



**Kariamburi v Bins (Nairobi) Services Ltd (Cause E433 of 2021)
[2024] KEELRC 1975 (KLR) (22 July 2024) (Judgment)**

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**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E433 OF 2021
BOM MANANI, J
JULY 22, 2024**

BETWEEN
HARDARD MACHARIA KARIAMBURI CLAIMANT
AND
BINS (NAIROBI) SERVICES LTD RESPONDENT

JUDGMENT

Background

1. The instant dispute arises from the closure of the employment relation between the parties to the action. Whilst the Claimant contends that the relation was unfairly terminated by the Respondent, the latter contends that it is the Claimant who terminated the relation through his voluntary resignation.

Claimant's Case

2. The Claimant filed a Statement of Claim dated 27th May 2021. Through it, he contends that the Respondent engaged his services as its General Manager from 1st December 2011. He contends that although the contract was for three years, it was renewable and that once the renewal took effect, it was to serve as an extension of the previous contract and not as a new standalone contract.
3. The Claimant contends that his gross salary was agreed at Ksh. 290,250.00 per month. He avers that the net monthly pay worked out to Ksh. 224,337.00.
4. The Claimant contends that after the initial contract lapsed, it was not expressly renewed. However, he continued to serve the Respondent until he resigned in October 2020. He contends that at this time, he had worked for the Respondent for a period of slightly over eight years.
5. The Claimant avers that sometime in April 2020, the Respondent unilaterally reduced his net salary to Ksh. 157,948.00. He contends that the Respondent's director subsequently wrote to him on 30th



- April 2020 sending him on unpaid leave allegedly due to the effects of the Covid 19 pandemic. He asserts that the decision to send him on unpaid leave was made without consultation with him.
6. The Claimant avers that after the Respondent sent him on the aforesaid leave, it did not contact him regarding resumption of duty. Neither did it communicate to him regarding his employment status.
 7. The Claimant contends that this state of affairs remained until 12th October 2020 when he tendered his resignation from employment. He avers that the resignation was involuntary since the Respondent had left him in a state of limbo regarding the status of his employment and without pay. He contends that this had caused him emotional anguish leaving him with no option but to resign. As such, he pleads constructive dismissal from employment.
 8. The Claimant contends that he learned that the Respondent had appointed one Mr. Aloo Muga in May 2020 to take over his position in a substantive capacity. He avers that Mr. Aloo Muga had initially been tasked to discharge the functions of his (the Claimant's) office in acting capacity from 30th April 2020.
 9. The Claimant contends that he also learned that the Respondent had terminated his medical insurance cover in July 2020. Further, he asserts that he also came to know that the Respondent had stopped remitting his statutory dues in respect of Pay As You Earn, National Social Security Fund and National Hospital Insurance Fund.
 10. According to the Claimant, these events pointed to the fact that the Respondent no longer considered him as its employee. In his view, the events corroborate his belief that the Respondent had taken a decision to terminate the employment relation between them.
 11. The Claimant avers that the Respondent treated him in a discriminatory manner by preferring to retain Mr. Aloo Muga as its General Manager instead of him. In his view, this treatment also violated his right to fair labour practices.
 12. The Claimant contends that during his term of service, he was not able to utilize his leave days in full due to the nature of his engagement. Further, he contends that although he was entitled to paid holidays under his contract, he did not utilize this benefit. As such, he claims for payments to cover these benefits.
 13. The Claimant further claims for general, aggravated and exemplary damages to redress the alleged violations alluded to above. He also prays for compensation for unfair termination of his contract.
 14. The Claimant avers that his salary was unilaterally withheld for the duration that he was sent on unpaid leave. In addition, he contends that he did not accede to the salary reduction which was effected against him in the month of April 2020. As such, he seeks to recover these amounts.

Respondent's Case

15. In response, the Respondent contends that the parties had a three year fixed term contract. It contends that this contract was not renewed after it came to a close. However, the Claimant continued in its service. As such, even though the Claimant continued in its employment, he was serving on a month to month contract. Consequently, he is not entitled to claim service pay.
16. The Respondent denies that it terminated the Claimant's employment. According to it, the contract between the parties was terminated by the Claimant when he voluntarily tendered his resignation from employment on 12th October 2020.



