Ohana v Kenol Kobil PLC (Cause 601 of 2019)
[2024] KEELRC 2184 (KLR) (6 September 2024) (Judgment)

Neutral citation: [2024] KEELRC 2184 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 601 OF 2019

NJ ABUODHA, J

SEPTEMBER 6, 2024

BETWEEN

DAVID OHANA ..... CLAIMANT

AND

KENOL KOBIL PLC ..... RESPONDENT

JUDGMENT

1. By a memorandum of claim dated 6th September, 2019 the claimant averred among others that:-

    a. At all material times, the claimant was the Respondent's employee for 17 years from on or around 2002. He rose through the ranks to become the Group Managing Director (hereinafter the "Group MD") in 2013 vide a contract of employment dated 12th June, 2014 for a period of three years. In January 2017, due to exemplary performance, the Claimant's contract of employment was renewed for a further three years upto 31st December, 2019 (hereinafter the "contract of Employment")

    b. The terms of the contract of employment were, among others that;

        i. The claimant would be entitled to a net salary of USD 28,000 per month.

        ii. The claimant may be entitled to receive an annual bonus, net of taxes of between USD 250,000 and USD 700,000.00 based on the Board's assessment of his achievement of the strategic objectives.

        iii. On an annual basis, the Claimant, like other eligible employees, was entitled to the cost of living adjustment COLA on his salary, the last one having been communicated on 27th March, 2019.

iv. The Respondent could with the agreement of the Claimant, concluded not later than 3 months before the expiry of the Term, extend the Contract of Employment for a further period of One (1) year up to 31st December 2020.

v. Either party could terminate the employment by giving the other party, through the Board, not less than Six (6) months' notice in writing to that effect expiring on the last day of any month or, in the case of termination by the Respondent, paying to the Claimant at any time Six (6) months' salary in lieu of notice.

vi. In the event of termination by the Respondent, the Claimant would be entitled to;

a. Proportionate leave pay in respect any portion served by the Claimant upto the expiry of the notice of service;

b. Six (6) month's salary as benefit;

c. A relocation amount of USD 10,000.00 net of taxes; and

d. Cost of transportation.

c. Pursuant to and in accordance with the Contract of Employment, the Claimant diligently carried out his duties and obligations with the result that the Respondent rebounded from being a loss-making entity to a highly profitable public listed company.

d. During his tenure as the Group MD, the Claimant did not undergo any disciplinary action; neither did he get any warning on his performance. To the contrary, the Claimant's outstanding performance led to the payment of bonuses and renewal of the Contract of Employment in 2017 for a further term of 3 years which was due to expire on 31st December 2019.

e. Due to the impressive performance alluded to in paragraph *5* above, on or around March 2019, Rubis Energy, a French Oil Company, through a market takeover acquired majority shareholding in the Respondent by paying Kshs 23 per share when at the time it was trading at Kshs 15 per share on the stock exchange.

f. Upon the takeover, the Respondent instructed the Claimant to issue a memo to all employees assuring them that their employment would not in anyway be affected by the change in its shareholding and encouraged them to continue discharging their duties as previously with diligence and commitment.

g. Further, the Respondent entered into a Settlement Agreement dated 9th April 2019(hereinafter "the Agreement") with all its employees. Among others, the Agreement provided that;

i. No employee shall be terminated for a period of two years effective 12th March 2019 to 11th March 2021 save for instances of proven non-performance and/or gross misconduct as defined in the Respondent's Human Resource Policy and Kenyan Laws.

ii. The actionable non-performance would be based on;

a. Performance appraisals,

b. reasonable key performance indicators,

c. clear job description, f

d) Facilitation with tools of work and employee being subjected to performance program.

iii. Any other termination other as provided herein would be implied as a redundancy.

iv. Additionally, constructive termination would imply redundancy declaration and as such clause 2.2 of the Agreement would apply.

v. Clause 2.2 of the Agreement provided that the redundancy/severance package would be calculated as follows:

a. One (1) month's salary for every year worked and;

b. Gross salary calculated from the date of declaration of redundancy to 11th March 2021 being the termination period for the aforestated assurance.

