

KENYA / JUDGMENT

Msafari v Alternative Energy Systems Limited [2026] KEELRC 1162 (KLR)

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COURT

Employment and Labour Relations Court

CASE / FILE NUMBER

Cause E120 of 2025

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Neutral citation:

[2026] KEELRC 1162 (KLR)

Republic of Kenya

In the Employment and Labour Relations Court at Nairobi

Cause E120 of 2025

ON Makau, J

April 30, 2026

Between

Arnold Masharu Msafari

Claimant

and

Alternative Energy Systems Limited

Respondent

Judgment

Introduction

1. By a Memorandum of Claim dated 11th February, 2025, the Claimant sued the Respondent for constructive dismissal and prayed for the following reliefs:-a. This court make a declaration that the Claimant was constructively dismissed.b. The Respondents be compelled to pay the Claimant

the sum of Kshs. 1,014,792/= being the award of general damages for the constructive termination of the contract of employment which is broken down and justified as follows Kshs. 84,566.00/= (the Claimant's basic pay) x 12 months.c.The Respondents be compelled to pay the Claimant the sum of Kshs. 60,757.00/= being the net salary for the month of January 2025.d.The Respondent be compelled to pay the Claimant the sum of Kshs. 18,309.85/= being the salary arrears owing for the month of December 2024.e.The Respondents be compelled to pay the Claimant the sum of Kshs. 248,624.04/= being the wages for the annual leave days worked, worked out and justified as follows; Kshs. 84,566.00/= (basic pay) divided by 25 working days a month = Kshs. 3,382.64/= x 49 days x 1.5 (enhanced wages for leave days).f.The Respondent be compelled to pay the Claimant house allowance to the tune of Kshs. 1,382,969.20/= being 15% of Kshs. 84,566.00/= x 108 months January 2016 – January 2025.g.That the Respondent be compelled to remit the unpaid statutory deductions as enumerated at paragraph 14 and 15 herein above to the National Social Security Fund and SHA respectively.h.That the Respondent be compelled to pay the Claimant the sum of Kshs. 100,000/= being punitive and aggravated damages for failure to issue the Claimant with a Certificate of Service for the years worked in is employment.i.Costs of this claim.j.Interest on the special damages at court rates from the date of filing of this claim and interest on the general damages from the date of the Judgment.k.Such other or further relief as this Honourable Court may deem just to grant

2.The Respondent denied the Claimant's allegations and filed a counterclaim for Kshs. 192,010 being loan advances during the term of his service.

3.On 8th October 2025, the parties agreed to dispose of the suit by adopting written statements and documentary evidence on record and file written submissions.

Claimant's case

4.The Claimants relied on his written statement dated 11th February 2025 and 32 documents in the list dated even date. In brief his case is that he was employed by the Respondent in January 2016 for a basic salary of Kshs. 84,566 per month. He diligently worked until 30th January 2025 when he resigned citing frustrations including unilateral variation of terms of employment.

5.His persistent demand for the withheld salary and instead the employer accused him of poor performance, theft of fuel and late reporting. He was never subjected to any disciplinary process before he resigned for either misconduct or performance.

6.He averred that Kshs. 201,663 of his salary was withheld from February to November 2024 and Kshs. 18,309.85 in December 2024. He was also not paid housing allowance throughout his period of service. He contended that he resigned due to the ill treatment by the Respondent.

7.The Respondent relied on the written statement of its Managing Director, Mr. Rajesh and a bundle of ten (10) documents as its evidence. In brief, the Respondent's case is that it employed the Claimant as a permanent officer and thereafter promoted him to a Manager. He started well leading to the elevation but thereafter his attitude changed and despite many cautions, he continued reporting to work late or not attending at all. As a result, the company decided to keep

a log on his reporting time in 2024. He did not offer explanation for his late reporting and therefore he was issued with a warning letter dated 27th January 2025.

8.It is the further Respondent's case that the Claimant started pilfering from the company way back 2022 including on 22nd January 2022 when a supply of 10000 litres of diesel was found to be less by 456 litres similar trend was noted in purchase of raw materials and in October 2024, the Purchase Book which was in the Claimants sole custody got lost. As a result the company could not verify supplier balances to its detriment.

9.It was also Respondent's case that the Claimant acted negligently by failing to ensure that suppliers did not mix the materials with impurities to cheat on the weight. As a result the impurities in the raw materials led to frequent breakdown of the machine, cost of repair and reduced production.

