further confirmed that from the payments stated by the claimant as Kshs.22, 535,881.32 as from 1st April 2008, this entire amount, only 10 million has been paid with 9.1 million being due and will not be paid due to the damages payable to the clients which has to be absorbed by the respondent. The due amounts from the KAA Project are Kshs.4, 057,804.80 which has not been paid and from the paid amount of 19 million, what the respondent has received is 15 million only. The claimant could not be fully paid as this amount has not yet been fully paid. Payments were made in quarters but an account for bonuses was in principle settled in full once the account was fully paid. In this KAA project, 4 million has not been paid as the client can sue due to incomplete work and thus to pay bonus would be taking a heavy risk for the respondent when the project is still incomplete. When the claimant submitted his fee note, the same was not approved as the project was not yet concluded. The problem was the matrix used and the kind of sales quoted – the matrix expansion was not approved and the sales related to small boxes and small hires which were excluded.

36. When the claimant submitted his fee note, there was a meeting with the witness who refused to sign in approval as the claim/fee was based on wrong calculations. To extrapolate the matrix, the same required

prior approval by the respondent. The claimed bonuses relate to contracts that are still open/not concluded and the clients can ask for their money back as there were complaints. The claimant left the respondent employ before concluding these projects properly. That in the event the claimant would go back to these clients and have them pay since he had good relations with them, the respondent would be upon the conclusion of the payments.

37. The witness noted that the claimant has taken a contract with KAA on the same project and there is a possibility that by the time he left the employ of the respondent he was aiming at doing this contract on his own. That the claimant had all along wanted this KAA contract to himself. That is how he is able to state that the respondent has been paid yet this is not correct. Mr. Mwakidendi confirmed to the court that the claimant had a confidentiality clause in his contract. This was however to end at the end of his employment.

Submissions

38. Both parties made the written submissions which were extensive. The claimant submitted that apart from the agreed issues, he was introduced to bonus earnings as per the respondent's set matrix based on his then salary of Kshs.25,900.00 which amounted to Kshs.310,800.00 per annum which was then 40% per annum while the target variable bonus earnings were pegged at 60% that is working out to Kshs.466,200.00 per annum bringing a 100% total earnings to Kshs.777,000.00 to be earned on achieving total sales of Kshs.14 million based on sales percentage progression in percentage on the annual pay where the bonus is based at 65% of sales corresponding sales of Kshs.9,100,000.00 and the matrix was extended up to progression sales of 125% comprising a total sales of Kshs.17,500,000.00 with sales achievement of 120% and with a multiplier of 450% with annual pay at Kshs.2,408,700.00 and monthly equivalent of Kshs.200,725.00 per month.

39. From these submissions, the claimant further stated that the contested issue was the box sales, small hires and repeated orders. That these sales, though contested by the respondent, they were to be taken into account in adding sales for the claimant for purposes of working out annual bonuses earnings as show under the agreed measurement dimensions and the value of sales where the claimant would be entitled to value of new products or the box sales sold. That this was part of the claimant's job description to ensure he sold and increased demand of respondent products for the clients to make repeat orders and to maintain a record of his clients. That from the claimants letter of appointment, it was stated that his sales targets were to be based on project sales and any sales of small boxes and small hires were not part of the sales targets and that this contradicted others terms in the same employment letter and it was at the discretion of the respondent to decide on how bonuses were to be earned. That the respondent was to pay the bonuses based on earnings paid quarterly in arrears based on results of the sales and performance objectives of the prior quarter. That these sales were based on the annual returns and the maximum bonus payable in quarters 1 to 3 of the year were up to 75% of the year and thus the 4th quarter added up to the 100% of the bonus earned which were to be paid in full after reconciliations. That the claimant should have therefore been paid all his sales for the years and not made to wait for the full payments by the clients.

40. The other contested issue was on the claimant's extension of the matrix provided beyond 125% of sales, 17, 500, 000.00 sales. In this regard, the claimant submitted that under the matrix, the respondent gave the claimant the opportunity to exceed his targets bonus from 466,200 to 604,800 by overachievement of sales targets and performance objectives meaning that the sales targets could not be extended without extending the multiplier percentages by the same increment by stages of 70% after the 450%. That in this case the claimant was encouraged by the respondent to sell more and make more earnings beyond the matrix level of 17,500,000.00 and therefore when the claimant wade total sales of Kshs.26,201,367.33, the matrix should have been extended in a progression to allow him to earn higher bonuses. Therefore in 2007, the annual sales volume of Kshs.26,201,365.33 was at the percentage of 190% at the multiplier of 1360% giving the claimant the annual pay of Kshs.6,651,120.00 based on his annual salary of kshs.310,800.00 and thus his annual bonus for the year should have been Kshs.6,346,320.00 all being a total dues to Kshs.6,340,320.00.