17. The Respondent avers that following the emergence of the Covid 19 pandemic, its business was adversely affected. As such, it was not able to meet some of its financial obligations as and when they fell due. This included paying staff salaries.
18. The Respondent contends that this development forced it to reduce staff salaries starting April 2020 in order to remain afloat. It contends that the decision to effect salary cuts was made by its management team which included the Claimant. As such, the Claimant is deemed to have consented to the salary cut.
19. The Respondent contends that owing to the Claimant's high salary, it became impracticable to keep him at work after April 2020. Consequently, a decision was taken to send him on unpaid leave pending the easing of the effects of the pandemic.
20. It contends that in view of the decision to send the Claimant on unpaid leave, it became necessary to engage another person to replace him in acting capacity. Consequently, Mr. Aloo Muga was appointed as its Acting General Manager.
21. The Respondent denies that it treated Mr. Muga preferentially in comparison to the Claimant. According to it, Mr. Muga was retained in employment and appointed as its Acting General Manager because he was earning a significantly lower salary as compared to the salary that the Claimant was earning.
22. The Respondent denies that it discontinued the Claimant's medical insurance and remittance of his statutory dues on account of his contract of service having been terminated. According to it, these benefits were temporarily withdrawn in response to the aftershocks of the Covid 19 pandemic. It contends that the decision affected all of its employees.

Issues for Determination

23. After evaluating the pleadings and evidence on record, it is apparent that the following are the questions to be resolved in the cause:-
 - a. What was the nature of the employment relation between the parties at the time that the Claimant resigned from employment in October 2020?
 - b. Was the Claimant constructively dismissed from employment or he voluntarily resigned?
 - c. Are the parties entitled to the reliefs that they seek?

Analysis

24. At the close of the trial, the parties asked to make final submissions. They both filed written submissions which the court has taken into account.
25. It is apparent from the evidence on record that the parties initially entered into a fixed term contract of service for a term of three years. The contract was to run from 1st December 2011 to 30th November 2014.
26. Although the contract was for a fixed term, it contemplated the possibility for its renewal. Specifically, clause 2.1 of the contract provided that its renewal would be evidenced by a memorandum in writing.
27. The clause further provided that if the contract was renewed, it would be deemed as an extension of the previous contract and not a new and separate contract. As such, being an extension of the previous



- contract and not a new and separate contract, any renewal of the contract implied that the parties extended their engagement on the same or similar terms as the preceding contract.
28. There is no evidence that the parties endorsed a renewal of the contract in writing. However, they continued in the employment relation after the lapse of the first contract.
 29. In effect, although the parties did not expressly renew their contract in the manner that was contemplated under clause 2.1 of the aforesaid instrument, they nevertheless renewed it through their conduct. As such, the contract between them was renewed by implication (*Eunice Mwikali Munyao v Elys Chemical Industries Limited* [2017] eKLR).
 30. The Respondent suggests that the renewed contract meant that the parties entered into a month to month employment relation. With respect, the basis for this assertion is unclear.
 31. The *Employment Act* which anchors individual contracts of service does not make provision for month to month employment contract. The law only recognizes fixed term, indefinite term, piece rate and casual term contracts of service. There is no nomenclature for month to month contracts of service.
 32. Once the parties renewed their relation by conduct and continued to exchange provision of labour for pay, they thereby entered into an indefinite term contract of service. As such, the parties had an indefinite term contract of service from 1st December 2014 until the time that the employment relation between them was terminated on 12th October 2020.
 33. The evidence on record shows that the parties continued to engage on similar terms as those under the expired contract. For instance, they maintained the Claimant's gross monthly remuneration of Ksh. 290,250.00. Thus, it is apparent that the new contract was to run on similar terms as the expired contract as long as the said terms were not inferior to or inconsistent with those that are implied by the *Employment Act* (see *Eunice Mwikali Munyao v Elys Chemical Industries Limited* [2017] eKLR).
 34. The law on constructive dismissal from employment is now fairly settled. An employee is considered as having been constructively dismissed from employment when the employer subjects him to an intolerable working environment which pushes the employee into resigning.
 35. Although the contract is terminated through the employee's act of resigning, the law considers the contract as terminated by the employer. This is because the employee is forced into resigning in order to escape the intolerable work environment. Thus, the resignation is considered as involuntary.
 36. The factors that may force an employee into resigning in circumstances that constitute constructive dismissal are many. They include: unilateral variation of fundamental terms and conditions in a contract of service by the employer; demotion of an employee from his position at work; failure to allocate an employee work; and persistent failure or refusal to remunerate an employee among others (*Duncan Murunyu Mungai v Slopes Media House Limited* [2021] eKLR).
 37. The Court of Appeal had occasion to consider this concept in the case of *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR. In the case, the court observed as follows regarding the concept:-