10.It was averred that the company operates every day of the week but on 16th January 2023, the Claimant failed to open the factory for other workers, leading to loss as the company paid wages to the workers without any work done.

11.It is further Respondent's case that the Claimant failed to meet his performance targets, a fact he admitted by his letter dated 22nd March 2024.

12.As regards the claim for leave, it was the Respondent's case that the Claimant had no accrued leave. It further averred that the claim for unpaid house allowance was unwarranted since the salary negotiated was inclusive of house allowance.

13.The Respondent contended that it advanced loans to the Claimant from time to time and as at the time he resigned, he owed the company a balance of Kshs. 192,010, which is due and payable. Finally, the Respondent averred that the salary reduction was discussed and mutually agreed.

Issues for determination

14.Having carefully considered the pleadings, evidence and submissions by both sides, there is no dispute that the Respondent employed the Claimant, first as a procurement officer in January 2016 and later promoted him to a Manager on 1st November 2016. His salary was Kshs. 84,566 as per the employee information produced by the Respondent and his payslips. There is also no dispute that the Claimant resigned from employment by letter dated 30th January 2025 citing unilateral reduction of his salary and failure by the employer to resolve his grievances.

15.The issues for determination are:-a.Whether the resignation by the Claimant amounted to constructive dismissal by the employer.b.Whether the reliefs sought by the Claimant are warranted.c.Whether the counterclaim has merits.

Constructive dismissal.

16.The term constructive dismissal is not found in our statute but it is a legal concept developed by the courts. Black's Law dictionary defines constructive dismissal as follows:-“An employer's creation of working conditions that leave a particular employee or group of employees little or no choice but to resign, as by fundamentally changing the working conditions or terms of employment; an employer's course of action that, being detrimental to an employee, leaves the employee almost no option but to quit.”

17.In this case the Claimant resigned citing unilateral variation of terms of employment contract by the employer but the employer contended that the variation was mutually agreed. I have carefully considered the evidence on record, there are no minutes or other documents confirming that any discussion was held to reduce the Claimant's salary and that a mutual agreement was reached. There is also no letter produced by the Claimant to prove that the salary was reduced to Kshs. 30,000. What is on record is schedule of salary reconciliation showing total salary of Kshs. 62,948 as opposed to the Kshs. 84,566 was being received.

18.There is also a letter by Richard Kimithi to the Claimant notifying the Claimant that the company would pay certain amounts because analysis of his performance had revealed that he was far below this targets. The letter and the salary schedule must have been written after December 2024 because it refers to salary balances from August to December 2024. The letter states that:-“Subject: Salaries For The Month Of August ToDecember 2024Dear Arnold,I wish to draw your attention to the above issueAs per the performance analysis below, your performance for the said period visavis your targets the company is to pay you the following balances;Month Performance(%) Amount Payable (in kshs)August 12% 3600September 11% 3300October 8% 2400November 13% 3900December 1% 300Total 13,500It is clear from this analysis that your performance is far below the average and going forward you are expected to improve and achieve your target. Failure to demonstrate substantial improvement may compel the company to review your contract of employment.Please treat this matter with the utmost seriousness and take the necessary steps to enhance your performanceSincerely,Richard KimithiC.C MR. Raj Kent”

19.Having considered the above document and other produced, it clear that the employer unilaterally altered the terms of the Claimant's contract of employment. It first reduced his salary from Kshs. 84,566 to 62,949 per month and further calculated the balances based on his performance. The alleged analysis of his performance was not supported by any of the evidence adduced before this court.

20.The Respondent alleged that the Claimant was not diligent in his performance and had exposed it to losses through his negligence, pilferage of raw materials and late reporting among other infractions. The court notes that an employer has prerogative of taking disciplinary action against his employee provided that there is a valid reason and fair procedure is followed.

21.In this case the employer never initiated any disciplinary proceedings against the Claimant that culminated into the decision to reduce salary. It follow that the decision to alter the Claimants monthly salary was unilateral and it amounted to breach of an essential term of the contract of employment.

22. In *Western Excavating ECC Ltd v. Sharp* [1978] 2 WLR 344 Lord Denning held: "If the employer is guilty of conduct which is significant breach going to the moot of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, he terminates the contract by reason of the employers conduct, he is constructively dismissed."

