



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CAUSE NUMBER 58 OF 2016**

**BETWEEN**

**JACQUELINE KAMENE MUNGULI [MUNGUTI].....CLAIMANT**

**VERSUS**

**PAN AFRICA EXPRESS TRANSPORT LIMITED.....RESPONDENT**

*Rika J*

*Court Assistant: Benjamin Kombe*

*Munee Katu & Associates, Advocates for the Claimant*

*Lawrence Obonyo, Advocate for the Respondent*

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**JUDGMENT**

1. The Claimant filed her Statement of Claim on 5<sup>th</sup> February 2016. Her last name is variously given as Munguli or Munguti, in her Pleadings and Documents on record. She avers that she was employed by the Respondent on 10<sup>th</sup> October 2013 as a Sales Territory Manager Mombasa. The gross monthly salary agreed to between the Parties was Kshs. 126,000. The Respondent did not pay this amount. The Claimant was underpaid salary between November 2013 and March 2014. She never went on annual leave. Her contract was terminated by the Respondent on 5<sup>th</sup> May 2014 without just cause, and without payment of terminal benefits.

2. On 13<sup>th</sup> January 2015, Parties consulted. It was agreed the Claimant is reinstated effective 19<sup>th</sup> January 2015. She would work in the same position, on a monthly consolidated salary of Kshs. 90,000. She was informed on resuming duty that her net monthly salary would be Kshs. 85,000. She worked without taking annual leave. On 29<sup>th</sup> December 2015, the Respondent informed the Claimant through e-mail, that her services were no longer required. She was not given any reason for the decision. She was not heard. She prays for Judgment against the Respondent in the following terms:-

a) 1 month salary in lieu of notice under the 1<sup>st</sup> contract at Kshs. 105,000.

b) Arrears of salary under the 1<sup>st</sup> contract at Kshs. 458,461.

c) Accrued annual leave under the 1<sup>st</sup> contract at Kshs. 36,750.

Total under 1<sup>st</sup> contract....Kshs. 600,211.

d) 1 month salary in lieu of notice under the 2<sup>nd</sup> contract at Kshs. 90,000.

e) Accrued annual leave at Kshs. 110,250.

f) December 2015 salary at Kshs. 90,000.

g) Salary for 1<sup>st</sup> to 5<sup>th</sup> January 2016 at Kshs. 21,000.

h) 12 months' salary in compensation for unfair termination at Kshs. 1,260,000.

Total under 2<sup>nd</sup> contract ... Kshs. 1,571,250.

Total under both contracts...Kshs. 2,171,461

i) Certificate of Service to issue.

j) Costs and interest.

3. The Respondent filed its Statement of Response, on 21<sup>st</sup> March 2016. It is conceded the Claimant was employed by the Respondent, initially on contract dated 10<sup>th</sup> October 2013. Her gross monthly salary was Kshs. 126,000. It was paid promptly after deduction of statutory dues- N.S.S.F, N.H.I.F and P.A.Y.E. Her salary was deducted for days not worked in the month of October 2013. In February 2014 an amount of Kshs. 28,000 was deducted being the sum she had spent in Nairobi while under training. She never complained during service that she was in any way underpaid. She was on probation for 6 months, and no leave accrued to her during this period. She was suspended on 19<sup>th</sup> February 2014, and her contract terminated on 6<sup>th</sup> May 2014 for integrity reasons. She was paid terminal dues of Kshs. 93,747 and executed discharge. She cannot therefore say she was owed anything under the 1<sup>st</sup> contract, having discharged the Respondent.

4. The Parties entered a 2<sup>nd</sup> contract on 14<sup>th</sup> January 2015. The Claimant was engaged for a period of 6 months, to work as an Independent Contractor. She was not to enjoy the rights of an Employee in her second coming. Upon achieving the breakeven point of Kshs. 1,800,000 for 2 consecutive months, the Claimant would be offered employment by the Respondent full time. The agreement would be terminated if the Claimant failed to achieve the cumulative target of Kshs. 5,700,000, for 6 months, starting February 2015. The Claimant did not achieve the cumulative target, or the breakeven point. She was an independent contractor in the 2<sup>nd</sup> contract. She is not entitled to the remedies sought.

5. The Parties recorded consent on the claims made under the 1<sup>st</sup> contract, on 6<sup>th</sup> November 2017. Nothing therefore turns on the 1<sup>st</sup> phase of the dispute.

6. The Claimant gave evidence on the 2<sup>nd</sup> contract, on 10<sup>th</sup> July 2018. The Respondent did not call any Witness. Proceedings closed on 10<sup>th</sup> July 2018. The matter was last mentioned on 27<sup>th</sup> September 2018, when Parties confirmed filing of their Closing Submissions.

