

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI

CAUSE NO. E6516 OF 2020

AGGREY WEKESA FUNGUTUTI.....CLAIMANT

VERSUS

AMEX AUTO PARTS LIMITED.....RESPONDENT

JUDGMENT

The Claimant worked for the Respondent as an Operations Manager from 7/7/2019 to 17/7/2020 a period of one year.

The Claimant filed the suit on 3/12/2020 seeking the following reliefs: -

- a) A declaration that the termination of the Claimant's employment by the Respondent was unlawful, malicious, un-procedural and an infringement on his constitutional rights.
- b) A declaration that the unilateral reduction of salary by the Respondent was unlawful and order for payment of the retained salary.
- c) Maximum compensation for wrongful dismissal
- d) Special damages:
 - i. One month's pay in lieu of notice Kshs. 400,000.00
 - ii. Damages for wrongful dismissal (KSHS. 400,000 x 120) = Kshs. 4,800,000.00
 - iii. Annual leave not granted Kshs. 400,000.00 May 2020

- iv. House allowance (15% of Kshs. 400,000 x 13 months June 2019 to July 2020) Kshs. 1,050,00.00
 - v. Salary arrears (Kshs. 400,000 – 225,000 = 175,000 x 6 months) Kshs. 36,000.00
 - vi. Allowances arrears, Airtime allowance (Kshs. 1,000 x 6 months) = 6,000.00 Fuel allowance (Kshs. 5,000 x 6 months) = Kshs 30,000.00.
- e) Interest on the total sum
 - f) Certificate of service
 - g) Costs of the cause
 - h) Any other and further relief this honourable court may deem fit and just to award under the circumstances.

The Claimant adopted a witness statement sworn under oath on 23/11/2020 as his evidence in chief. The Claimant testified that he earned Kshs. 400,000.00 monthly salary. That he was never issued with a written contract of service and was never given a payslip. That he did not take annual leave. That sometimes in March 2020, one Mr. Devshi Patel informed the Claimant that his salary was to be reduced to Kshs. 225,000.00 and his fuel and airtime allowances were to be reduced to Kshs. 10,000.00 and Kshs. 1,000.00 respectively. This was said to be due to the effects of COVID-19.

That the Claimant was the only one affected by the reductions and without notice.

That despite that the sales had gone down due to corona; the Claimant was given a sales target of Kshs. 50,000,000.00 per month till the month of December.

That in May 2020, the Claimant achieved the sales target and in June 2020, the Claimant exceeded the target to 62,000,000.00 whereas the month of July projections were of Kshs. 70,000,000.00.

The Claimant wrote to the Director asking for a salary review since he had exceeded the targets. The Respondent replied to the letter informing the Claimant that his services had been terminated. The email seeking salary review and the response are attached to the Memorandum of Claim.

The termination was without notice, notice to show cause, or any hearing. No reasons were given in the letter of termination except that Mr. Devesh Patel told the Claimant that the company was unable to meet his expectations and so it “would be a good time to part ways” just like that.

The Claimant was informed to go on leave and come back in August to handover. The Claimant said that he had greatly improved the performance of the company in the year 2019 and 2020 and had seen a decline of credit due accounts from 22,000,000 as at December 2019 to under Kshs. 10,000,000/= as at 27th July 2020. That he had brought on board corporate fleets joining tier 1 category of customers among them being Isuzu East Africa, Kenya Africa Industries and G42.

That the Respondent had no justification to reduce his salary as the sales were at their peak during the COVID-19 period.

On 22/7/2020, the Respondent contacted the Claimant and informed him that he was being offered a new position of sales team leader by the company. The Claimant was pressured to sign a contract of employment for the first time. The Claimant did not take up the position as he did not agree to the new terms which included a salary of Kshs. 180,000.00 per month.

The Claimant wrote a demand letter to the Respondent which letter was responded to by the Advocates for the Respondent informing the Claimant that his services had been terminated for absconding work. The demand letter is dated 20/8/2020 and the response is dated 28/8/2020.

