



IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 971 OF 2013

PASAKA OGUMBOCLAIMANT

VERSUS

CORPORATE TALK LTD RESPONDENT

JUDGEMENT

1. The claimant filed the claim on 7th June 2012 for payment of commissions and the salary due from the respondent following her resignation. On 10th October 2012 the respondent filed their defence and denied the claims noting that the claimant resigned without the respondent enjoying in her development and thus does not owe anything. In evidence the claimant gave her sworn statement while the respondent called Andrew Lopokoyit as the witness. At the close of the hearing, both parties filed their written submissions.

Claimant’s case

2. In January 2008 the claimant was employed by the respondent as the Business Executive on a salary of Kshs.28, 000.00 together with commissions. In August 2008 the claimant was promoted to Business Manager and her salary increased to kshs.40, 000.00. In December 2008 the claimant was promoted to Regional Business Manager and the salary increased to Kshs.50, 000.00, all in addition to commissions. Commission was awarded above the basic salary on the structure made by the respondent. Commission had been paid twice in November and December at kshs.169, 000.00 and 105,000.00. In 2009 the claimant started facing difficulties with regard to the payment of commissions when she was told that she had been overpaid in the past years.

3. On 8th July 2009 the claimant resigned after the respondent failing to pay commissions due. The resignation was accepted but the claimant was not allowed to serve her notice period and was told to surrender all property and leave the premises immediately. On 3rd August 2009 the respondent called the claimant to go and collect her dues which included 8 days’ pay for July and nothing else which the claimant refused to accept. On 5th August 2009 the claimant followed up on her dues but there was no positive response.

4. The claimant is therefore seeking commissioners for December 2008 at kshs.89, 145.00; March 2009 at kshs.24, 949.00; and April 2009 at kshs.117, 559.00. The claimant was refused to serve notice period and thus claim full salary for July 2009 all to be paid with interest and costs of the suit.

5. In evidence, the claimant stated that she worked for the respondent as the business Executive and was promoted her last position being that of Regional Business Manager in 2009. The last salary earned was kshs.50, 000.00 that was to include commissions from various sales. The claimant resigned on 8th

July 2009 after a deadlock on the non-payment of her commissions that were due. All commissions until December 2008 had been paid and those due at the time of termination were not paid yet the clients had already paid the respondent. That the respondent had a commission structure where the claimant was to get 18% of direct sales and on indirect sales there was 8% payable on a sales target of 6 million sales. In December 2008 the net value of sales was kshs.4, 979,720; March 2009 sales were kshs.2, 494,923.00 and April 2009 sales were kshs.5, 877,958.00. And the dues commissions from these sales were kshs.87, 145.00, Kshs.24, 949.00 and kshs.117, 559.00 respectively. The respondent refused to pay these commissions stating that the structure that the claimant had previously used was wrong and had not been approved.

6. The claimant also stated that when she asked for her commissions, the respondent promised to pay and later changed and refused to pay them. There were changes in management and the managing director left and when new management took over the claimant was told that she had been overpaid. There was an accountant who prepared all the payments and used the schedules that the respondent had developed for the purpose.

7. The claimant is seeking commissions due in April 2009 at kshs.229, 653.00, salary for July 2009 at kshs.50, 000.00 as the claimant was not allowed to serve the notice period all to be paid with interest.

8. On cross-examination the claimant stated that she had a contract that outlined her terms of work and there was a clause that regulated trainings and how this was to be applied for the respondent benefit. In the resignation letter the claimant did not indicate that she wanted to serve for the notice period but that there were noted tasks that she had noted to be done during the notice period. There was a commission structure but had not been signed by the respondent in approval and in the interim the claimant used what was in draft and she received pay under the same. Other staff like Otieno used the available commission structure.