c. This package, it was stated in clause 2.3.2 of the Agreement, was subject to capping at 30 months gross salary for employees who have worked for the company for 11-20 years.

h. On 27th June 2019, without any prior notice or opportunity to respond to any inquiries, the Claimant was placed on suspension and issued with a notice to show cause based on alleged non-performance as the Group MD.

i. Despite the Claimant's detailed and substantive response to the notice to show cause, the Respondent, in haste, proceeded to unfairly and unlawfully terminate his Contract of Employment through a letter dated 8th July 2019 and, in the process, maliciously clawed back on some of his contractual entitlements.

j. The Claimant avers that the termination of his Contract of Employment was substantively unfair on the grounds that;

2. The Respondent filed its Statement of Response and averred inter alia

i. The Claimant has worked for the Respondent for approximately various capacities including Head of Operations, Head of Sales & Marketing, General Manager for the Kenyan Business and ultimately as the Group Managing Director a position which he held since July 2013. During the Claimant's engagements with the Company, the Claimant would be engaged on fix term renewable contracts, usually for three (3) years at a time.

ii) On 1st January 2017, the Claimant executed a Contract of Employment with the Respondent valid for a three-year term (effective 1st January 2017 and ending 31st December 2019). The terms of this Contract of Employment provided inter alia that:

a. The Employee shall devote the whole of his time, attention and ability to his duties in the capacity of Group Managing Director and shall carry out and perform his duties in accordance with such directions as he may from time to time receive from the Company. [Emphasis Ours]

b. The Employee shall use his best endeavours to extend and improve the business of the Company and the Group and take all proper precautions to prevent the loss, destruction, embezzlement, damage or waste of any or to any property of the Company. [Emphasis Ours]

c. The Claimant shall report directly to the Board of the Company.

d. The Company shall pay the Employee a net salary of USD. 28,000 per month payable in arrears.

e. The Employee may be entitled to receive an annual bonus based on the Board's assessment of the Employee's achievement of the Strategic Objectives. Depending on the achievement of Strategic Objectives, the bonus payable will be net of taxes and between USD. 250,000.00 and USD 750,000.00. For the avoidance of doubt, the payment of bonus is discretionary, and payment will be based of the Board's assessment of attainment of the Strategic Objectives. [Emphasis Ours]

f. In order to investigate any complaint against the Employee for serious misconduct or material breach of this Agreement, the Company reserves the right to suspend the Employee for such period as is reasonably necessary to enable the Company carry out a proper investigation and determine any disciplinary action which may be appropriate provided... [Emphasis Ours]

g. The Company may upon proving the same, dismiss the Employee from its service without prior notice or compensation, if he commits a breach of any undertaking or Agreement on his part herein contained, or shall be grossly negligent in the execution of his duties.... or he shall be guilty of any gross misconduct. [Emphasis Ours]

h. In the event of the dismissal or termination of the Employee under clause 15 (summary dismissal), the Company shall be under no obligation to provide the amount payable under clause 22 (final departure payments) [Emphasis Ours].

h. There was no provision in the contract of employment for extension of the contract upon its expiry on 31st December 2019.

i. Upon the Employee leaving the services of the Company under any circumstances, he shall deliver up to the Company all documents relating to the affairs of the Company and all other property of the Company which shall, during the Term, have come into his possession or under his control and he shall pay to the Company any sums, which may be due by virtue of the provisions hereof and such sums shall be deductible from any monies whatsoever due or payable by the Company to the Employee. [Emphasis Ours]

A copy of the Contract of Employment dated the 1st of November 2017 is marked as "KK-1" in the Respondent's Bundle of Documents.

iii) It is not in doubt the Claimant has served with the Respondent over a substantial period as more particularly set our herein and was therefore expected to be well versed in the Company's policies, systems and procedures.

iv) In discharging his duties as the top management officer in the Company, the Claimant was to adhere to among others his employment covenants, job description, the strategic objectives set periodically, the Human Resource Policies and Procedures Manual, good corporate governance principles, Rules and Regulations set out by the Capital Markets Authority (as the Respondent was a listed company in the Nairobi Stock Exchange] and general exercise of reasonable care, skill and diligence.

v) It is conceded that the Respondent was wholly acquired by Rubis Energy S.A.S [hereinafter | referred to as "Rubis"] which takeover was complete on or about March 2019. It is averred that as the Group Managing Director of the Respondent, the Claimant was an integral part of the process and was duly informed and in the know regarding the take-over exercise.

vi) Upon taking over the Respondent, Rubis appointed directors to the Board of Directors, including Mr. Jean-Christian Bergeron, who was so appointed effective 21st May 2019.

