

REPUBLIC OF KENYA
INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE 1297 OF 2011

CATHERINE WAITHERA RUKORIO.....1ST CLAIMANT

JOAN WATHIMU MUGO..... 2ND CLAIMANT

-VERSUS-

MEDIAMAX NETWORK LIMITED..... RESPONDENT

JUDGMENT

The claimants Catherine Waithera Rukorio and Joan Wathimu Mugo filed the memorandum of claim on 04.08.2011 through D.B. Osoro and Company Advocates. The respondent Mediamax Network Limited filed the memorandum of reply on 18.08.2011. The amended memorandum of claim was filed on 26.10.2011 and the amended memorandum of reply was filed on 16.11.2011. The claimant's further list of documents was filed on 31.10.2012 and their earlier further list of documents filed on 20.04.2012. The claimants' other supporting documents were attached on the bundle of the notice of motion filed on 26.09.2011 for leave to amend the memorandum of claim. The respondent filed the respondent's list of documents on 26.09.2012, the supplementary list of documents on 5.10.2012 and a further supplementary list of documents on 31.10.2012. The claimants' written submissions were filed on 13.12.2012 and the respondent's written submissions were filed on 18.12.2012.

The claimants in the amended memorandum of claim are praying for orders against the respondent as follows:

- a) Determination that the claimants were unfairly, wrongfully and unlawfully terminated.
- b) Compensation for unfair, wrongful and unlawful termination as the court shall deem fit.
- c) An order for the payment to the claimants for the actual pecuniary loss suffered as a result of the wrongful termination being outstanding commissions, severance pay and three months' salary in lieu of three months termination notice, for the 1st claimant a sum of Ksh.715, 110 and the 2nd claimant Ksh. 1,980,623.
- d) An order for issue of a certificate of service to the claimants.
- e) An order for payment of costs and any other relief this Honourable Court may deem fair and fit to grant.

The respondent in the amended memorandum of reply prayed that the claimant's amended memorandum of claim be dismissed with costs.

The case came up for hearing on 7.11.2012 and on 3.12.2012. The claimants gave evidence to support their respective cases and the respondent's witness was one Ken Ngaruiya.

The 2nd claimant testified as follows:

1. That she was employed by Regional Reach Limited since 2008 working as a sales person but was issued with a letter of appointment as sales and marketing consultant as per folio 43 on the bundle of the notice of motion. The letter stated that she was offered the post of marketing and sales consultant of K24TV starting Monday 15th September, 2008. The letter signed by Rose Kimotho as Managing Director stated that the 2nd claimant was to serve initially for three month contract with a monthly retainer of Ksh. 40,000. Her sales target was fixed at Ksh.1, 000,000 per month to be reviewed after the three months period. The letter then stated that the claimant would receive 10% commission on net value before VAT for orders secured on behalf of Regional Reach Limited for sales raised above the fixed target. No commissions would be paid for orders from advertising agencies. The claimant would receive fuel allowance of up to Ksh. 5,000 per month. She was to liaise with the direct, agency sales and marketing teams so as to ensure that there was no duplication of approach to the same clients. The agreement was to be reviewed after three months in December, 2008. The claimant accepted the offer by endorsing her name and signature on 12.09.2008.

2. The claimant's work involved sourcing for sales by talking to clients and persuading them to advertise on K24TV and Kameme radio. Her commission was due for payment when the advertisement had been aired and paid for by the client. She could not be paid if the client had not paid; even if the advert had been aired. The retainer was to be paid in every event even if she did not get business.

3. The respondent bought Regional Reach Limited and the claimant received a letter dated 18.01.2010 at folio 42 of the bundle of the notice of motion. The terms were the same only that she became a permanent staff with benefits such as medical cover and pension scheme based on the staffing grade. The letter was signed by the claimant in acceptance on 19.01.2010. It stated as follows:

“18th January 2010 Joan W. Mugo P.O. Box 27609 – 00506 Nairobi Dear Joan, Terms and Conditions – Monthly Retainer

As part of our ongoing review of the terms and conditions applicable under your previous employer (RRL), we are pleased to advise you that your monthly retainer of Kshs. 40,000 will now be classified as basic remuneration and with effect from 1st November, 2009 will be at the rate of Kshs. 57,150 per month. This, plus any additional earnings such as sales commission is required, under current KRA regulations, to be taxed under the PAYE system.

If you wish to be formally employed by MNL, under these remuneration process we will, in the not too distant future, be implementing a staff medical and pension scheme, membership of which will be dependent upon the final agreed terms and conditions and categories of staff to be covered.

Should you not wish to accept this offer, please advise us accordingly.