41. Similarly in 2009, the bonuses should be calculated at the level of 95% in corresponding multiplier of 95% giving an annual pay of kshs1,050,510.00 on the then fixed salary of kshs.433,200.00 thus an annual bonus of kshs.617,310.00 all dues being Kshs.617,310.00. These were dues owing from the respondent to the claimant that should be paid with interest. The claimant further submitted that he was not negligent or in mismanagement of projects as the respondent technical department was in charge of implementing all projects. That the cables required by KAA project that were said to be substandard were complaints made by KAA against the respondent and not against the claimant. That the claimant's job description was that of a project manager while there was a Head of Technical Services. On the KMD project, the claimant submitted that upon his resignation, he made a handover to the appropriate officers of the respondent and should not be held liable for any liabilities after his handing over that was accepted.

42. To support his submission, the claimant cited several cases without an indication as to how they relate to his case.

43. In return, the respondent submitted that the claimant is not entitled to the bonus payments for 2007 and 2009 as claimed on the basis that upon his employment he was provided with a contract and a matrix and the terms upon which bonus could be earned. Those bonuses were to be based on project sales and not sales of small boxes and small hires, which documents were signed by both the claimant and the respondent officer, Tole Mwakidendi as the Managing Director. That in 2007 and 2009, majority of sales made by the claimant were small boxes and small hires and the matrix clearly provided on how bonuses could be earned to which the claimant never achieved. The sales achieved by the claimant from projects less small boxes and small hires all amounted to kshs.2, 936,053.00 whereas in 2009 the project sales amounted to kshs.1, 839,100.00 which too could not attract a bonus.

44. There were projects undertaken by the claimant but full payments have not been received. This was because the projects had to be reviewed to ensure the work done was complete and thus the delay of full payments. In the KAA project, the same is incomplete and the contract not concluded to warrant a claim for bonus by the claimant. In the KMD project is at the arbitration level where the client is claiming a refund of the 50% advanced. The respondent also submitted that the extension of the matrix by the claimant was not approved and the multiplier applied was erroneous as the same could not be extended beyond 450% for sales achieved to 125%. That this was a unilateral act by the claimant which was not approved by the respondent to make it binding on them.

45. That the claimant never achieved his sales targets in 2007 or in 2009 and thus earned no bonuses. That the projects the claimant undertook were shoddy that have created liabilities for the respondent and no full payments have been received over these projects to enable the respondent close the account and assess the bonuses due.

Analysis

46. In making an analysis of the issue raised by the parties, there are several questions that emerge to be addressed;

Whether the terms and conditions of the claimant employment were clearly spelt out;

Whether there are any bonuses due to the claimant from the respondent;

Whether a party to the contract can make alterations to the same based on provided information; and

Whether there are any remedies.

47. On the terms and conditions of employment, it is now settled under the Employment Act sections 9 and 10, in a contract of service, there are key highlights that must be indicated by an employer particularly the terms and conditions of the employment. Parties are encouraged to put their terms and conditions of employment in writing as soon as practicably possible and not later than two (2) months.

This is essentially because as set out under section 9(3) to ensure that each party gives their consent to these terms and where there is ambiguity, the same is clarified immediately based on the written document. It thus states at section 9;

(2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3)

(3) For the purpose of signifying his consent to a written contract of service an employee may?

(a) Sign his name thereof, or

(b) Imprint thereon an impression of his thumb or one of his fingers in the presence of a person other than his employer.

(4) Where an employee is illiterate or cannot understand the language in which the contract is written, or the provisions of the contract of service, the employer shall have the contract explained to the employee in a language that employee understands.

48. Therefore, this becomes a very important document as it outlines what the parties to the contract have agreed to at the beginning of their employment relationship. Where there is doubt, the parties can refer back to these documents and where there is an ambiguity, the same can be reference to the same as well as where there are conflicts, the terms and conditions of employment as set out in the contract of service become relevant.