A copy of public notices issued in this respect are marked as "KK-2" in the Respondent's Bundle of Documents.

vii) Thereafter, and having only taken over the Respondent, as part of the dictates of good corporate governance principles, international standards and goof business ethics, the Board of the Respondent conducted its own internal investigations/inquiries regarding the affairs of the Respondent including the office of the Group Managing Director and its office holder as part of good corporate governance and business ethics. To facilitate this exercise, the Claimant was sent on a leave of absence with full pay effective 22nd May 2019 until 30th June 2019 and the Board of the Respondent appointed Mr. Mr. Jean-Christian Bergeron to carry out the functions of the claimant's office during this period.

A copy of an email dated the 21st May 2013 confirming the leave of absence is marked as "KK-3" in the Respondent's Bundle of Documents.

viii) As a result of the inquiries referred to above, it emerged that for the period January 2019 to May 2019:

a. All financial indicators are significantly decreasing due to poor management and wrong business decisions;

b. The gross profit of the Respondent had plunged to -27%;

c. The Earnings Before Interest, Taxes, Depreciation and Amortization [EBIDTA] was down by -39%.

d. Operating Income was down by-46%.

e. The Respondent's net income went down by -52% consequently spawning a net loss for the Respondent of an astonishing USD 6,457,000.00; and

f. Cash loss to the tune of USD 9,712,000.00 which was occasioned by the free cash flow being down at -75%.

ix) In view of the above findings, the Respondent then issued the Claimant with a Notice to show Cause and suspended him in accordance with the terms of the Employment Contract and HR Manual. It is instructive to note that the Claimant's suspension was with full pay and benefits for the suspension period as required under the law and the terms of his Contract of Employment.

A copy of the Notice to Show-Cause letter dated the 27th June 2019 is marked as "KK-4" in the Respondent's Bundle of Documents.

x) The Claimant received the Notice to Show Cause on 28th June 2019 and responded by requesting for (1) additional documentation from the Respondent to enable him respond adequately and (2) additional time -7 days - in which to respond to the Notice to Show Cause.

A copy of the response dated the 28th June 2019 is marked as "KK-5" in the Respondent's Bundle of Documents.

xi) In response to the Claimant's request, the Respondent expeditiously provided the requested information/documentation sought through a letter dated the 28th of June 2019.

A copy of the letter dated the 28th of June 2019 from the Respondent is marked as "KK-6" in the Respondent's Bundle of Documents.

xii) The Claimant thereafter gave his written response to the show cause letter through his response letter dated the 3rd of July 2019.

A copy of the response to the Notice to Show Cause by the Claimant dated the 3rd of June 2019 is marked as "KK-7" in the Respondent's Bundle of Documents.

xiii) In his written response to the Notice to Show Cause, the Claimant markedly conceding the following;

a. That the profit margin of the Respondent dropped during his tenure (Refer to issue 2 at page 3 of the said letter);

b. That he had not been in strategic leadership and could therefore not make strategic business decisions - a startling admission considering his job description and role as Group Managing Director;

c. That there was indeed a decline of EBIDTA (Earnings Before Interest, Depreciation, Taxes and Amortization), operating income and net income.

d. That cash flow went down by-75%

xiv) The Respondent having considered the representations made by the Claimant was dissatisfied with the response and was of the view that the allegations of poor performance had been met to the degree required in law and determined to terminate the Claimant's employment in accordance with the provisions of clause 14 of the employment contract as read with section 35 of the *Employment Act*. It should be noted that although grounds were satisfied for termination of the Claimant without notice in accordance with the terms of the contract of employment, the Respondent in consideration of the claimant's long service at the Company opted to, ex-gratia, terminate the claimant with notice.