Yours sincerely, MEDIA MAX NETWORK LIMITED Signed, Alan Molloy Finance Manager cc: Rose Kimotho Janet Walunya Betty Ndungu”

4. The claimant signed another letter dated 31.05.2010 at folio 14 of the claimants' further list of documents. The letter signed by Rose Kimotho as the Chief Executive Officer informed the claimant that following a successful probationary period, she had consistently hit her targets and the respondent was very pleased to confirm her appointment as head of agency sales in the respondent's establishment. In that letter, the respondent congratulated the claimant for a job well done and acknowledged her hard work, commitment, team spirit and drive that had enabled the respondent to successfully reorganize and motivate the agency sales team into a formidable sales force. As relates to the claimant's terms of service, the letter provided, thus, **“Consequently, we are also pleased to confirm that we will be increasing your salary from Kshs. 57,150 to Kshs. 70,000 from 1st June 2010. In addition, you will get monthly mileage of Kshs. 7,000. Confirmation of your appointment entitles you to enjoin all other company benefits including our corporate medical policy which you are already enjoying. Three months notice or three months pay from either party will be required before termination of contract.”**

5. That before the confirmation, in the letter of 31.05.2010, the 2nd claimant testified that she had been served with the notice of termination of employment being the letter dated 16.03.2010 at folio 18 of the respondent's list of documents filed on 26.09.2012. That letter stated that the notice of termination had been prompted by the inability of the marketing and sales department to achieve agreed revenue targets over that season. Thus, the letter conveyed to the 2nd claimant that should the department meet the agreed revenue targets, in the subsequent three months being March to May, the three months notice to terminate would be reviewed at the respondent's discretion. It was the 2nd claimant's response that the letter of 31.05.2010 confirming her into appointment followed her successful work to meet the agreed revenue targets.

6. As head of agency sales, she could not sell directly to customers and she had to do so through the agents. She also had to supervise two members of the team. She was expected to develop a concept by way of a proposal and if it was good, the agents would give the business. The clients, the owners of the adverts would provide business through the agents. She did not need to speak to the clients directly.

7. The claimant testified that folio 41 on the bundle of the notice of motion being the letter also dated 31.05.2010 provided for the changed structure of payment. The letter stated as follows:

**“31st May 2010 Joanne Mugo Head of Agency Sales Mediamax Network Limited Nairobi
Dear Joanne, RE: SALES COMMISSION STRUCTURE REVIEW**

I am pleased to inform you that the company has reviewed and approved a change in your salary and commission structure as follows:

New monthly retainer Kshs. 70,000/- per month.

Please note: Failure to meet to meet your monthly sales target for three consecutive months will result in cancellation of your contract forthwith.

New commission structure:

PERFORMANCE BAND	RATE
0-50%	0%
51-70%	2.50%
71-80%	5%
81-90%	8%
91-99%	9%
100%+	10%
101% and above	15%

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salary and commission takes effect from 01 June 2010. Your sales target will be communicated on a monthly basis based on your overall performance. We expect a tough financial year ahead as competitors realign and reposition their radio and TV stations.

We therefore expect a significant effort on your side in helping keep the company in the No. 1 position. The very best to you in the coming year.

Yours sincerely, Signed Rose Kimotho Chief Executive Officer”

8. The claimant further testified that folio 40 on the notice of motion provided for the target for the sales. It is an internal memo dated 14.06.2010 by the Chief Executive Officer which refers to a sales and marketing meeting held on 31.05.2010 on the Agency Team Retainer and showing that the claimant's target was Kshs. 4 million and her retainer was to be Kshs. 70,000.

9. The claimant testified that from October 2010, her targets changed to Kshs. 3 million from Kshs. 4 million as per folio 39 on the notice of motion being the letter of 4.10.2010 signed by David Kimotho the Head of Direct Sales 1 (Government and Associated Business). The letter stated that it was further to the team's meeting held at Safari Park Hotel on 2.10.2010. the letter confirmed that the team's monthly sales targets was Kshs. 15 million and the claimant's individual target for K24 was Kshs. 1,125,000, for Kameme FM was Kshs. 1,125,000 and for the People was Kshs. 750,000 making a sum of Kshs. 3 million.

10. The claimant then testified on her claim for commissions as follows:

a) In May 2010, her target was Kshs. 1 million and she sold Kshs. 5,412,540. She was paid all the invoices except the one for Kshs. 730,620 and the one for Kshs. 1,426,300. The total was Kshs. 2,156,920. Her claim for unpaid commissions was **Kshs. 215,692** for May 2010 as per folio 23 of the claimants' further list of documents being the claimant's commission summary for May 2010. Folio 15 on the claimants' further list of documents shows that the respondent accepted her sales commissions claim form. It shows unpaid commissions of **Kshs. 73,063** and the claimant stated that some figures were missing in the sales commissions claim form.

b) For June to October 2010, the commission structure changed. For June she was paid all her commission claims. For July, the target was Kshs. 4 million and she sold Kshs. 9,798,900. The target structure is as per folio 41 of the notice of motion. It is the structure that applied until the end of January 2011. For July 2010, she claimed **Kshs. 589,416** and folio 16 of the claimants' further list of documents showed an admission that she had made the sales as per her sales commissions claim form. The summary of her claim for June to September 2010 when the target was Kshs. 4 million per month is at folio 24 of the claimants' further list of documents.