"whenever an employee alleges constructive dismissal, a court must evaluate if the conduct of the employer was such as to constitute a repudiatory breach of the contract of employment. Whether a particular breach of contract is repudiatory is one of mixed fact and law. (See *Pedersen -v- Camden London Borough Council* [1981] ICR 674). The criterion for evaluating the employers conduct is objective; the employer's conduct does not have to be intentional or in bad faith before it can be repudiatory (See *Office -v- Roberts* (1980) IRLR 347). The employee must be able to show that he left in response to the employer's conduct (i.e. causal link must be shown, i.e. the test is causation). In



the case of Jones -v- F. Sirl & son (Furnishers) Ltd. [1997] IRLR 493, it was held that there can still be constructive dismissal if the employee waits to leave until he has found another job to go to. The employee must leave because of the breach but the breach need not be the sole cause so long as it is the effective cause. (See Walker -v- Josiah Wedgwood & Sons. Ltd. [1978] IRLR 105). The criterion to determine if constructive dismissal has taken place is repudiatory breach of contract through conduct of the employer. The burden of proof lies with the employee. The employer's conduct must be such as when viewed objectively, it amounts to a repudiatory and fundamental breach of the contractual obligations.”

38. The evidence on record shows that the Respondent sent the Claimant on unpaid leave on 30th April 2020. The Respondent indicated that this decision was taken due to the prevailing circumstances that had been occasioned by the Covid 19 pandemic.
39. The Claimant was asked to handover his office to the Chief Accountant, Mr. Aloo Muga. However, there was no indication on when he was to resume duty.
40. Between 30th of April 2020 when the Claimant proceeded on unpaid leave and 12th October 2020 when he resigned from employment, the Respondent did not get back to him regarding whether he was going to resume duty or the status of his employment. Faced with this uncertainty, the Claimant opted to tender his resignation from employment on 12th October 2020.
41. From the letter of resignation, it is clear that the Claimant's decision was involuntary. He contended that he had been forced into resigning from employment because of the hardship that the Respondent had subjected him to after it sent him on indefinite leave without salary.
42. The Claimant further spoke to the fact that he had learned from a third party that the Respondent had replaced him with Mr. Aloo Muga. He expressed his anguish and distress at these developments and the fact that the Respondent had elected to keep him in the dark about them.
43. The evidence on record shows that the Claimant's letter was delivered to the Respondent by email on 12th October 2020 at 10.56 AM. On the same day before 2.00 PM, the Respondent had written back accepting the resignation. However, it made no reference to the myriad grievances which the Claimant had flagged.
44. The Claimant says that this was evidence of the Respondent's lack of concern for his plight. He says that the Respondent's reaction to his resignation demonstrated that it (the Respondent) was only too happy that he had opted out of his employment.
45. Although there was nothing wrong with the Respondent accepting the Claimant's resignation, the fact that it made no reference to the issues which he had flagged in his letter speaks volumes about the state of mind of the Respondent's management towards him. Undoubtedly, the management was not bothered about his plight or departure. If it was, it would have reacted to his concerns and sought to resolve the matter.
46. The fact that the Respondent had made up its mind to sever the employment relation with the Claimant is also self-evident from other pieces of evidence on record. For instance, on 17th June 2020, it (the Respondent) wrote to the Claimant asking him to return work equipment which were in his possession despite the fact that he was still in its employment. On 14th August 2020, the Respondent wrote to the US Embassy introducing Mr. Aloo Muga as its General Manager after he had been installed in the position in acting capacity from 1st May 2020. The Respondent stated that Mr. Muga had henceforth replaced the Claimant who had allegedly left the company on 30th April 2020. On 12th October 2020, moments after the Claimant tendered his resignation, Mr. Aloo Muga is quoted as



describing himself as the Respondent's General Manager. Never mind that he had begun describing himself as such much earlier without any reprimand from the Respondent's management.