7. The Claimant told the Court she was employed by the Respondent, under the 2<sup>nd</sup> contract, on 19<sup>th</sup> January 2015. She was the Regional Sales Representative. The contract was indefinite. It was terminated by the Respondent on 5<sup>th</sup> January 2016. Her monthly basic salary was Kshs. 85,000, with allowances of Kshs. 5,000, making a total of Kshs. 90,000. She received e-mail from the Respondent advising her that her services were no longer needed. There was no hearing, and no notice. She was not an Independent Contractor. She was an Employee.

8. Cross- examined, the Claimant testified that she signed the 2<sup>nd</sup> contract on 19<sup>th</sup> January 2015. The contract did not offer her full time employment. She would be employed on achieving certain targets. She met the target because she continued working even after 2 months expired. She worked after 6 months had expired. The contract said she would work as an Independent Contractor, with no employee rights. She was both an Employee and an Independent Contractor. She told the Court on redirection that she enjoyed rights of an Employee under the 2<sup>nd</sup> contract. She was paid airtime. She worked from the office. There was no expiry date.

**The Court Finds:-**

9. The 2<sup>nd</sup> contract is captured in a document signed by both Parties on 14<sup>th</sup> January 2015.

10. Parties had a meeting the previous day, on 13<sup>th</sup> January 2015, where they agreed to formalize the 2<sup>nd</sup> contract.

11. It was agreed:-

- The Claimant would be contracted by the Respondent, to generate sales revenue in Mombasa and surrounding areas.
- She would be contracted for 6 months.
- She would be paid a lump sum of Kshs. 90,000 monthly in return.
- She would be eligible to a 2% bonus for revenue amounts over and above the monthly established target.
- She would act as an Independent Contractor with no rights of an Employee.
- She would be offered employment on full time basis, upon achievement of breakeven point of Kshs. 1,800,000.
- Failure to achieve the cumulative established target for the 6 months' period starting February 2015, of Kshs. 5,700,000 would

result in termination of employment.

12. The Court has no doubt that the Parties did not intend, that the 2<sup>nd</sup> contract, was an employment contract. They had an employer-employee relationship in the recent past, which ended in termination and payment of terminal dues to the Claimant. They entered into the 2<sup>nd</sup> contract with the benefit of hindsight.

13. The 2<sup>nd</sup> contract expressly states the Claimant would be an Independent Contractor. It is explicit that she would not, unlike in the past, enjoy the rights of an Employee. Parties were both aware of the meaning and use of the term 'Independent Contractor.' The Claimant had sat down and discussed the terms of engagement with the Respondent on 13<sup>th</sup> January 2015, before putting those terms on paper, on the following day, 14<sup>th</sup> January 2015. She was not in doubt when she signed the 2<sup>nd</sup> contract, that she would not have the rights of an Employee.

14. The 2<sup>nd</sup> contract defines what was paid to the Claimant as lump sum amount of Kshs. 90,000. She was not paid a monthly salary, but a monthly lump sum. If she was paid other benefits such as airtime, this would not transform the nature of her contract, from Independent Contractor to an Employee.

15. There were conditions agreed to between the Parties, which the Claimant had to fulfill, to be considered for employment. She had to attain a breakeven point of Kshs. 1,800,000 for 2 consecutive months. She does not have evidence showing she met this condition. The Respondent was entitled to terminate the 2<sup>nd</sup> contract, if the Claimant did not achieve the cumulative established target for the 6 months starting February 2015, of Kshs. 5,700,000. She does not have evidence showing that she met this target. The Respondent was therefore entitled to terminate the 2<sup>nd</sup> contract for Claimant's failure to achieve this condition. It is immaterial that the Claimant went on working after 6 months had lapsed. The Respondent had the liberty to terminate the 2<sup>nd</sup> contract any time after 6 months had lapsed, if the Claimant did not achieve the established target.

16. The Claimant herself conceded in her evidence that she was an Independent Contractor. She however brought in confusion to the proceedings, by asserting that she was both an Independent Contractor, and an Employee. The 2<sup>nd</sup> contract did not refer to her as an 'Employee' or to the Respondent and an 'Employer.' The Employment Act does not have part- Employee, part-Independent Contractor. There is no mixed-breed Employee, in the term 'Employee' defined in Section 2 of the Employment Act. One can only be an 'Employee' under the Act.

***17. The Claimant's prayers under the 2<sup>nd</sup> contract have no foundation and are declined. Final Judgment is entered in favour of the Claimant, in terms of the consent recorded in Court on 6<sup>th</sup> November 2017. It is so ordered.***

**Dated and delivered at Mombasa this 14<sup>th</sup> day of December 2018.**

**James Rika**

**Judge**