c) For August 2010, the claimant testified that she was claiming unpaid commissions of **Kshs. 618,834** because she had sold Kshs. 6,295,560. She stated that folio 17 of the further list of documents showed that the accountant admitted that her sales were Kshs. 6,042,560 but in fact, it was Kshs. 6,295,560. The claimant testified that folio 60 to 66 of the notice of motion were the purchase orders for the sales in issue.

d) For September 2010 she was not making any claim for unpaid commissions.

e) For October 2010, she testified that the target changed to Kshs. 3 million but the structure remained as per folio 41 of the notice of motion. Her claim for October 2010 was **Kshs. 53,325** as per her summary at folio 26 of the further list of documents. For that month, the respondent agrees to sales of Kshs. 1,432,000 but the claimant testified that she had sold Kshs. 2,133,000. The accounts records for that month are with the respondent and were not given to the claimant.

f) For November 2010, she testified that she sold Kshs. 2,118,000 and she was claiming unpaid commission of **Kshs. 105,900** as per folio 27 of the further list of documents being her summary for the month.

g) For December 2010, the claimant made total sales of Kshs. 1,898,240 and she was claiming unpaid commissions of **Kshs. 47,456** as per her summary at folio 28 of the claimants' further list of

documents. For that month, the respondent disputed Kshs. 500,000 for the documentary by the Kenya Anti corruption Commission.

11. She testified that the payment structure at folio 23 of the respondent's list of documents was unknown to her as it was never attached to the letter of 4.10.2010 being folio 22 on the respondent's list of documents as well as folio 39 on the notice of motion being the letter of 4.10.2010 signed by David Kimotho the Head of Direct Sales 1 (Government and Associated Business).

12. That folio 28 of the respondent's list of documents was a summary of computation by the respondent and she agreed with the sales for November but disagreed with the commission structure. The figures were different due to difference in the commission structure applied.

13. That in July 2010, the client paid and she did not understand why she was not paid the commission. The agency was Mindshare and the client was Committee of Experts and that she had dealt with the agent as the head of agency sales. There was no sale that could come to the respondent directly and she had to source for it. The commission system was aimed at motivating the sales, requiring the claimant to be creative in giving ideas to the agency.

14. At the time of termination, the claimant received the letter at folio 37 of the notice of motion dated 27.01.2011 titled "**FAILURE TO ATTEND WEEKLY SALES PLANNING MEETING**" signed by Jacqueline Githinji, the respondent's Human Resources Specialist. It stated, thus, "**I note with disappointment that you have not bothered to explain why you did not attend the above meeting. Therefore, the company would wishes to discontinue your services as a freelance Business Executive with immediate effect. Kindly handover all company properties in your possession to Robert Nderitu.**" The claimant testified that it was the first letter she had received from the respondent on Sunday before 27.01.2011 the Chief Executive Officer, she testified, had called her to be in his office at 7a.m. for a planning meeting for the month of January 2011. She complied with the Chief Executive officer's appointed meeting at his office at the Kijabe Street head office and did not attend the weekly meeting at the Moi Avenue office. She further stated that before termination, on 25.01.2011, as the sales team, they had written the letter at folio 38 of the notice of motion complaining about unpaid commissions for 2010. They expressed their dissatisfaction about the manner that the commissions payable to each one of them had been calculated. That they neither had knowledge of nor had the commission structure used to calculate their collective figures for the year ending December 2010. Accordingly, they demanded that the chief finance officer Ken Ngaruiya uses the relevant and valid commission structure that was attached being folio 39 on the notice of motion. In that letter they gave notice that they would not vacate the respondent's premises unless they were paid failing which they would invoke legal action against the respondent for redress. The claimant testified that the human resource officer had told her at a meeting that the respondent had not paid and the respondent had enough money to oppose any court case which in any event would take a long time spanning over five years. That after two days, she received the termination letter and she reported her case to the Kenya Human Rights Commission who did a demand letter and, the respondent replied as per folio 35 and 36 of the bundle of the notice of motion.

15. The claimant testified that there had been no pension and the respondent agreed to owe her three month's pay in lieu of her termination notice. As per the letter dated 15.04.2011, on without prejudice basis, the respondent stated that the claimant's outstanding commission as at December 2010 was Kshs. 74,130 and she was entitled to Kshs. 210,000 being three months salary in lieu of termination notice at the rate of Kshs. 70,000 per month. The claimant prayed for judgment as per the amended memorandum of claim.