47. Although the Respondent's witnesses tried to downplay this evidence by asserting that Mr. Muga was only engaged as Acting General Manager, the correspondence in question tell a different story. They tell a story of an employer who had made up its mind to shake off its employee (the Claimant) and moved on.
48. Oblivious of these developments, the Claimant continued to await communication from the Respondent about when he was to resume duty. However, when it dawned on him that this was unlikely to happen, he tendered his resignation.
49. The picture which emerges from the evidence on record is one of an employer who was uncaring about the plight of its employee. Despite the reality of the Covid 19 pandemic, it was quite insensitive for the Respondent to have kept the Claimant in the dark regarding the status of his employment for close to five months notwithstanding that it was aware that all this while, he was not at work and was without a salary.
50. The Respondent was only awakened to the reality that the Claimant was still awaiting updates about the status of his employment when the latter tendered his resignation. It is at this time that the Respondent found it appropriate to write to the Claimant but only for purposes of accepting his resignation.
51. In my view, the Respondent's conduct was callous. It took an emotional toll on the Claimant thus driving him into resigning from his employment out of frustration.
52. The Respondent's conduct was a clear demonstration of its intention not to be bound by the terms of the contract between the parties. The conduct was clear evidence of the Respondent's intention to repudiate the employment relation between them.
53. In my view, the Respondent took advantage of the Covid 19 narrative to justify its scheme to get rid of the Claimant. I hold this view because despite the difficulties which the pandemic visited on businesses forcing some of them to temporarily release their members of staff, reasonable employers still found it within themselves to periodically updated affected employees regarding the efforts that were being made to resume normalcy. And where resumption of normalcy was not foreseeable, the employers took prompt decisive action to release affected employees from the workplace through declarations of redundancies.
54. There is no evidence that the Respondent engaged the Claimant about attempts to resume normalcy at the workspace after the latter was sent on unpaid leave. Yet, there is evidence that the company continued in operation with a number of staff, including Mr. Aloo Muga, reporting to work.
55. The Respondent did not take any steps to inform the Claimant whether it would not retain his services because of the financial strain it allegedly continued to encounter after he had been sent on unpaid leave. Instead, it maintained studious silence and ambivalence regarding the fate of his contract. In the circumstances, it was not unreasonable for the Claimant to have concluded that the Respondent was no longer interested in keeping him in its employment.
56. As such and based on the evidence on record, I am satisfied that the Claimant has established a case for constructive dismissal from employment on a balance of probabilities. Consequently, I find and declare that the Respondent constructively terminated the Claimant's employment.



57. The next issue to be addressed relates to the reliefs that have been sought in the cause. Having arrived at the conclusion that the Respondent unfairly terminated the Claimant's employment, I find that it (the Respondent) is not entitled to an order dismissing the Claimant's suit against it.
58. On his part, the Claimant has prayed for a plethora of reliefs. Some of them are in the alternate.
59. I have already arrived at the conclusion that the Respondent unfairly terminated the Claimant's employment through constructive dismissal. Consequently, a declaration is issued in that regard.
60. The Claimant remained in the Respondent's employment until 12th October 2020 when he resigned. The evidence on record shows that the Respondent had sent him on unpaid leave from 30th April 2020. This means that between 30th April 2020 and 12th October 2020, the Claimant remained in employment but without pay.
61. The Respondent argues that because its business had been affected by the Covid 19 pandemic at the time, it could not sustain paying some members of staff including the Claimant. As such, it took the decision to send the Claimant on unpaid leave. The Respondent argues that the Claimant was not the only member of staff who was affected by the decision. Therefore, his complaints in this respect are baseless and should be rejected.
62. The Respondent fails to appreciate that employment contracts are individual in nature and not communal based. Therefore, an employer cannot invoke some communal directive at the workplace to justify interference with individual contracts of service in the absence of evidence of concurrence by the affected employees.
63. Although the Respondent argues that the decision to send some members of staff including the Claimant on unpaid leave was arrived at in a management meeting where the Claimant was present, it did not present cogent evidence to support this assertion. One would have expected the Respondent to tender minutes of the purported meeting at which the decision was made and the resultant resolution to back its claims. However and as the record shows, this was not done. As such, I reject the Respondent's attempts to justify the impugned decision.
64. Salary of an employee is a protected statutory right (see Part IV of the *Employment Act*). The employer cannot unilaterally withhold an employee's salary by sending him on unpaid leave. As was observed in *Duncan Murunyu Mungai v Slopes Media House Limited* [2021] eKLR, failure or refusal by an employer to pay an employee salary is a breach of the employment contract.
65. It is to be noted that the law does not recognize the concept of unpaid leave. However, this nomenclature has developed out of practice to enable an employer to release an employee from work outside the normal leave schedule usually to enable the employee attend to urgent private needs.
66. In his publication, "Employment Law Guide for Employers" second edition, George Ogembo observes as follows of the concept:-

"Unpaid leave is a special arrangement granted to an employee who requires to be absent from work for periods not covered by either the statutory leave or paid leave as defined by the contract or HR policy. The leave may be granted in special circumstances on grounds of private affairs, in proved cases of exceptional hardship or compassionate grounds where no other leave arrangement is available or appropriate."(See pages 199 to 200).