Respondent's case

9. The respondent stated that the commission schedule document attached to the claim by the claimant is a strange document as the same is not approved by the respondent and this fact was brought to the attention of the claimants when it was realised that she had been overpaid. A meeting was held with the claimant upon this realisation of an overpayment and it was agreed a new commission's structure was to be put in place. The respondent in good faith sponsored the claimant for training abroad for her growth and for the benefit of the respondent but immediately she came back she resigned even before the respondent could benefit from the costs of sending the claimant for training abroad thus incurring losses. When the claimant resigned she did not indicate that she intended to serve her notice period and was thus paid for time worked and when terminal dues were offered, she declined to collect and thus her case should be dismissed with costs to the respondent.

10. In evidence, the respondent called Oliver Wekesa Wanyama the respondent Chief Executive Officer who testified that he knew the claimant well as they had worked together. That the claimant resigned citing the terms of service were not good and that she was not happy with the way commissions on sales were computed. The respondent had a commission structure that had been presented to the Board for approval and the claimant used a structure that had been prepared by Accounts department but had not been approved and all the sales done by the claimant were going to the payment of her commissions and the respondent was making losses. The accountant was not the authorised person to approve the commission structure; this was the role of the Board of Directors. The accountant Kennedy Otieno who used the structure not approved to pay the claimant was dismissed due to fraud and forging cheques. The respondent prepared a structure which was given to the claimant to sign but she refused and opted to resign. All outstanding dues at the time to resignation were paid to the claimant.

11. That before the claimant resigned the respondent had invested heavily on her and took her for training to South Africa and was given 2 extra days fully paid for by the respondent for her personal shopping. Immediately upon return, the claimant resigned and there respondent was not able to recover the investment in the claimants from the training that had been expected to help in the next phase of

respondent's work planning.

12. In the contract of employment, the claimant was entitled to commission sales and there was a structure that was in use. When the claimant used the wrong structure applied by the Accountant, there was an overpayment but the figures were not shared with the claimant.

Submissions

13. The claimant in submission stated that all the claimed amounts in commissions are due as this was not an overpayment and the respondent witness failed to state how much overpayment was done with regard to the claimant due commissions. There was an entitlement to the commissions and some were paid and the balances are due and owing. That fraud charges against Kennedy Otieno are not related to the claimant and should be pursued separately.

14. The respondent submitted that there are no due commissions owing as the claimant cannot base her claim on the fact the commissions had been previously paid using the wrong structure. The claimant resigned and did not offer to serve for her notice period and once the same was accepted, she had to be paid for time worked only. That the respondent heavily invested in the claimant but there was no benefit in return. There was no agreed commission structure at the time the claimant was at work and any payments made to the claimant was without Board approval and thus did not act in good faith to resign due to application of the correct commission structure. The accountant who approved payments had no authority to make such payments and the claimant is aware that this Accountant was charged with fraud.

Does the claimant have any basis for the claim for commissions?;

Whether there are any remedies

15. The letter of contract issued to the layman and dated 1st September 2008 spell out the terms and conditions of service. This contract was reviewed from time to time as stated by the claimant in her evidence following several promotions and increase to her salary. This was not contested by the respondent. At clause 4(a) the contract states;

The Company will pay you a gross salary of Kshs.40, 000.00 and commissions based on sales targets achieved.

Note: the commission is payable on gross at the end of the month and after the payment has been received from the client.

16. This was a material condition of the employment contract that the claimant was to be paid her gross salary as stated and also commission after payment has been received from clients. This document as at annexure 3 in the Respondent's bundle is not signed or indicated as accepted by the claimant. Of importance to note is that the claimant never attached her later of contract to her claim. This document is only made available to this court by the respondent. Was the document signed or not? This is the big question here but also very crucial to the determination of the issues herein. If the respondent kept a crucial document that outline the terms and conditions of employment with regard to the claimant's employment not signed, which other documents remained operational and not signed?

17. The Employment Act now makes it mandatory to every employer to keep a record of each employee in their service. These records are to be kept even after such an employee has left that employment. Section 74 is crucial here to cite;

74. (1) an employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this Act which shall contain the particulars?