16. Before the cross examination, counsel for the respondent applied that the letter of 31.05.2010 at folio 14 required expert evidence to verify its authenticity. Counsel argued that the letter lacked the names of the directors and therefore it was not authentic. The court has perused the letter and finds that the letter was not any different from the other letters by the respondent lacking the names of directors and there is obvious variance in the letter head and other papers the respondent used to communicate to staff. The court has also noted and observed that it was not disputed for the respondent that Rose Kimotho as the

Chief Executive Officer of the respondent had in fact signed the letter in issue. There were no allegations of the signature having been forged. Accordingly, the court finds that the letter is authentic.

17. The claimant stated that the letter of 18.01.2010 at folio 42 of the notice of motion did not refer to the commission pay structure. That the letter of 31.05.2010 at folio 14 of the claimants further list of documents and the letter dated 31.05.2010 at folio 41 were both received by the claimant and they related to different subjects; folio 41 letter is the commission pay structure the claimant stated was known to her and folio 14 later was a letter of confirmation of appointment as head of agency sales.

18. The claimant testified that she was paid by cheque banked in the bank account whose name was Diva Communications, her company.

19. The claimant in cross examination stated that she did not reply to the memo by the human resources specialist at folio 26 of the respondent's list of documents dated 25.01.2011 and which preceded the termination letter dated 27.01.2011 at folio 25 of the respondent's list.

20. Further the claimant testified that folio 22 of the respondent's list was a general letter addressed to the team and attaching a general commission structure at folio 23. It was her evidence that she had a specific structure addressed to herself and that applied to her individually.

The 1st claimant testified as follows:

1. That at the time of the hearing, she was employed as a sales and marketing officer at the Royal Media Services.

2. That she worked with Regional Reach Limited from 2009 as a sales person where she was earning 10% commission for every sale made. On 1.09.2010 she entered into a contract with the respondent where she worked as a direct sales representative. The work required her to approach individual clients both personal and corporate. The letter of the contract of service was dated 1.09.2010 being folio 1 on the claimants' further list of documents. Some key provisions of the letter stated as follows:

a) Provided for the elaborate claimant's duties.

b) The contract was for one year from 1.09.2010 to 31.08. 2011.

c) The official working hours were 8.30am to 1.00pm in the mornings, 2.00pm to 5.00pm in the afternoons from Monday to Friday and 8.30am to 1.00pm on Saturdays; she was to work for a minimum of 8 hours each weekday and be paid at the end of the month on commission basis for the sales made. The commission was payable when the client had paid in full.

d) The payment was to be based on the approved payment structure attached to the letter. The commissions paid would be taxable. She was entitled to use the respondent's telephone, email and transport while on duty. Upon attaining 10% of the weekly targets she would be paid Ksh. 1,200 transport per week and Ksh. 1,000 airtime per month upon hitting 10% of the monthly target.

e) She was to use order books and receipts issued centrally by the respondent.

f) To terminate the contract each party was entitled to give a one week notice. The respondent would terminate without giving the notice and on account of the claimant's failure to carry out the duties as per the contract or the respondent failed to honour the contract.

3. That the commission structure applicable to her was the one dated 31.05.2010 at folio 12 of the notice of motion. The letter stated as follows:

**"31st May 2010 Catherine Waithera Direct Sales Representative Mediamax Network Limited
Nairobi Dear Catherine, RE: SALES COMMISSION STRUCTURE REVIEW**

I am pleased to inform you that the company has reviewed and approved a change in your salary and commission structure as follows:

New monthly gross salary Kshs. 15,000/- per month.

Please note: Failure to meet to meet your monthly sales target for three consecutive months will result in cancellation of your contract forthwith.

New commission structure:

PERFORMANCE BAND	RATE
0-50%	0%
51-70%	2.50%
71-80%	5%
81-90%	8%
91-99%	9%
100%+	10%
101% and above	15%

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commission takes effect from 01 June 2010. Your sales target will be communicated on a monthly basis based on your overall performance. We expect a tough financial year ahead as competitors realign and reposition their radio stations.

We therefore expect a significant effort on your side in helping keep the company in the No. 1 position. The very best to you in the coming year.

Yours sincerely, Signed Sam Kariuki Head of Sales”

4. She testified that she signed the memorandum dated 24.06.2010 at folio 10 of the notice of motion. The memorandum, raised complaints of dissatisfaction on the issue of new sales commission structure. In the letter of 31.05.2010 it had been stated that the retainer of Kshs.15, 000 per month was referred to as new monthly gross salary with the negative consequence of attracting higher taxation of 30%. Accordingly, the memo stated the withdrawal from the salary scheme by being scrapped off from the monthly gross salary. It was the 1st claimant’s evidence that by that memo, she only withdrew from the salary scheme stated in the letter of 31.05.2010 but not the commission structure.

5. The claimant stated that she could claim the commissions only after the client had paid the respondent for the sales she had made to the client as the sales person. She linked the customer to the respondent and she had a desk at the respondent’s office. She left work at 5.00pm after the day’s engagements. She did sales for the respondent and did not work for any other employer. By the respondent’s policy she could not work for any other person.