A copy of the termination letter dated the 8th July 2019 is marked as "KK-8" in the Respondent's Bundle of Documents.

xv) Upon termination of the Claimant's employment, the Respondent computed the Claimant's terminal dues -in accordance with termination provision under the contract of employment as follows;

a. USD. 168,000.00

USD. 7,364.00

USD. 75,840.55

USD. 10,000.00

USD. 6,631.00

Six (6) months' salary in lieu of notice

b. Salary for the eight (8) days of July 2019 -

c. Accrued leave for 59.6 days -

d. Relocation allowance-

e. Air Tickets plus shipping costs- Total USD. 267, 835.93 Out of this total entitlement of the Claimant, the Company was mandated under the terms of the contract of employment and the law to deduct any monies due and owing to it. The Company therefore deducted the following amounts due and owing to it from the Claimant:

a. Advanced Bonus - USD. 250,000.00

b. Cost of Living Adjustment as at 31.05.2019 - USD. 85,555.20

This left a sum of USD. 67,719.27 due and payable to the Respondent by the Claimant. The Respondent reserves it rights to move the court as appropriate to amend its Reply to include a counterclaim for this amount and puts the Claimant on notice.

A copy of the final dues' computation dated the 8th July 2019 is marked as "KK-4" in the Respondent's Bundle of Documents

xvi) The Respondent wishes to state as follows with respect to the issue of bonus payments:

a. It is clear from the terms of the contract of employment that bonus was (1) discretionary on the exclusive part of the Respondent and (2) if payable, would be based on the Board's assessment of the Employee's achievement of the Strategic Objectives.

b. Upon making the appropriate enquiries, it emerged that the Claimant had unilaterally authorised without Board approval the advance payment of a sum of USD 250,000.00 on account of bonus payments. Indeed, the Respondent formed the view that this authorisation had been made in abuse of the position held by the claimant as Group Managing Directors.

c. The Board of the Respondent never authorised the payment of any bonus to the Claimant for the year 2018 - whether a sum of USD 250,000.00 or any sum at all.

d. Indeed, upon review of the performance of the Claimant vis a vis the strategic Objectives, it was determined that the Claimant in any event did not warrant the payment of any bonus for the year 2018.

e. The Company was therefore wholly entitled to recover the advance payment of bonus.

A copy of an email dated the 4th June 2019 marked as "KK-9" from the Claimant demonstrates the Claimant was aware of the Strategic Objectives and admitted taking an advanced payment of bonus prior to board approval

xvii) The Respondent wishes to state as follows with respect to the Cost of Living Adjustment [COLA].

a. The Claimant, as part of management, was not entitled to COLA.

b. The contract of employment between the claimant and the Respondent did not provide for payment of COLA to the Claimant as alleged.

c. The terms of service of the Claimant were those of an expatriate and consequently, the purpose and intent of COLA, as set out in the Human Resource Manual of the Company was not to cater for employees in management level, including the Claimant who was as a matter of fact and law, the senior most management level employee.

d. The Respondent was therefore wholly entitled to recover COLA from the Claimant.

Evidence

3. In his oral testimony in Court, the claimant adopted as his evidence in chief, his witness statement dated 6th September, 2019 and the bundle of documents filed with the claim. In cross-examination he stated that he had 21 years of experience in oil and gas industry and had a Bachelors Degree in Economics and that the position as CEO was the highest he ever held in the industry. At the time of the trial, he stated that he was engaged in oil and gas advisory in Israel. It was further his evidence that the termination of his service by the respondent did not impede his chances of getting employment elsewhere.

4. The claimant referred to the contract of employment for Jean Bergeron and stated that he was employed on 9th July, 2019 and that he was terminated on 8th July, 2019. It was his evidence that Bergeron was appointed prior to his termination. He made reference to the letter at page 179 of his bundle of documents to support this and stated that the letter spoke for itself and that he got it from HR and showed it to the Chairman. Prior to the letter he had been asked to resign as the respondent could no longer afford him. According to him Bergeron came in March, 2019 and he did not know when he was appointed a Board member. He however acknowledged the notice at page 13 of the respondent's documents which showed that Bergeron was appointed to the Board from 21st May, 2019 and that he joined the Rubis Group in April, 2019.