49. The Employment Act does not stop at that, at section 10, it goes further to spell out more terms as between the parties, with regard to job description of the employment, duration of the contract, place of work and the remuneration. At section 10(2) (h) to (k) the same states;

A written contract of service shall state –

(h) The remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits;

(In) the intervals at which remuneration is paid; and

(j) The date on which the employee's period of continuous employment began, taking into account any employment with a previous employer which counts towards that period; and

(k) Any other prescribed matter.

50. And as section 10(5) states;

(5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.

51. In essence therefore, the terms and conditions of service shall be documented and where there is a change, review or revision of these terms and conditions, the contract of service must be revised to reflect these change, review or revision. This is a good practice the every employer should adopt.

52. In this case, the parties had a contract of service vide the letter of appointment that was issued to the claimant and dated 26th April 2004 and the Employment Contract dated 30th April 2004. These two documents spell out the terms and conditions of service as between the parties and at based on the Contract of Employment (Contract) at paragraph 13 it stated;

This document supersedes all previous documents recoding conclusion of your employment. It is a Contract and therefore if any information on this form is, in your opinion, incorrect or if I four require any information or explanation concerning your employment with the company, you should write immediately to the Managing Director, skytech Communications Resources Ltd.

53. Therefore, from the onset, written communication as between the parties was recommended. This seems to have been the case as demonstrated by all major events during the employ of the claimant with the respondent. There were written communications at every stage of the employment relationship. Both parties signed to any new terms or conditions that were introduced.

- On 1st December 2004, the claimant received a promotion and a change of his terms and conditions of service;
- On 7th December 2004, the claimant was transferred to Coast Region;
- On 28th June 2008, the claimant was appointed to a new position and a change of his terms and conditions of service; and
- On 4th April 2006, the claimant was transferred to Head Office.

54. To these changes, the contract was revised and both parties gave their consent to the new terms. From the letter of appointment dated 26th April 2004, the claimant as the Sales Executive for the respondent was to commence work on 1st May 2004 on the following terms;

... You shall be paid a fixed salary of Kshs.14, 697.00 per month which comprises of a basic monthly salary of kshs.10, 197.00 and a house allowance of Kshs.14, 500.00 and is subject to taxation and other statutory deductions.

The balance of your income shall be earned from commissions.

The department's target on sales revenue is Kshs.10, 800.00 per annum you are expected to bring in at least Kshs.4, 200,000.00 per annum which translates to Kshs.350, 000.00 per month.

The commissions will be payable whenever we have been paid and any success in exceeding the targets will be rewarded with incremental commissions or bonuses.

Please note that you are expected to solicit new clients after every year.

The above commissions are calculated excluding those from our most favoured clients and those if the managing director and other members of the management.

For ease of reference the following are the most favoured clients:

However should you succeed in getting any of the most favoured clients' other businesses or put them on annual contracts, such sales shall be considered as yours.

In addition any commissions or expenses payable to 3rd parties or where we have to purchase extra equipment/services will be deducted from the sale price or your commissions or should be built in into the sale price.

55. This offer was accepted by the claimant and formed the basis of the contract that was entered into between him and the respondent. This letter of appointment further entrenched the terms and conditions of services. Based on the outlined conditions, the claimant went ahead to apply these terms and for 3 months earned his commissions/bonuses based on his sales targets. He seemed to have performed very well as on 1st December 2004, he received a promotion to a Sales Executive II and his terms of employment were improved. This was to take effect as from 1st February 2005. What is important to highlight here is paragraph 2;

The promotion will not affect your contract period and other terms and conditions as contained in the contract of employment.

56. This was therefore an enhancement of the claimant's terms of service based on his good performance. The monthly salary was increased to Kshs.18, 542.00. The list of favoured clients remained the same and the contract terms apart from the clause on salary, remained the same. This new contract was signed on 7th December 2004. Things improved further for the claimant and on 28th June 2005 he was appointed as Corporate and Marketing Executive. His terms improved with a salary of kshs.25, 900.00 and his annual target bonus increased to Kshs.504, 000.00 that was to be earned through sales target of Kshs.14, 000,000.00 per annum which was equivalent to Kshs.42, 000.00 per month. The claimant was also given the opportunity to exceed his target bonus to a maximum of Kshs.604, 800.00 by overachievement of the sales targets and performance objectives. About the bonus, the respondent letter stated;

Bonus earnings will be paid quarterly, based on the results of the sales and performance objectives of the prior quarter. Because it is an annual programme, the maximum bonus payable in quarters 1 to 3 of the year will not exceed 75% of your year-to-date cumulated bonus earnings. At the end of quarter 4 of the year all 100% of bonus earned will be paid following full reconciliation of your achievements.