67. Being a concept which has no legal foundation but which has arisen out of practice, unpaid leave can only be resorted to through consultation and concurrence between the parties to an employment contract in response to an urgent need. It cannot be unilaterally imposed by the employer.
68. From the evidence on record, the decision to send the Claimant on unpaid leave was a unilateral one by the Respondent. There is no evidence that the parties had an agreement to anchor this form of leave. Thus, it was in breach of the contract between the parties for the Respondent to have unilaterally sent the Claimant on unpaid leave.
69. The Respondent has sought to rely on a schedule of names of employees who were sent on leave to support its contention that the Claimant was legitimately sent on unpaid leave. However, this is of little value to its case for a number of reasons.
70. First, the schedule does not show that the Claimant was in the list of the employees who were to proceed on leave. Second, the schedule does not, in any event, show that the affected employees were sent on unpaid leave. Third and as mentioned earlier, employment contracts are not communal. They are individual based. Therefore, if a decision is made affecting an employee's contract, there must be evidence of individualized consultations with the affected employee. No such evidence is present in the instant case.
71. The foregoing being the position, the Claimant is entitled to recover the salary that was withheld from him during the period between 30th April 2020 when he was unlawfully sent on unpaid leave and 12th October 2020 when he resigned from employment. According to paragraph four (4) of the Statement of Claim, the Claimant's gross salary at the time was Ksh. 290,250.00 per month. At paragraph 3 of the Amended Memorandum of Response, the Respondent concedes this fact.
72. Thus, the court enters judgment for the Claimant for Ksh. 290,250.00 x 5 = Ksh. 1,451,250.00 being salary for the months of May, June, July, August and September 2020. The court also enters judgment for the Claimant for Ksh. 116,100.00 being prorated salary for the twelve (12) days in October 2020 before he resigned. The total award under this head is Ksh. 1,567,350.00.
73. The Claimant has also contended that the Respondent unilaterally paid him reduced salary for April 2020. He contends that he was paid Ksh. 157,948.00 instead of his net salary of Ksh. 224,337.00 thus suffering a shortfall of Ksh. 66,389.00.
74. In response, the Respondent contended that the 25% reduction to the Claimant's salary was agreed upon through a decision by its management team which included the Claimant. The Respondent contended that as a matter of fact, the Claimant appended his signature on the internal memo which communicated this decision to other members of staff. In the Respondent's view, this signified the Claimant's concurrence with the decision.
75. On his part, the Claimant maintained that the decision to reduce his salary was made unilaterally without his involvement. He contended that he signed the internal memo in question in order to authorize its placement on the Respondent's Notice Board. However, he denied that this signified the fact that he had been consulted over the matter and agreed to it.
76. An analysis of the evidence on record shows that despite the Respondent alleging that the Claimant was in the meeting at which the aforesaid decision was made, no minutes and resolution of the alleged meeting were produced in evidence. Absent this evidence, it is impracticable for the court to conclude that the decision was by the Respondent's Board and that the Claimant was in attendance at the meeting at which it was made.



77. That notwithstanding, even if the Respondent's Board had taken such decision, it was imperative for the Respondent to have engaged employees individually on the matter and obtained their individual concurrence with the proposal. This is because contracts of service are individual in nature and cannot be varied communally except through the devise of collective bargaining where it applies.
78. There is no evidence that the Respondent engaged the Claimant individually regarding the alleged reduction of his salary and obtained his individual consent to the reduction. Absent this evidence, the court agrees with the Claimant that the impugned decision was unilateral and therefore in breach of the contract between the parties. As such, the Claimant is entitled to recover the amount of Ksh. 66,389.00 being the shortfall in his salary for April 2020. It is so ordered.
79. The Claimant has also prayed for commuted leave for the duration that he served the Respondent. In response, the Respondent contends that the Claimant was the one who used to approve leave. Thus, he ought to have processed his own leave. The Respondent further contends that in any event, if the leave days claimed were not taken, they were forfeited.
80. Section 28 of the *Employment Act* entitles an employee who has served for a continuous period of one year to annual leave for a minimum of twenty one (21) days with full pay. Thus, the Claimant was entitled to annual leave after he completed one year from the date of his engagement on 1st December 2011 until he resigned under the new indefinite term contract of service with the Respondent.
81. The Claimant asserts that he was unable to utilize his leave days because of his busy schedule at work. He however concedes that he had an arrangement with the employer pursuant to which he was allowed to utilize the period between 23rd December and 4th January of every year to rest. During her cross examination, the Respondent's first witness also alluded to this arrangement.
82. Section 28 of the *Employment Act* contemplates a scenario where an employer may, with the consent of the employee, split the employee's leave days in a given leave earning period into portions to be taken at intervals. If the employer enters into such arrangement with the employee, the employee must take at least two weeks of uninterrupted leave within the leave earning period and the balance within eighteen months from the date the leave earning period to which the leave in question relates ended.
83. Section 28(4) of the Act which anchors this requirement is couched in the following terms:-
“The uninterrupted part of the annual leave with pay referred to in subsection (3) shall be granted and taken during the twelve consecutive months of service referred to in subsection (1) (a) and the remainder of the annual leave with pay shall be taken not later than eighteen months from the end of the leave earning period referred to in subsection (1) (a) being the period in respect of which the leave entitlement arose.”
84. This provision appears to suggest that where parties to an employment contract have agreed to split the leave earned in any given leave earning period into blocks to be taken separately, the employee must take at least two weeks of uninterrupted leave within the leave earning period. And the balance thereof must be taken within eighteen months from the date of the end of the leave earning period to which the leave relates. By implication, this suggests that if the balance of the leave is not taken within the prescribed period, it stands forfeited.
85. The Respondent appears to rely on this provision to argue that the Claimant forfeited any leave days that he did not utilize during the currency of his employment. The Claimant's claim for the balance of his accrued leave days appears to have been entrapped by section 28(4) of the *Employment Act*. He confirmed that he used to take portions of his leave days from 23rd December to 4th January of every