5. Concerning the Show Cause Letter, he stated that he received the same on 27th June, 2019 and that the same was not detailed enough to enable him respond to the allegations against him. He responded to the letter asking for additional details and that the respondent responded providing additional documents requested and that he then responded to the Show Cause Letter and thereafter received a termination letter in response. According to him, the respondent did not address his response to all the allegations against him and that he never conceded to any of the allegations against him. He neither responded to the termination letter nor appealed the termination. He never knew he had a right of appeal.

6. It was his evidence that he responded based on the data presented to him and noted that the profits were down by 46% and that he never disputed anything because there were no audited accounts. He further stated that when he took over, the responded was down in profits and had tax arrears. The claimant further stated that the termination letter computed his dues which he disputed and that he was not paid the disputed amount.

7. Regarding bonus, he stated that the payment was discretionary and was approved by the Board. The bonus was between USD 250,000/- and 700,000/-. The bonus was decided by the remuneration committee through its chair. It was his evidence that the Chair approved the bonus and that they exchanged email about it. He however did not have copies of email exchanged in his bundle of documents filed in court. He further could not authenticate that the document found at page 182 of his bundle of documents originated from the Board Chairman Mr. Mathenge and the document was not signed and was not on the respondent's letterhead. The claimant further stated that bonus was paid in December before the accounts were published. The payment of USD 250,000/- was for 2018 bonus and that the Chairman of the remuneration committee approved it and that he never approved

payments to himself but he was entitled to bonus just like other employees and if he was not getting he was discriminated against.

8. Concerning his June salary, it was his evidence that he was entitled to the same but was paid less. His monthly salary was USD 28,000/- and that his contract stated that notice money was not payable to employees summarily dismissed. He further stated that he sought to be paid his leave dues and that he was allocated 59.9 leave days and that he did not know how the calculation was done. He further stated that his claim was based on the settlement agreement Rubis and his former employer Kenol. He was the Managing Director when the document was signed and that the new owner wanted to settle all the employees of the respondent. The arrangement was between the buyers (Rubis) and the employees and did not know about management because all employees at Kenol/Kobil were the same. He however conceded that clause 1.2 of the agreement did not apply to termination on account of non-performance and gross misconduct. The agreement however applied to all employees including those with fixed term contracts. He further confirmed that he was paid under the Employee Share Ownership program and that he could not remember how many units he held.

9. In re-examination he stated that prior to his suspension, he was never told about his poor performance. The performance period in issue was between January, 2019 and 21st May, 2019 and that the strategic objective was one of the performance indicators and that the respondent never entered into any of the strategic objectives in 2019 and he had not signed any. Concerning suspension he clarified that this was to enable investigation and that he never received communication that the investigations had been completed and that he was never placed on Performance Improvement Plan and was never taken through any training. Regarding finances he stated that he was not the sole person in charge of finances. There was finance committee and the Board.

10. Regarding the appointment of Bergeron, it was his evidence that he was appointed before he was terminated and that the notice of his appointment was dated 30th May, 2019 and that he was terminated in July, 2019. He further stated that Bergeron signed the settlement agreement on behalf of the respondent when he was employed by the respondent as CEO. It was his evidence that he interacted with Bergeron almost on a daily basis and that all major decisions were made by the buyers.

11. Concerning performance, it was his evidence that the respondent had a HR Policy Manual that provided for how to deal with cases of non-performance. Performance was measured against a calendar year but he was assessed after 5 months. He further stated that the Settlement Agreement applied to all employees including himself. Concerning bonus payments he stated that recommendation was prepared and sent to the remuneration committee of the board. There was advance payment and the balance was paid after the publication of accounts. He relied on the email dated 28th May, 2018 in his supplementary bundle of documents which he said was from the chairman and authorized payment of his bonus. He further stated that the issue of advance bonus was never captured in the suspension letter and that the same was never demanded back from him. It was further his evidence that his salary was Kshs. 8.3 million but was paid less in June, 2019.