The sales targets and other performance objectives will be set annually, and calendared for monthly and quarterly management. They will be guided by corporate objectives and your job performance requirements outlined by areas of accountabilities and measurement dimensions as indicated below:

57. There was a revised contract to effect the new terms. The same rider as before used in the letter of appointment was reiterated that;

In addition any commissions or expenses payable to 3rd parties or where we have to purchase extra equipment/services will be deducted from the sale price or your commissions or should be built in into the sale price.

58. The new additions to the revised contract were also outstandingly different from the previous review. To the new revised contract were the *Job Definition* and the *Compensation Matrix – Bonus Table* that were attached to this revised contract. This *Compensation Matrix* was conditional, similar to what one would call the *liability clause* as outlined in the document stating;

You will note that for any salary increase, the target will shift and also the bonuses will increase.

This is a dynamic tool that we shall be using throughout your engagement and compensation is only limited to your abilities.

However I wish to reiterate that your target should be project sales and any sales of boxes and small hires should not be your target and indeed may not attract bonuses. This is covered by the fixed pay that you receive.

For any clarification, please contact the undersigned.

[Emphasis added]

59. By 2007, these were the terms and conditions pertaining to the claimant's employment. So far the respondent with respect to the requirements of section 9 and 10 of the Employment Act, they had complied to the letter. All new terms were documented, issued to the claimant as a new offer and upon his acceptance, a new contract was drawn.

60. I find from the total sum of documents submitted by the claimant, the defence and submissions made by the respondent, the terms and conditions of employment for the claimant were made clearly without

any uncertainty. The claimant had a monthly fixed salary graduated over time due to good performance whereas there were commissions earned based on sales targets based on the compensation matrix that had specific conditions attached to it. The contract of service was done together with other attachments particularly the letter of appointment, letters of promotion, the *Job Definition*, and *Compensation Matrix* were also part of the terms and conditions of service. It spelt out how commissions were to be calculated and earned.

61. Under these terms and conditions, the claimant continued to undertake his duties and made sales and cumulated to over Kshs.26 million in 2007. The *Job Definition* and the *Compensation Matrix – Bonus Table* that further gave clarity to the terms and conditions of service. There was no ambiguity. All these records must be viewed in whole as to separate one and ignore the other would be to misunderstand the whole concept as outlined in section 9 and 10 of the Employment Act.

62. Was the claimant thus entitled to the bonuses claimed and could he then alter the Compensation Matrix where need arose? These two issues cannot be separated as they are intertwined.

63. In defence, Mr. Mwakidendi admitted in his evidence that at the time the claimant resigned, the respondent business was not doing very well. That can explain why for several months, the claimant's salary remained unpaid. He also stated that if the claimant was willing to convince the clients he was serving while in their employ to pay their balances, they could consider and pay him a bonus. But the payment of such bonuses was conditional. Since 2007, the claimant had to attain annual sales of Kshs.14 million and the commissions due to him would be paid based on the *Compensation Matrix*. The same would be paid subject to removal of *box sales* and *small hires*. The respondent did provide the list of *favoured clients* but only in evidence did the respondent witness define what were *project sales*, *box sales* and *small hires*. He stated these to be;

... The definition of project sales is not the amount but where there is a serious installation and involving a serious process. ... Box sales are an individual item where there is no complexity of supply and delivery. Small hires is where a client require a small item and not project sale, which is based on complex sales involving major installation with complex equipment.

64. With this definition there is no list or an analysis by the respondent based on the claimant's schedule and analysis as attached to annexure KM-PK 7 to the claim. The respondent being the employer responsible for all work undertaken by the employee, has the duty to outline what is defined as *box sales* and *small hires* from the schedule that the claimant had attached to his claim. The only schedule available before court is the list of the *favoured clients*. To their base the defence that;

... The sales achievement of 2007 less box sales and small hires of the same year was 2,936,053 in which case, the claimant did not qualify for a bonus. Further, the sales achievement for 2009 less box sales and small hires is Kshs.1, 839,100.00 which did not attract a bonus. ...