The Claimant prays to be awarded as prayed in the memorandum of Claim including one-month salary in lieu of notice; payment of house allowance at 15% of Kshs. 400,000.00; salary arrears being deduction for Kshs. 400,000.00 to Kshs. 225,000.00 (Kshs. 175,000.00) per month times six months; deducted allowances in the sum of Kshs. 36,000.00; (Airtime allowance (1,000 x 6 months) Kshs. 6,000.00; and fuel allowance being Kshs. 59,000 x 6 months) Kshs. 30,000.00; compensation for the unlawful dismissal equivalent to 12 months' salary; certificate of service; interest and costs.

Respondent filed Memorandum of Response dated 23/12/2020 in which the entire claim is denied stating that Claimant entered into a new contract with the Respondent dated 21/7/2020 which was executed on 25/7/2020. That the new contract superseded the earlier one in the new position as a senior sales executive at a salary of Kshs. 180,000.00. That the Claimant sought leave from 4/7/2020 to 12/8/2020, which leave was granted and Claimant proceeded on leave but never resumed duty.

The Claimant was formally invited to show cause by a letter dated 19/8/2020 which the Claimant ignored and the Respondent terminated his employment by a letter dated 31/8/2020. One Judy Njeri Mwangi testified to the aforesaid facts by adopting a witness statement dated 17/5/2021 as her evidence in chief and produced exhibits marked '1' to '19' in support of the case. RW1 confirmed that the Claimant had worked for the Respondent before and earned Kshs. 400,000.00 per month. RW1 denied that the initial contract was terminated adding that Mr. Patel had only indicated that they could no longer be able to meet the terms demanded by the Claimant and it was time to part ways. That however the Claimant was issued a new contract which he duly signed.

The new contract dated 22/7/2020 titled "Offer of Employment" was produced before court and was signed by the Managing Director Mr. Devesh Patel on 2017/2020 and was signed by the Claimant on 24/7/2020 and witnessed by RW1 on 25/7/2020.

The Claimant had a total leave balance of 18.5 days for the year 2020 as per the staff leave application form produced by RW1 dated 3/8/2020. The show cause letter for absconding work dated 19/8/2020 was also produced by RW1 and the letter of summary dismissal dated 31/8/2020 was also produced by RW. The reason for dismissal was gross misconduct for not returning to work upon expiry of annual leave.

In terms of the letter, the Claimant was offered salary for days worked up to 11/8/2020 (9 days) Kshs. 62,308; 11.5 days outstanding leave Kshs. 79,015.00 and 7-days' notice period Kshs. 48,462 and was to be paid a total of Kshs. 190,385.00 less statutory deduction.

Under cross-examination, RW1 stated that Claimant requested for leave on 4/8/2020 and was to return on 12/8/2020. That the leave applied was on the previous contract and did not serve at all under the new contract.

RW1 said that Claimant agreed to the new terms of the contract by appending his signature on it freely and voluntarily.

RW1 said that the Claimant was not an Operations Manager but was Business Manager and Sales Executive. RW1 said that there was no settlement with regard to the first contract but this was a new engagement. That the suit lacks merit and it be dismissed.

DETERMINATION

The court has carefully considered the evidence adduced by the Claimant vis a vis that by the Respondent. The court has also considered written submission filed by both parties and the issues for determination are: -

- (a) Whether the Respondent terminated the first employment relationship for a valid reason following a fair procedure.
- (b) Whether signing a new contract absolved the Respondent from any liability with regard to the 1st contract.
- (c) Whether the Claimant was validly dismissed for absconding work in respect of the 2nd contract of employment.

The Claimant adduced uncontested evidence that he was aggrieved by the reduction of salary from Kshs. 400,000.00 to Kshs. 225,000.00 which reduction was done arbitrarily, without any consultation or agreement. The Claimant tendered un-contradicted evidence that, despite COVID-19 pandemic, he had met and even exceeded his sales targets during the period he served the Respondent and in particular, the period after his salary had been drastically reduced by the Respondent.

It is not in dispute that the Claimant protested the reduction of his salary in writing and asked for a review of the same. It is also not in dispute that the request for review of his salary was met with a written threat of separation.

It is the court's considered opinion and finding, that the unilateral reduction of salary by a margin of Kshs. 175,000.00 per month amounted to a fundamental breach of contract of employment which entitled the Claimant to repudiate the same.

