



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1730 OF 2011**

**ROBERT ADUDA OYUKO ..... CLAIMANT**

**VERSUS**

**REAL INSURANCE COMPANY LTD. .... RESPONDENT**

Mr. Koceyo for the Claimant

Mr. Michuki for the Respondent

**JUDGMENT**

1. The Claimant seeks payment of terminal benefits to wit;
  - i. payment of three (3) months salary in lieu of notice in the sum of Ksh. 281,250/=;
  - ii. payment in lieu of leave for the year 2011 at Kshs.281,250/=; arrears salary for nine (9) days in September 2011 in the sum of Kshs.84,375/= and maximum compensation for unlawful and unfair dismissal in the sum of Kshs.3,375,000/=.

2. The pleadings as contained in the memorandum of claim dated 5<sup>th</sup> October 2011 allege that the Claimant was employed by a letter dated 10<sup>th</sup> July 1995 by the Respondent as a senior underwriter at a starting monthly salary of Kshs.16,000/=.

He rose through the ranks and on 22<sup>nd</sup> March, 2010, he held the position of Area Manager, Nairobi Region.

At the time of his termination on 9<sup>th</sup> September 2011, his gross monthly salary was Kshs.281,250/= in the position of Branch Manager City Centre, Queensway House Branch.

He claims to have served the Respondent faithfully, diligently and had a clean record throughout the period of service.

**Dismissal**

3. According to the Claimant, he was falsely accused by the Respondent of introducing an Agent in a direct business with the aim of unlawfully earning a commission for himself to the loss and detriment of the Respondent.

4. The Claimant alleges that as a consequence of the unlawful dismissal, he has suffered loss and damages and claims as above.

The Claimant testified under oath in support of the particulars of claim which evidence may be summarized as follows;

### **Testimony**

5. As Area Manager in Nairobi his main duty was to source business for the Respondent and manage the Branch. That he had no disciplinary issues at the workplace until the year 2011 when he was dismissed on allegations of fraud. He denied conducting himself fraudulently nor receiving any undue benefits or money from the alleged transaction as alleged in the letter dated 9<sup>th</sup> September 2012 by **Joseph Kiuna**.

6. That up until the 9<sup>th</sup> September 2011 he had not been charged with any offence and was surprised by a letter of dismissal dated 9<sup>th</sup> September 2011. That no disciplinary hearing was held to afford him opportunity to defend himself in terms of **Clause 13, Page 46** of the **Employment Handbook**. Therefore the Respondent violated its own procedure applicable to discipline and dismissal of its employees. He was not given a first and final warning prior nor did he receive a notice to show cause prior to the dismissal.

7. In terms of his contract, termination was by a three (3) months notice by either party. He was not given the notice nor paid in lieu thereof. He claims the payment thereof.

8. That in the year 2011, he had taken a few days leave and at the time of dismissal he had 18 days outstanding leave, which translates to one month's salary less 7 days. He was entitled to 25 days leave per year. He was also not paid for the 9 days worked in September and is entitled to Kshs.84,375/= in respect thereof. In addition he claims compensation for the unlawful and unfair dismissal.

9. He was closely cross-examined by **Mr. Michuki** for the Respondent regarding the circumstances that led to his dismissal and it was repeatedly put to him that, the totality of the evidence shows that he had unlawfully and with intent to defraud inserted an Agent in the Insurance Application Form in order to earn a Commission well knowing that the customer had approached the Insurance directly and not via an agent. It was further put to him that this was a dismissible offence for which the Respondent was entitled to dismiss him summarily which it proceeded to do and therefore the suit should be dismissed with costs.

### **Statement of Response**

10. The Respondent has conceded liability with respect to the payment in lieu of three (3) months notice and salary arrears for the 9 days worked in September 2011 and a consent order dated 3<sup>rd</sup> February 2014 was entered into and payment was made accordingly. The Respondent however, insists that the Claimant had no outstanding leave at the time of dismissal and persists in denying the claim.

11. The Respondent called three (3) defence witnesses. **Dorothy Wanjiru, Maina**, an Underwriter serving under the Claimant told the Court that the account in question, Blue Shield Insurance was direct business. The company contacted the Respondent directly. It executed a proposal form which did not specify any Agent. In all correspondences no evidence of copying in the Agent was seen. The only reference to Collins Rock Agency was the Claimant's own endorsement on the document in his handwriting that this was a Collins Rock Agency business. This evidence was corroborated by RW2 **Lilian Wanjiku**, the Credit Controller of the Respondent since June 2009. Her work included payment of Commissions to Agents. She was Secretary to the Credit Control Committee. She told the Court that

Commissions are paid once the business has been paid for. That direct business does not attract Commission. She told the Court that from the payment receipts in this transaction, it would appear Blueshield paid for the cover directly and not through the Agent Collins Rock.

She however conceded that normally Agents conveyed cheques drawn by the customer and therefore the evidence that the cheque was in the customer's name does not exclude the possibility that there was an Agent involved in the proposed cover.

12. RW3, **Wachuka Ndei**, testified and told Court that she was the Human Resource and Administration Manager and knew the Claimant Well. She told the Court that the Claimant was given a hearing on 9<sup>th</sup> September 2011 to explain why he had wrongly introduced an Agent in a direct business. He was invited to the meeting on telephone. He appeared before herself, the Chief Finance Officer, the Chief Executive Officer and the Chief Operations Officer.

13. The Claimant was hostile during these proceedings and asked for a termination letter. He explained that he was working hard to meet his business targets but had not tried to defraud the company. The committee rejected his explanation.

14. It was apparent that the Claimant had taken it upon himself to chase the payment even though the Agent had todate not claimed the commission. According to her, the reason for the dismissal was valid. She produced the minutes of the hearing.

The witness told the Court that by the time the Claimant was dismissed, he had taken all the 23 leave days due to him. She produced a leave form to that effect which was marked 'R5'. The claim for leave has not been sufficiently proven and same is dismissed.

### **Dismissal**

15. The totality of the evidence before Court indicates that the Claimant had introduced an Agent by the name of Collins Rock in an insurance proposal made directly to the Respondent by Blue Shield Insurance.

16. A careful perusal of all the relevant documentation produced before Court and the oral testimony of the Claimant vis avis that of RW1, 2 and 3 shows that the introduction of an Agent in the specific transaction was improper and contrary to the Respondent's policy on Insurance Proposals. Had the claims for the commission been made good, it would have amounted to an unjust enrichment by the Claimant to the detriment of his employer.

17. Notwithstanding the good record of the Claimant at the workplace for a considerable long period, given the level of trust accorded him by the Respondent in the position of Branch Manager City Centre, the breach of this trust gave the Respondent a valid reason to dismiss him. The Respondent accorded the Claimant a fair opportunity to defend himself and his explanation was rejected by the Respondent.

18. The Court finds that the dismissal was for a valid reason and in terms of a fair procedure.

Credit goes to the Respondent for accepting to reduce the dismissal to a normal termination in the cause of the hearing and paid the Claimant Kshs.928,125/= in lieu of three (3) months notice and salary arrears for 9 days for the month of September 2011.

19. The rest of the claims by the Claimant are dismissed.

Since the claim was partly successful, each party is to bear its own costs of the suit.

**Dated and Delivered at Nairobi this 30th day of May, 2014.**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**