65. Without a schedule of what comprises these *box sales* and *small hires* the respondent's analysis would be erroneous in the circumstances of this case. There was no contention that the claims by the claimant were based on sales made from the list of the *favour clients*. Rather, the claim is based on;

... As you will see from the attached detailed analysis, I managed to get Sales Orders of Kshs.26, 201,367.33 before 16% V.A.T.

Annexure KM-PK7

66. The schedule attached to annexure KM-PK7 comprise *Paul Kogi sales Orders for year 2007* being *hire, service, and sale*. These entire *orders* amount to Kshs.26, 201,367.33 none of the clients have been challenged as belonging to the list of *favoured clients* but on the other hand, these are noted as *orders for the year 2007*. To therefore base the whole amount of these *orders* as the basis for a claim for a commission based on the *compensation matrix* by the claimant would be equally erroneous. The use of the *compensation matrix* is conditional as the same was to follow reconciliation thus;

Bonus earnings will be paid quarterly, based on the results of the sales and performance objectives of the prior quarter. Because it is an annual programme, the maximum bonus payable in quarters 1 to 3 of the year will not exceed 75% of your year-to-date cumulated bonus earnings. At the end of quarter 4 of the year all 100% of bonus earned will be paid following full reconciliation of your achievements.

67. And further;

In addition any commissions or expenses payable to 3rd parties or where we have to purchase extra equipment/services will be deducted from the sale price or your commissions or should be built in into the sale price.

68. The same was to follow the *compensation matrix* logic that;

However I wish to reiterate that your target should be project sales and any sales of boxes and small hires should not be your target and indeed may not attract bonuses. This is covered by the fixed pay that you receive.

[emphasis added].

69. Did the claimant therefore take into account his performance objectives for 2007 and 2009? Was there a proper reconciliation to enable the respondent pay the full 100% bonds due? There is no evidence that indeed the above outlined terms in the claimant's contract were followed. Bonuses were to be earned based on results of the sales and performance objectives of the prior quarter. This is not indicated by the claimant. Bonuses were to be earned after expenses payable to 3rd parties or where there was purchase of extra equipment/services were deducted from the sale price or where commissions were not built in into the sale price, thus a reconciliation had to be done and also there was to be factored as to what was project sales and against what was termed as *box sales* and *small hires*. These conditions were to be met before cumulated sales could attract commissions.

70. As outlined above there is no analysis by the respondent as to what comprised the *box sales* and the *small hires* from the list submitted by the claimant that amounted to Kshs.26, 201,367.33. On the other hand the schedule submitted by the claimant comprise of *orders for year 2007*. The use and extension of the *compensation matrix* to base the bonus/commissions claimed was without consultations with the respondent and even where there were consultations and a meeting held between the parties as both Mr. Paul Kogi and Mr. Mwakidendi testified in Court to have done, there was no agreement. The claimant could therefore not apply the extensions to the matrix on his own volition. All along the parties to the contract of service had undertaken and conducted their relationship through written communications and consents that were reduced into written revisions to the contract. This was a good practice that should have been followed even in this case. The claimant could not take his *orders for year 2007* and then expand the *Compensation Matrix* alone, without the consultation and approval of the respondent. His attached schedules of sales made in 2007 and 2009 should have factored the outlined conditions as under his contract; that of taking his set objectives for the year, reconciliations before a claim for commissions and separation as to what was *box sales* and *small hires*. In any event the claimant was still on his monthly salary and this had to come from some sales from the respondent business. That is why he had been employed in the first instance. To make sales and where he went above his set targets, then a commission could be paid based on the respondent's *Compensation Matrix*.

71. The maxim that *he who alleges must proof* equally applies here as for the claimant to state that he was owed commissions from *orders for year 2007* with an analysis based on any reconciliations with an indication that there were actual payments after the *orders for year 2007* and that these payment were paid in full less any dues owed to any 3rd parties, would be to go contrary to the very terms of the contract and letter of appointment issued to the claimant where there terms and conditions for the job were well outlined. Where there were sales and a commission due, the Contract terms were clear;

In addition any commissions or expenses payable to 3rd parties or where we have to purchase

extra equipment/services will be deducted from the sale price or your commissions or should be built in into the sale price.