At the time the Claimant went on leave, on 4th August 2020, he was no longer under obligation to serve under the old contract, the same having been fundamentally breached by the Respondent for no valid reason and without following a fair procedure.

That is the matter before court. The Claimant signed a new contract of employment subsequently, which contract did not materialise as the Claimant did not report to work at all since, he was not satisfied with a lesser offer of salary in the sum of Kshs. 180,000.00. Clearly, the Claimant was operating under financial pressure his salary having been reduced substantively from Kshs. 400,000.00 to Kshs. 225,000.00 and now was being offered an even lesser salary of Kshs. 18,000.00 despite his written protestation.

The court finds that the 2nd contract of employment did not come to effect, since there was no performance at all, same was frustrated by the Claimant, but this did not absolve the Respondent from the unlawful and unfair termination of the first contract of service despite un-contradicted stellar performance by the Claimant at the material time.

Accordingly, the court finds that the Claimant is entitled to payment of his deducted salary and allowances denied. The Claimant is also entitled to one month salary in lieu of notice; to payment in lieu of leave days not taken and to his certificate of service.

Furthermore, the Claimant had served the Respondent diligently for a period of over one year and his record of sales which exceeded the targets set were not contradicted by the Respondent at all. The Claimant suddenly lost a stable income unlawfully. The Claimant suffered loss and damage as a result of sudden loss of a high ranking sales job. There is no evidence that there was any justification to fundamentally breach the contract of employment of the Claimant. The Claimant did not contribute to that breach of the contract which ended his initial engagement with the Respondent unlawfully. The new contract which never materialised which offered even leave terms of service did not mitigate the damage suffered by the Claimant at the hands of the Respondent. The Claimant had not obtained a new job at the time of hearing the suit and had not been paid terminal benefits nor had he been given a certificate of service to enable him seek a new employment.

Considering similar case of **Ahuta v Associated Construction Co (K) Ltd (Cause 1311 of 2018) [2025] KEELRC 1373 (KLR) (5 May 2025) (Judgment)** where it was held that;

Having established that the Claimant was unfairly terminated the court proceeds to award her damages for unlawful termination as per section 49 of the Employment Act. When making an award under, section 49, a court of law is expected to exercise judicial discretion on what is fair in the circumstances. This court also takes in to account the considerations under section 49(4) of the Act and notes that the Claimant worked for the Respondent for one year and the nature of the termination and

awards her three months' salary as compensation for unlawful termination.

The Court has also considered the facts set out above in this case and awards the Claimant the equivalent of three (3) months' salary in compensation for the unlawful and unfair termination of employment.

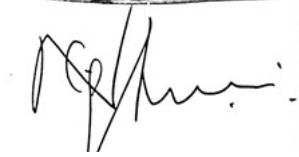
For the avoidance of doubt, the claim for house allowance lacks merit and is dismissed as same was not proved by the Claimant. There was no counterclaim in respect of the 2nd contract of employment between the parties which was frustrated by non-performance. The court makes no findings or order in respect of the same.

In the final analysis judgment is entered in favour of the Claimant against the Respondent as follows: -

- (a) Kshs. 400,000.00 being one-month salary in lieu of notice.
 - (b) Kshs. 1,050,000.00 being deducted salary for six months.
 - (c) Kshs. 36,000.00 being deducted airtime allowance for six months.
 - (d) Kshs. 30,000.00 being deducted fuel allowance for six months.
 - (e) Equivalent of three months' salary in compensation for the unlawful and unfair breach of employment contract in the sum of Kshs. 1,200,000.00
 - (f) Unpaid leave for 18.5 leave days Kshs. 246,000.00
- Total award Kshs. 2,962, 000.00.**
- (g) Interest at court rates from date of filing suit till payment in full.
 - (h) Costs of the suit

(i) Grant of certificate of service within 30 days of this judgment.

Dated at Nairobi this **16th day of March 2026**



Mathews Nduma

JUDGE

Dated, signed and delivered in open court at Nairobi this **9th day of April 2026**

Dr. Jacob Gakeri

JUDGE

In presence of:

Mr. Wetaba for Claimant

M/s. Musau for Respondent

Mr. Kemboi – Court Assistant