- year. However, he contends that he did not utilize the entire of his leave days during any of the eight (8) years that he was in the service of the Respondent.
86. In effect, the Claimant implies that his annual leave days were split into portions (blocks) to be utilized separately every year. However and all the while, he only utilized the days which fell between 23rd December and 4th January thus leaving the other days unutilized.
87. If the foregoing is the case, then by virtue of section 28(4) of the *Employment Act*, the Claimant was required to have utilized the balance of his leave days within eighteen months of every leave earning period. He says that he did not. Thus, these days were, in my view, lost.
88. I am alive to a seemingly different position which has been expressed on the subject in other decisions. For instance, in *Joaqim Mbithi Mulinge v Transoceanic Projects & Development [K] Limited [2017] eKLR*, the trial court observed as follows on the subject:-
- “There is no employment policy which supersedes the law. The law under Section 28 of the *Employment Act* 2007 does not sanction the practice of forfeiture of unutilized leave. The law entitles Employees, after 12 consecutive months of service with the Employer, to a minimum of 21 days of fully paid annual leave. There is no provision for forfeiture. The policy of forfeiture of annual leave days, adopted by some Employers, has no foundation in law.”
89. I agree with this view in so far as it relates to situations where an employee has not taken any part of her earned leave during a leave earning period. However, this does not apply to scenarios where the employee has utilized a portion of her leave during a leave earning period where the leave period had been split in blocks. In such case and in terms of section 28(4) of the *Employment Act*, the employee must utilize the balance of the leave earned within eighteen (18) months of the leave earning period. If she does not, the balance of the accrued leave days would be deemed as lost.
90. The Claimant has also claimed for pay for the paid holidays he was entitled to in the eight (8) years he served the Respondent. He avers that the paid holidays comprised of twenty one (21) days in every year.
91. This claim is anchored on clause 9 of the contract of service between the parties dated 27th October 2011. The Claimant’s case is that although the *Employment Act* does not provide for this benefit, the parties were at liberty to include it in their contract as long as it did not derogate from the minimum statutory benefits that are guaranteed by law. He relies on the principle of freedom of contract to postulate this argument.
92. In response, the Respondent tried to suggest that the paid holiday that is alluded to under the clause was the statutory right to annual leave that is provided for under section 28 of the *Employment Act*. That reference to the benefit as paid holiday was a misnomer.
93. It is a general principle of law that contracts belong to the parties. As such, courts are not entitled to re-write them. A court of law must give a contract the interpretation that flows from the literal meaning of the words used to frame it unless doing so would yield absurd results.
94. Having regard to the foregoing, I am reluctant to construe the phrase “paid holiday” in clause 9 of the impugned instrument as denoting “annual leave” under section 28 of the *Employment Act*. Therefore, I take it that in addition to the annual leave that is guaranteed under section 28 of the *Employment Act*, the parties to this action had agreed to provide the Claimant with an additional paid holiday of twenty one (21) days every calendar year.