72. Further to the above, the claimant admitted that on the KAA contract/project, a percentage of the total costs were paid and the same case applied on the KMD project where 50% was paid. This goes contrary to the terms and conditions set out in his contract and letter of appointment that 100% of bonuses and or commissions could only be paid upon the full reconciliations and *or expenses payable to 3rd parties or where we have to purchase extra equipment/services will be deducted from the sale price or your commissions or should be built in into the sale price.*

73. What is not in contest is that from all the sales the claimant made in 2007 and 2009, his salary accrued and was due for payment. The *hire, service* and *sales* made contributed to the salary and other overheads made by the respondent. To therefore base the entire claim on amounts of *hire, service* and *sales* is a misinterpretation of the very documents issued to the claimant when he was employed on 1st May 2004 and subsequent documents issued to him especially the *Compensation Matrix*. As much as this was a dynamic tool, the same had a basis for its use and involved the claimant, respondent and the nature of sales that had been undertaken annually.

74. Despite the error on the part of the respondent to analyses the sales to indicate which belonged to *box sales* or *small hires*, this claim is lodged by the claimant, he contests what ought to have been paid in bonuses and hence the duty rested upon him to prove that indeed he had complied with all the terms and conditions of his employment so as to warrant such commissions/bonuses. The bonus claim was never approved by the respondent and the conditions precedent to the use of the matrix where there were any questions with regard to its use and or application were never consented to by the parties to it. The claimant could not on his own volition make any changes, revisions or reviews. This duty is left to the respondent as outlined above under section 9 and 10 of the Employment Act.

75. The claim for bonuses due as claimed by the claimant must fail.

Remedies

76. Based on the above analysis prayers 5.1, 5.2, 5.3, and 5.4 must fail on the basis that even though the claimant was entitled to commissions during his employment, the same was to be assessed using the agreed-upon *Compensation matrix*, where there were questions the same had to be addressed and agreed-upon by mutual consent that was not done in this case. Even in the event that this *compensation Matrix* was agreed upon, in this case, the outlined claim does not relate to payments and or sales made by the claimant as the attached schedules relate to *orders* that cannot be interpreted to mean 100% payments on sales to warrant him to claim his commissions based on the available *Compensation matrix* as agreed with his employer. Further the burden of extending the *compensation matrix* was the responsibility of the employer and the claimant could not make changes to an agreed-upon tool alone without the approval and or consent of the employer. Therefore the commissions/bonuses claimed do not arise and this claim must fail.

77. On the claim for unpaid salaries for the months of May, June, July and August all totaling to Kshs.144, 400.00, this is a claim that has been admitted as due and owing. These are amounts that have been long due and owing despite the claimant working and offering his services to the respondent as he was required to. He was a good performer who got a good performance recommendation when he resigned. The respondent witness stated in his evidence that the respondent company was undergoing a bad financial time and therefore could not pay salaries in good time. In such cases where an employer is being faced with bad financial returns, there is a legal recourse as under section 40 of the Employment Act where an employer faced with a harsh business situation is allowed to declare some positions as redundant and once there is stability, such an employer can recall any affected employee. But in this case the respondent opted to let the claimant go on serving unpaid until he had to resign. The claimant must have felt frustrated that his claims for commission that he felt were due to him were not being approved and beyond this he was not being paid his salaries. This salary is due.

78. In this case, nothing stopped the respondent from paying the owed salaries even while the case was ongoing. This could have been viewed positively by this Court had the respondent offered to settle the admitted claim. This will therefore be paid as due together with interest as the same has remained in the possession of the respondent since 2010. The interest will be the current going rate by the Court.

79. Where the Court in its assessment notes that there has been an unfair Labour practice as undertaken by the respondent, the court has the discretion to award. To keep an employee without pay only to have the same employee resign due to non-payment of their dues is such an unfair Labour practice. This cannot be sanctioned by this court. I will therefore make an award in this regard. The claimant is hereby awarded 12 months' pay in compensation. This will be at his last salary of Kshs.25, 900.00.

In conclusion therefore, judgment is hereby entered for the claimant in the following terms;

- a. A declaration that there was an unfair Labour practice with regard to the non-payment of the claimant's owed salaries;**
- b. there is an award of Kshs. 310,800.00;**
- c. owed salaries amounting to kshs.144,400.00;**
- d. costs of the suit**
- e. Interest on (b) and (c) above at court rates.**

Dated at Nairobi this 14th day of January 2014.

M. Mbaru

Judge

In the presence of:

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