(a) Of a policy statement under section 7(2) where applicable; [contract of service]

(b) Specified in section 10 (3); [statement of entitlements]

(c) Specified in section 13; [statement of charges]

(d) Specified in sections 21 and 22 [statutory deductions]

(e) Of an employee's weekly rest days specified in section 27; [hours of work]

(f) Of an employee's annual leave entitlement, days taken and days due specified in section 28;

18. Therefore, all relevant details with regard to an employee are to be outlined in the contract of service as required by section 74 of the Employment Act. This section consolidates all the requirements that go into a contract of service looking at all section of the Act. In this case, the document that was to serve these purposes and submitted by the respondent is not signed by the respondent or the claimant. The respondent is now keen to rely on a document that they state the claimant used to calculate commissions without approval by the Board of Director. That this document was wrongly applied.

19. On 26th May 2009, the respondent wrote to the claimants noting that her commissions were being calculated but there was an overpayment that required to be looked at. This overpayment was not indicated. On 7th July 2009 the respondent wrote to the claimant noting that commissions paid in 2008 were in excess of what should have been paid and there was an overpayment. The overpayment is not stated. On the same date, 7th July 2009 the respondent wrote to the claimant noting that the commissions paid for the previous year were too punitive to the respondent. The overpayment was not stated.

20. From the above outline, the respondent does not state how much the overpayments were to the claimant nor is there a schedule attached that the claimant was to use in assessing due commissions. The claimant commenced work on 1st September 2008 based on the unsigned contract and continued to rely on a document that was not signed to assess her dues. This document applied in three occasions when the claimant was paid her 2008 due commissions and despite knowledge of the claim against the respondent; there was no effort to give a record of how the 2008 commissions were arrived at and the logic as to why the due commission for 2009 should not be paid. Where the respondent had challenges with one of their employees, Kennedy Otieno who committed fraud and forged cheques, this should not be visited upon the claimant who was owed her commission based on the unsigned contract document submitted by the respondent. The commissions claimed are therefore due.

20. The claimant is seeking to have her July salary paid in full on the basis that upon resignation, she wanted to serve the notice period. Looking at the letter of resignation dated 8th July 2009, the claimant noted;

I hereby tender my resignation as regional Business Manager of Corporate Talk Ltd. I would like to take this opportunity to thank corporate Talk management of the opportunity given to me within this organisation.

I wish you the best in your entire endeavour.

21. This is a resignation notice without an indication of the date of effect. There is also no indication that the claimant wished to serve notice period. The claimant does not refer to any contract term period. Section 35 of the Employment Act relate to either party that wishes to terminate an employment contract to give the other party notice or payment in lieu of such notice. This notice is to be in writing so as to allow the other party organise their affair due to the impending termination or hire a new person with the pay in lieu of such notice. In this regard the claimant can therefore not rely on her ambiguous resignation to state that she wanted to serve for the term of an unstated period. The reading of the resignation letter by the Court is of the effect that the claimant *wished the respondent well* but failed to state the date the resignation was to take effect. The notice should have been given noting the time applicable and that the

claimant wished to serve her notice term or pay in lieu of such notice. In the absence of such an indication, the claimant is to pay in lieu of notice as hers was a resignation.

21. The commissions owing all amounted to kshs.229, 653.00. This will be paid less kshs. 50,000.00 gross monthly salary that the claimant should have paid in lieu of notice. The total due is Kshs.179, 653.00 and will be awarded thus.

In conclusion, judgement is entered for the claimant as against the respondent in the following terms;

- a. **The sum of Kshs.179,653.00 as commissions due;**
- b. **The sum Kshs.13,636.36 due pay for 1st to 8th July 2009;**
- c. **Each party to bear their own costs.**

Delivered in open Court at Nairobi and dated this 11th Day of June 2014

Mbaru

JUDGE

In the presence of

Court Assistant: Lilian Njenga

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