6. The claimant in her evidence made claims as follows:

a) That she claimed commissions being balance for August 2010 and October 2010, full amount for November 2010, December 2010 and January 2010.

b) That the claim for August 2010 was for **Ksh. 79,294** as per folio 4 of the Claimants' further list of documents and according to commissions' payment structure of 31.05.2010 at folio 5 of the further list.

c) That the claim for October 2010 was Ksh. 17,900 being as per the summary at folio 10 of the claimants' further list of documents.

d) For November 2010 the claim was for Ksh.99, 659 as per folio 11 of the claimants' further list of documents.

e) The claim for December 2010 was Ksh. 255,750 as per folio 13 of the claimants' further list of documents.

f) That as per folio 9 on the notice of motion, the new commission structure was agreed between the claimant and the respondent on 31.01.2010. Her monthly target was increased to 4,000, 000 for the period January to March 2011. The new structure entitled her to a retainer of Ksh.40, 000. Folio 8 on the claimants' further list of documents is the commissions claim form for October, 2010. It was signed by the accountant to confirm the claim was true. For the other months the relationship between the parties were declining due to the dispute and the claimant could not access the claim forms for the subsequent months as completed between them.

7. That the claimant and her workmates raised a complaint about the commissions paid to them as per folio 5 on the notice of motion. She was served with the termination letter dated 25.01.2011 being folio 6 on the notice of motion. The termination letter stated that the reason for termination was failure to attend the meeting on Monday 24.01.2011 and the reasons for that failure had been found unacceptable. The claimant was therefore terminated effective 25.01.2011. The claimant testified that the letter of termination did not accord her any hearing. On the date of the meeting in issue that she did not attend, she had reported on duty arriving at 9.30 am because at pick hour she was unable to afford the high fare since she was broke. The human resources specialist in the respondent's employment told her that she was broke to go to court to secure her rights.

8. She disagreed with the respondent on the sales made and the applicable commission structure. For August 2010, she testified that the respondent's summary at folio 7 of the respondent's supplementary list of documents failed to include the sales she had made to the Full Gospel Church and Hon. Githunguri. Hence her total sales for that month did not agree with the respondent's summaries. That for August and October 2010 the respondent had denied the claimant her due commissions without any explanations.

9. The claimant stated that she was not aware of a November 2010 meeting she failed to attend and was not aware of any November 2010 agreement on a new structure for payment of the commissions.

10. The claimant also submitted that she had complied with the set procedures for making the claims for payment of the commissions by the respondent.

11. The claimant testified that she was not at the alleged Safari Park meeting and she had seen in court folio 10 on the respondent's list of documents being the email from Samuel Kariuki dated 05.10.2010. She testified that that email purporting and alleged to have varied her targets was strange to her and she had not agreed to any such variation.

The respondent's witness was Kenneth Kinyanjui Ngaruiya. He was the respondent's chief finance officer since September 2010. With respect to the case of the 2nd claimant he testified as follows:

1. That he knew her as Joan Waithimu Mugo between September 2010 and June 2011. He produced the letter dated 13.11.2009 as Exhibit R1 being the respondent's letter of offer and subsequent employment of one Juliet Waruguru Maina. He also produced marked Exhibit R2 the said Juliet's undated letter of resignation from the employment of the respondent and with effect from December 2011. He testified that no other employee in the respondent's establishment was known as Juliet. Thus folio 61 on notice of

motion being the order for client or advertiser known as Ogilvy East Africa and addressed to “**Attn. Julie**” and dated 29.07.2010 could not have referred to the 2nd claimant. The witness stated that the order had been given to all media houses by the Committee of Experts. The witness referred to the respondent’s further list of documents at folio 2 being a letter by Ipsos Synovate endorsed 10.10.2012 which shows that K24 and Kameme FM were among the media houses the Committee of experts booked in May, July and August 2010 to air referendum information on constitutional review and voter education.

2. That the sales procedure involved the sales person making the proposal, the head of sales or chief executive officer approving the proposal, the sales person presenting the proposal to the client and if the client approved, the orders were approved by the finance and sales managers as well as the chief executive officer. Folio 24 On the notice of motion was a typical order approved by finance and sales. For walk in clients like the Committee of Experts, there would be no agency name on the order.

3. For the 2nd claimant the commission structure applicable was as per folio 39 of the notice of motion being the letter dated 4.10.2010 following the Safari Park Hotel meeting of 2.10.2010 which the 2nd claimant had attended. The witness stated that he was present at that meeting. That folio 41 on the notice were targets as at 31.05.2010 and folio 39 on the notice were the reviewed targets and which applied to the 2nd claimant at her termination. That the 2nd claimant did not make any sales in January 2011 because she had declined to sign the relevant targets. East African Breweries Limited, order at folio 72 of the notice of motion was not paid because they were walk in clients. That similarly the Kenya Tourist Board at folio 59 of the notice of motion was not paid for because it was settled after lapsing of the 30 days credit period. The witness accepted that orders continued to be addressed to Regional Reach Limited even after the respondent purchased it.