23. In *Milton M. Isanya v. Aga Khan Hospital Kisumu* [2017] eKLR Onyango J held: "In constructive dismissal, the desire to resign is from the employee as a result of a hostile working environment or treatment by the employer. Constructive dismissal occurs where the employer does express the threat or desire to terminate employment but frustrates the employee to the extent that the employee tenders resignation."

24. Applying the above analysis it is clear that the resignation by the Claimant vide the letter dated 30th March 2025 amounted to constructive dismissal as it was clear that the employer was no longer intending to continue being bound by the agreed terms of the contract and he had in fact altered the same unilaterally to the detriment of the Claimant. The said alteration amounted to a fundamental breach of the contract and the Claimant was justified to resign and sue for constructive dismissal.

Reliefs of the Claimant

25. In view of the foregoing conclusion, I find that the Claimant is entitled to declaration that his employment was constructively terminated by the Respondent. Constructive dismissal by its very nature is unfair and unlawful and therefore I further find that he is entitled to compensation for unfair termination under Section 49 of the Employment Act. He worked from January 2016 to January 2025 but he contributed to his termination through misconduct. Consequently, I award him six (6) months gross salary as compensation being Kshs. $84,566 \times 6 = \text{Kshs. } 507,396$.

26. The Claimant further prayed for salary arrears of Kshs. 18,309.85 and the Respondent filed a schedule of salary arrears for August to December 2024 confirming the said sum was still outstanding. Consequently, I allow the same.

27. He further prayed for Kshs. 60,757 as salary arrears for January 2025 but no supporting evidence was adduced to substantiate that claim. Consequently I decline the same.

28. The Claimant prayed for 49 leave days but no particulars were pleaded. He produced leave application form dated 8/12/2023 indicating 49 accrued leave days out of which he took three (3) days leaving a balance of 46 leave days.

29. The Respondent produced leave records showing that as at January 2025 the Claimant had 23 accrued leave days. He never challenged that evidence and therefore I award him Kshs. $84,566 \times 23/30 = \text{Kshs. } 64,834$.

30.The Claimant also prayed for unpaid house allowance for the 108 months worked from January 2016 and January 2025. He computed it at the rate of 15% of the salary of Kshs. 84,566. The Respondent contended that the Claimant was receiving a gross pay which included housing.

31.I have perused all the payslips produced as exhibits by both sides and they clearly indicated the Claimant's salary as gross pay. The Claimant never raised any complaint about the components of his salary since 2016. Consequently, I decline to award the claim for house allowance for lack of merits.

32.The Claimant prayed for an order to compel the Respondent to remit statutory deductions as enumerated in paragraph 14 and 15 of the memorandum of claim. I grant that order as prayed. Compliance to be done within 30 days of the judgment. Likewise the prayer for issuance of certificate of service is granted since it is s right under Section 51 of the Employment Act.

Counterclaim

33.The Respondent prayed for Kshs. 192,010 being loan advances to the Claimant from time to time. The Claimant submitted that there is no evidence to support the said loan advances. The Respondent filed a salary loan reconciliation schedule, but that fell short of proving that the Claimant applied for and obtained loans from it.

34.Save for payslip for March 2021 which indicated a deduction for a loan of Kshs. 10,000, no other payslip produced by the two sides indicated any other recovery of loan but salary advance. They all indicated salary advance deductions which is a normal arrangement in work place. Consequently, I find that the counterclaim lacks merits and it is dismissed.

Conclusion

35.I have found that the Respondent constructively dismissed the Claimant by unilaterally altering his terms of service. I further found that the Claimant is entitled to some of the reliefs sought. I have also found that the Respondent has not proved its counterclaim on a balance of probability and dismissed it. Consequently, I enter judgment for he Claimant as against the Respondent as follows:-a.Declaration that Respondent constructively dismissed the Claimant from employment.b.Compensation Kshs. 507,393/-c.Salary arrears (December 2014) Kshs. 18,309.85/-d.Leave Kshs. 64,834/-e.The award is subject to statutory deductions.f.Claimant will have costs of the suit plus interest at court rates from the date of the judgment.

DATED, SIGNED AND DELIVERED VIRTUALLY IN OPEN COURT AT NAIROBI THIS 30TH DAY OF APRIL, 2026.ONESMUS MAKAUJUDGEAppearance:Waigwe for Nga'ng'a for ClaimantMungu for Respondent

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Prepared on 11 October 2026 · Esheria