95. The fact that the parties may have agreed to such an arrangement is neither absurd nor unusual. I say so because there are employment relations such as those of Judges in Kenya where judicial officers are entitled to both annual leave and other paid breaks. Therefore, it is not unusual for an employer to have such an arrangement with an employee. It all depends on the contractual preference of the parties as long as this does not result in the parties contracting below the minimums that the law provides.
96. Having reached the above conclusion, the next consideration is whether the Claimant can legitimately pursue this benefit. Clause 9.3 of the contract in question reads as follows:-
- “The entitlement to holiday (and holiday pay in lieu of holiday) accrues monthly pro rata throughout each calendar year and any entitlement to holiday remaining at the end of any calendar year may only be carried forward if the Board/Management so agrees and otherwise shall be lost and no payment made in respect thereof.”
97. The import of this provision in the contract was clear. It required the paid holidays to be utilized in the year that they were earned. If this was not possible, the Claimant was required to either convert them into cash or seek the Respondent’s Board’s approval to carry the days forward. If he did not do either, the days were thereby lost and no payments could be made in respect of them.
98. There is no evidence to demonstrate that the Claimant either sought the approval of the Respondent’s Board to carry the unutilized paid holiday days forward or sought to have them liquidated. As such and in my respectful view, the days were lost.
99. The Claimant’s counsel has argued that this entitlement could not be lost through forfeiture. However, it is apparent that this was a contractual as opposed to statutory right. That being the case, it can only be conceptualized in accordance with the agreement between the parties. And in terms of clause 9 (3) of the contract between the parties dated 27th October 2011, the benefit was to be lost unless it was utilized within a year of its accrual or carried forward with the approval of the Respondent’s Board.
100. The Claimant has claimed for service pay for the eight (8) years that he served the Respondent. By virtue of section 35 (5) of the *Employment Act*, an employee whose services have been terminated is entitled to service pay for every year worked. However, section 35 (6) of the Act disentitles employees who are registered with provident funds and the National Social Security Fund (the NSSF) from claiming this benefit
101. At page 25 of the Claimant’s trial bundle, he attached a statement from the NSSF showing that the Respondent had been remitting NSSF dues on his behalf. Although the record shows that some monthly instalments were not remitted in 2014, 2015 and 2020, this does not derogate from the fact that the Claimant was registered with the NSSF during the subsistence of his contract with the Respondent. As such and by virtue of the above provision, he is not entitled to claim service pay.
102. The Claimant has prayed for compensation for unfair termination of his contract of service. Under section 49 (1) (c) as read with section 50 of the *Employment Act*, the court is empowered to grant this relief. However, it has to take into account the various factors that are enumerated under section 49(4) of the Act.
103. I have considered that prior to the decision to sever the employment relation between the parties, they had been in the relation for approximately eight (8) years, a considerably long time. Further, I note that the Claimant’s conduct did not contribute to the decision to end the relation between the two. Rather, it was the actions by the Respondent which led to the Claimant’s decision to resign from



employment. As a matter of fact, the Respondent's first witness vouched for the Claimant's exemplary conduct whilst in employment

104. Having regard to the foregoing, I award the Claimant compensation for the unfair termination of his contract that is equivalent to his gross salary for ten (10) months. This works out to Ksh. 290,250.00 x 10 = Ksh. 2,902,500.00
105. The Claimant has claimed for general damages for discrimination and unfair labour practices. He has also claimed for aggravated and exemplary damages. However, the court finds that the matters which he raised point to a case of breach of the employment contract between him and the Respondent. As such, they can be adequately redressed by reference to the provisions of the Employment Act. Section 49 of the Act provides for sufficient remedies for breach of employment contracts which do not include the above remedies.
106. In any event, the general position in law is that claims for breach of contract ought not to attract the remedy of general damages. As for aggravated and exemplary damages, this may only be awarded where it is apparent that the aggressor's acts were arbitrary and oppressive (*Gichaba v Lexis Investment Limited* (Civil Appeal 131 of 2019) [2024] KEHC 479 (KLR) (29 January 2024) (Judgment)).
107. In the instant case, even though the Respondent's actions were so oppressive as to result in the constructive dismissal of the Claimant, the law provides for a specific remedy of compensation for unfair termination of the contract for this kind of injury. As such the court is disinclined to grant the prayers for general, aggravated and exemplary damages.
108. The Claimant has also claimed for pay in lieu of notice to terminate his contract. In the Claimant's letter of resignation dated 12th October 2020, he expressed the wish to have the notice take effect immediately. In the Respondent's response of even date, it accepted the Claimant's request without insisting on him serving the notice period prescribed by law.
109. In terms of section 38 of the Employment Act, if an employee tenders notice to terminate a contract of service (whether voluntary or otherwise), the employer has the option of insisting that the employee serves the notice period prescribed under section 35 of the Act. In the alternate, the employer is entitled to waive this requirement in which case the employee is released from the obligation under the contract immediately. However, where the employer elects the option of waiving the right to have the employee serve the notice period, he (the employer) is required to pay the employee an amount that is equivalent to the notice period that he would have served had the waiver not been granted.
110. In the instant case, by the Respondent accepting the Claimant's resignation without insisting that he serves the notice period, it waived its entitlement to have the Claimant serve the notice period. The effect of this in terms of section 38 of the Employment Act was that the Respondent thereby became obligated to pay the Claimant salary in lieu of notice in terms of section 36 as read with section 35 of the Act
111. The Claimant has claimed for an amount that is equivalent to his gross salary for two months in terms of clause 2.1 of the initial contract between the parties dated 27th October 2011. As was indicated earlier in the judgment, when the parties renewed the employment relation through their conduct, they continued to engage on similar terms as set out in the expired contract dated 27th October 2011 except where such terms were inferior to or inconsistent with the ones implied by the Employment Act.
112. Clause 2.1 of the expired contract provided for notice of two months. Thus, when the Respondent waived the notice requirement by signifying its acceptance of the Claimant's request to resign immediately, it became obligated to pay him an amount that is equivalent to his gross salary for two