4. That the Kenafric Bakery Limited at folio 52 of the notice of motion was cancelled and therefore not paid for and the 2nd claimant was not informed of the cancellation.

5. That he did not know Diva Communications, the name the 2nd claimant had testified belonged to her company.

6. The witness stated that the 2nd claimant had to file the claim form, take to the head of sales, to the accountant and finally for approval by the chief finance office. The claim forms like one at folio 15 on the claimants’ further list of documents was incomplete because his office had not done the quality assurance function as required.

For the 1st claimant, the witness testified as follows:

1. That the 1st claimant rejected the commission structure at folio 7 of respondent’s list of documents being sales commission structure dated 31.05.2010. Folio 10 and 22 on the list were the structures that applied in December 2010. They were in place after the one of 31.05.2010. The 1st claimant signed the structure at folio 13 of the list.

2. After termination the respondent offered the 1st claimant Ksh.75, 875 as per folio 3 of claimants’ further list of documents. The claimant failed to take up the offer.

The court has considered the pleadings filed, the evidence and the submissions made for the parties and makes the following findings as to the issues and questions that turn out for determination in this case:

1. The first issue for determination is the terms and conditions of service applicable to the 1st claimant. The court finds that the terms and conditions governing the 1st claimant’s employment were expressed by the parties in the letter of the contract of service dated 1.09.2010 being folio 1 on the claimants’ further list of documents. The payment terms were clearly spelt out in the contract which was to run for a year from 1.09.2010 to 31.12.2011. The contract was silent on variation of the agreed terms of payment. It is the court’s considered opinion that the respondent as an employer could not vary the agreed terms of

payment unless the 1st claimant as the employee was agreeable to such variation. Section 10(2) (h) of the Employment Act, 2007 provides that remuneration, scale or rate of remuneration, the method of calculating that remuneration and details of any other benefits shall be stated in the contract of employment. Section 10(5) stipulates that where it is desired to have changes in such matters stated in the contract of employment, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee in writing. The provisions reflect the idea of freedom of the parties to negotiate and by consent, enter into the employment relationship. It is the court's finding that it was not open for the respondent to unilaterally impose the structure for the payment of the commissions and other benefits to the claimant outside the agreed terms of payment and to the detriment of the claimant. The court further finds that in absence of any contrary material before the court, the approved commission structure referred to as appendix 1 in the clause on payment terms in the letter of the contract of service is obviously the letter of 31.05.2010 addressed to the 1st claimant and titled "**Sales Commission Structure Review**" being folio 7 on the respondent's list of documents.

2.The next issue for determination is whether the 1st claimant rejected the sales commission structure dated 31.05.2010. She testified that she signed the memorandum dated 24.06.2010 at folio 10 of the notice of motion. The court has considered that memorandum and it is clear that the claimant and her colleagues who signed the memorandum were stating that they were entitled to a monthly retainer of Ksh.15,000 and not a new monthly gross salary of Ksh.15,000. The objection was stated as a negative impact to their commissions which, in view of the salary arrangement, they would have to shoulder a higher taxation of 30%. Hence they were unanimously withdrawing from the salary scheme. There was no mention of the new commission structure and the court finds that the new commission structure in the letter of 31.05.2010 continued to apply to the 1st claimant.

3.The next question is whether a new commission structure was issued to the 1st claimant on 5.10.2010 as per the documents in folio 10, 11 and 12 of the respondent's list of documents. The court finds that the email at folio 10 was not addressed to the claimant and nowhere on the documents did the claimant sign to accept the alleged new commission structure. The court has already held that an employer cannot unilaterally change the contents of a contract of service as prescribed in the Employment Act, 2007 without prior consultation with the employee. The court finds that the alleged new commission structure would have in any event been a unilateral imposition by the respondent as no evidence of such consultation has been produced. The court further finds that the only new structure that the 1st claimant signed and was bound with was the one dated 31.12.2010 and which became effective from 1.01.2011. It was submitted for the respondent, thus, "**At the foot of the letter dated 31.12.2010 (folio 13 of respondent's list of documents) the 1st claimant acknowledged having read and understood the new commission structure effective 1st January 2011. The acknowledgement also confirms that the 1st claimant admits that a meeting was held in November 2010 to discuss the existing commission structure of 5th October 2010.**" The court has considered the submission and finds that the statutory requirement that the employer consults the employee before varying the terms of payment as stated in the contract of employment cannot be served by mere inference not supported by evidence of circumstances and overt actions by the employer to prove such consultation. Further, there is no evidence of the structure of the commissions that was discussed in November 2010 and whether any such structure was a mere proposed draft or an approved operational structure.

4.The next issue for determination is whether the 1st claimant is entitled to the commissions as claimed. The court finds that applying the target of Ksh. 800,000 as per the Commission structure of 31.05.2010, there are commissions due and payable to the claimant by the respondent. The claimant in her submissions it was stated that there was a slight discrepancy in her summaries but the figures of the sales she made were correct. The orders of what she sold as supporting her summaries had been attached and the respondent's summaries had excluded some of the sales such as those of Full Gospel Church and Hon. Githunguri as per the 1st Claimant's evidence. The court has considered the evidence, submissions and the provisions of section 20(1) which requires the employer to give written statement to an employee at or before the time at which any payment of wages or salary is made to the employee. Such respondent did not comply with that provision with respect to payment of the claimant's services. On the standard of

balance of probability, the court finds that the 1st claimant has established and proved her claim for commissions due but not paid. As submitted for her, she is entitled to **Ksh.636,748** comprising Ksh. 79,294 for August 2010, Ksh.17,900 for October 2010, Ksh.99,659 for November 2010, Ksh.335,750 for December 2010, Ksh. 51,250 for January 2011 as per the respondent's computation and Ksh. 52,895 being unexplained deductions in October and August 2010.

5.The next issue for determination is the structure that was applicable to the 2nd respondent. The 2nd claimant's case was that she was given only one commission structure at folio 41 of the notice of motion and dated 31.05.2010. It was her case that the alleged November 2010 structure was not known to her. The court has already held that to vary the stated terms and conditions of service as relates to the agreed payments it was necessary to consult the employee. The respondent has not shown such consultations with respect to the purported commission structure for November 2010. Thus, the court finds that the only valid structure applicable to the 2nd respondent was the one dated 31.05.2010.

6.The next issue for determination is whether the 2nd claimant is entitled to the unpaid commissions as claimed. As for the Kenafric Bakery Limited the 2nd claimant has submitted that the only objection to payment raised by the respondent is that the sale was cancelled in August, 2010. It has been submitted for her that her claim is for Ksh. 72,000 and Ksh. 150,000 for July 2010 before the alleged cancellation in August 2010. This submission has not been opposed and the court finds that the claimant is entitled to the sum of Ksh.220, 000 as per the submission. For November 2010, she testified that she sold Kshs. 2,118,000 and she was claiming unpaid commission of Kshs. 105,900 as per folio 27 of the further list of documents being her summary for the month. In the submissions, the respondent has conceded to the November claim save for the difference in the commission structure applicable. The court has found the claimant applied the correct structure and she is entitled to the sum as computed for her for the month of November. For the month of May, June and August 2010, the court finds that as submitted for the respondent, the claimant failed to establish and prove that she initiated and originated the claims. For December 2010, the court finds that the claimant is entitled to Ksh. 47,456 as submitted for her. The court also finds that the claimant failed to establish and prove that she passed to her customers by the name Julie and the court agrees with the submissions for the respondent that she lacked any nexus to the name. Under the claim for the unpaid commissions the court finds that the 2nd claimant is therefore entitled to a sum of **Ksh.373, 356**.

7.The next issue for determination is whether the 2nd claimant is entitled to severance pay. She claimed severance pay for cumulative three years of service. It has been submitted for the respondent that the 2nd claimant's pay slip at folio 22 of the claimants' further list of documents showed that she was a member of the National Social Security Fund and was not therefore entitled to severance pay with respect to service pay because under section 35(6)(d) she was not entitled as claimed. The court agrees with the respondent's submissions and finds that the claimant is not entitled to service pay and as claimed and styled as severance pay.

8.The 2nd claimant has prayed for three months salary in lieu of the termination notice. To oppose the claim the respondent has disputed the authenticity of the letter of 31.05.2010 at folio 14 of the claimants' further list of documents. The court has already found that in absence of evidence disputing that the signatory signed the letter, the letter is valid and it entitled the claimant to a gross monthly pay of Ksh. 77,000 and a basic pay of Ksh. 70,000. The court finds that the termination was without the due three months notice and the 2nd claimant is entitled to **Ksh. 210,000** as claimed.

9.The other issue for determination is whether the 2nd claimant was unfairly terminated and if yes, whether she is entitled to the twelve months maximum compensation under section 49 of the Employment Act, 2007. Section 49 (1) (c) provides that the court may award the equivalent of gross monthly wage of the employee but not exceeding twelve months as at time of dismissal. The confirmation letter of 31.05.2010 at folio 14 of the claimants' further list of documents entitled the claimant to the gross monthly pay of Ksh. 77,000. The court finds that the 2nd respondent was terminated by the letter dated 27.01.2011 at folio 25 on the respondent's list of documents. The court has found that in December 2010

the 2nd claimant was entitled to Ksh.47, 456 in commission and therefore her last monthly wage at termination was the sum of Ksh.124, 456. The court has considered the circumstances of the termination and finds that the reason for termination was not valid as it was not genuine and the termination was unfair under section 43 of the Act. The claimant's evidence that she did not attend the meeting leading to her termination because she was attending another meeting with the respondent's chief executive officer was not disputed. Contrary to section 41 of the Act, she was not given a hearing by the respondent before the termination and the decision was procedurally unfair. The court has considered the circumstances of the case including the 2nd claimant's length of service, the respondent's failure to give the claimant a hearing on the valid grievance as to the payment of the commissions and the unfair termination and considers that the claimant is entitled to **Ksh.995,648** being eight months gross salaries.