- months, that is to say, Ksh. 290,250.00 x 2 = Ksh. 580,500.00. As such, judgment is entered in favour of the Claimant for this amount.
113. Section 49 (2) of the *Employment Act* renders any award that is made thereunder subject to statutory deductions. Therefore, I order that the amounts awarded above shall be subject to the applicable statutory deductions.
 114. The Claimant has also prayed for interest on the amount awarded. Thus, I enter judgment for him for interest on the amounts awarded at court rates from the date of this decision.
 115. The Claimant has prayed for a Certificate of Service. Section 51 of the *Employment Act* entitles him to this relief. Consequently, I order the Respondent to issue him with the said Certificate.
 116. Although the Respondent did not succeed in the claim, there was controversy regarding whether the Claimant had cleared with it in order to receive his terminal benefits. In the Memorandum of Reply, the Respondent has specifically asked for an order that the Claimant returns its office equipment.
 117. During cross examination, the Claimant conceded that he is still holding the Respondent's computer, bank token and office keys. Although the Respondent claimed for two computers, it did not provide evidence to demonstrate that it had provided the Claimant with two computers.
 118. Further, the court recognizes the fact that the laptop computer in question was given to the Claimant for office use some while back. Therefore, there cannot be any warranty as to its present condition. Thus, the Claimant should return it "as is", normal wear and tear having been taken into account.
 119. Accordingly, the Claimant is ordered to return to the Respondent the following items which are still in his custody as part of the clearing process:-
 - a. The bank token.
 - b. The office keys.
 - c. The laptop computer.
 120. As the Claimant hands over the aforesaid items, he should be permitted to collect his personal effects, if any, which may have remained in the Respondent's premises at the time he was sent on unpaid leave. There is no reason for the Respondent to withhold these items. It is so ordered
 121. Finally, the court awards the Claimant costs of the case.

Summary of the Award

122. After considering the evidence on record, the court issues the following declarations and orders:-
 - a. The court finds that the parties to the action had an indefinite term contract of service from 1st December 2014 until 12th October 2020 when the Claimant resigned from employment.
 - b. The court finds and declares that the Respondent unfairly terminated the contract of service between the parties through constructive dismissal of the Claimant from employment.
 - c. The Claimant is awarded Ksh. 1,567,350.00 being salary for the period between 1st May 2020 and 12th October 2020.
 - d. The court awards the Claimant the sum of Ksh. 66,389.00 being underpayment of salary for the month of April 2020.
 - e. The court declines to enter judgment in favour of the Claimant for accrued leave days.



- f. The court declines to enter judgment for the Claimant for paid holidays.
- g. The court declines to enter judgment for the Claimant for service pay.
- h. The Claimant is awarded compensation for unfair termination of his contract of service that is equivalent to his gross salary for ten (10) months, that is to say, Ksh. 2,902,500.00.
- i. The court declines the Claimant's prayers for general, aggravated and exemplary damages.
- j. The Claimant is awarded Ksh. 580,500.00 as pay in lieu of notice to terminate his contract of service.
- k. The award made in the judgment is subject to the applicable statutory deductions in terms of section 49 (2) of the Employment Act.
- l. The court awards the Claimant interest on the sums awarded at court rates from the date of this decision.
- m. The court orders the Respondent to issue the Claimant with a Certificate of Service in terms of section 51 of the Employment Act.
- n. The Claimant is ordered to return to the Respondent the following items which he concedes to be holding:-
 - i. Bank token.
 - ii. Office keys.
 - iii. One laptop computer.
- o. The Respondent is ordered to permit the Claimant to collect his personal belongings, if any, which may have remained in its premises at the time the Claimant was sent on unpaid leave.
- p. The court awards the Claimant costs of the case.

DATED, SIGNED AND DELIVERED ON THE 22ND DAY OF JULY, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

JUDGE