10. The next issue for determination is whether the 1st claimant was an employee of the respondent. At paragraph 3 of the amended memorandum of reply the respondent pleaded that it will object that the 1st claimant was not an employee and was wrongfully before the court and that the court lacked jurisdiction. The respondent did not submit on the issue but it was submitted for the 1st claimant that she was an employee because her contract with the respondent subjected her to control of the respondent in terms of the working hours, she was answerable to the respondent's officers, she was restrained from working for other employers and she used the respondent's property and facilities to deliver her services such as office space. This court considered the issue in the case of **Stanley Mungai Muchai – versus- National Oil Corporation of Kenya, Industrial Court of Kenya at Nairobi Cause No.447N of 2009 pages 7 to 9** of the court judgment where it was stated, thus,

“The Industrial Court Act, 2011 in Section 2 defines employee to mean a person employed for wages or a salary and includes an apprentice and indentured learner. The section also defines employer to mean any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company.

The Employment Act, 2007 in Section 2 defines “Contract of Service” to mean an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include a foreign contract of service to which Part XI of the Act applies.

The court holds that whether the relationship between parties' amounts to a contract of service or contract for service is an issue both of law and fact but largely, one of fact. There is no doubt that a relationship that is a contract of service, unlike one that is a contract for service, will enjoy the statutory protections accorded by the employment legislation. This is more so in view of the definitions of “employee”, “employer” and “contract of service” under the Employment Act, 2007 and the Industrial Court Act, 2011.

A contract of service invariably relates to “dependent” or “subordinate” employment and a contract for service relates to “independent” or “autonomous” employment. Thus there is a constant line that is drawn between self-employed or independent contractors in a contract for service, and, employees in a contract of service. There is no universal formula for determining existence of a contract of service. Simon Deakin and Gillian S. Morris, Labour Law, 3rd Edition pages 146 to 168 have discussed some of the tests used by courts in determining “employment” or “service”. They include the following:

(a) The control test whereby a servant is a person who is subject to the command of the master as to the manner in which he or she shall do the work. However the formal or personal subordination of a worker as a test for existence of a contract of service may not apply for highly specialized workers such as in the case of the doctors, lawyers, and other professionals.

(b) The integration test in which the worker is subjected to the rules and procedures of the

employer rather than personal command. The employee is part of the business and his or her work is primarily part of the business. However, staff of independent contractors may as well perform entries integral or primarily part of the business when in fact, they are not employees.

(c) The test of economic or business reality which takes into account whether the worker is in business on his or her own account, as an entrepreneur, or works for another person, the employer, who takes the ultimate risk of loss or chance of profit.

(d) Mutuality of obligation in which the parties make commitments to maintain the employment relationship over a period of time. That a contract of service entails service in return for wages, and, secondly, mutual promises for future performance. The arrangement creates a sense of stability between the parties. The challenge is that where there is absence of mutual promises for stable future performance, the worker thereby ceases to be classified as an employee as may be the case for casual workers.

Since none of the foregoing tests can resolve the issue decisively on their own, in many cases the issue will be resolved by examining the whole of the various elements which constitute the relationship between the parties; this has been called the multiple test”.

The court upholds the reasoning in that case and finds that as submitted for the 1st claimant, there was a contract of employment between the parties. In the cited case, the court held that both contracts of service and contracts for service are amenable to the wide constitutional and statutory jurisdiction of this court. That holding is upheld.

11. The final issue for determination is whether the 1st claimant was unfairly terminated and whether she is entitled to compensation. The court considers that the termination was unfair because she was not accorded a hearing before the termination as envisaged under section 41 of the Employment Act, 2007. The court further considers that the claimant had a responsible and well founded complain about her claim for payment and the respondent could not act drastically by terminating the claimant with a shorter notice than it was agreed between the parties. For the unfair termination, taking into account that the 1st claimant was on a one year fixed contract and her last gross monthly wage was Ksh.51, 250, the court finds that two months compensation of **Ksh. 102,500** is just in the circumstances of the case.

In conclusion, judgment is entered for the claimants against the respondent for:

- a) a declaration that the respondent unfairly terminated the claimants’ respective contracts of service;
- b) the respondent to pay the 1st claimant **Ksh739,248** and the 2nd claimant **Ksh.1,579,040** plus interest at court rates from the date of the judgment till full payment;
- c) the respondent to issue and deliver to the claimants their respective certificates of service; and
- d) the respondent to pay costs of the case.

Signed, dated and delivered in court at Nairobi this 21st December 2012.

Byram Ongaya

JUDGE