12. The respondent first witness Mr. Ismael Opande (RW1) informed the Court that he was the respondent's Commercial and Industry Sales Manager. He signed his witness statement on 30th December, 2022 which he relied on as his evidence in chief. He further stated that he was one of the Employee Representatives who signed the settlement agreement. He was then Commercial Sales Representative. The other representatives that signed were Mercy Githinji, Conrad Molenje and Joyce Toroitich. It was his evidence that those who signed were all non-management staff.

13. Mr. Opande further stated that there was consultation with Rubis Management and that there were Town Hall discussions and that the claimant was not part of the meetings and never attended any and

never voted in the election of any of the representatives. He produced minutes (p. 49 RBD) of the meeting between employee representatives and Rubis team and that the management were excluded from the deliberations. Regarding Staff Share Ownership, it was his evidence that the claimant allocated himself all the shares and became the greatest beneficiary when Kenol/Kobil was taken over by Rubis.

14. In Cross-examination he stated that Joyce was a Payable Manager and Mercy was a Front Office Manager and that the negotiations were done by non-management staff. The meetings were as a result of employee demands. Two meetings were held (p49 and 52 of RBD). Not all employees attended. The sent their representatives. Bergeron was present and represented the Rubis team. It was further his evidence that the agreement did not state that it applied to non-management staff. Concerning shares, it was his evidence that he did not know how many shares Kenol/Kobil had and that it was the Board and Directors who decided who was allocated shares.

15. In re-examination he stated that employees feared to complain about the shares due to risk of losing their jobs. Concerning change in the respondent's board it was his evidence that this occurred on 30th May, 2019. This was one month after the settlement agreement. He further stated that management consisted of Heads of Departments and the CEO.

16. The respondent's second witness Evelyn Vosevwa informed the Court that she was the Group Head-People and Culture. She joined the respondent in April, 2022 and that she was not with the respondent when the claimant was terminated and that she relied on records. She signed her witness statement on 28th October, 2022 which she relied on as his evidence in chief. According to her, she was aware why the claimant was terminated. The claimant had earlier been suspended and issued with a show cause letter and that he was on full pay during suspension. It was her evidence that the claimant was supplied with the additional documents he asked for and that he substantively responded to the show cause letter which was found at pages 20 to 25 of the RBD. The letter was undated and further that the termination letter dated 8th July, 2019 stated that there was a finding that there was poor performance on the part of the claimant and he was terminated with immediate effect and that the termination letter set out terminal dues.

17. Ms. Vosevwa further state that due process was followed in the termination of the claimant and that the claimant's contract was due to expire in December, 2019 and that he had six month's to go by the time he got terminated. Regarding bonus she stated that none had been approved for 2018. She further stated that she was aware of the settlement agreement and that the HR Manual classified employees as permanent, contractual and expatriates. There were also management and non-management staff. This was exhibited at page 72 RBD and according to her, no management employee had made a claim on the settlement agreement except the claimant.

18. In cross-examination she stated that she joined the respondent in 2022 and that she relied on records. The claimant was respondent's employee working as the Managing Director and that the contract did not describe the claimant was as management staff and that he became MD in 2103 and worked in the position for six years by the time of termination. It was her evidence that the claimant had no previous disciplinary issues. Concerning the agenda 7 at p140 of the CBD on resignation, it was her evidence that the document was not signed by the Company Secretary and the email did not show where it was from. Concerning email from Mr. Githiomi, it was her evidence that it was a notice of a Board meeting at Serena. By then the claimant had neither been suspended nor issued with a show cause letter. Further there were no allegations of non-performance against the claimant.

19. Concerning the email from Bergeron, it sent the claimant on compulsory leave and that Bergeron was one of the directors. On 27th June, 2019, the claimant was issued with suspension letter and notice to

show cause. The suspension was to allow inquiry about the claimant's performance. She stated that she had no evidence showing the claimant was involved in the inquiry about his performance and further that performance appraisal was continuous. Monthly accounts were evidence of performance. She however stated that no formal appraisal was done and that the HR Manual set out the appraisal process and that the claimant was not rated

20. Concerning Bergeron, she stated that he issued the claimant with the suspension letter and leave of absence and that he joined as the CEO Rubis East Africa and that his appointment was with effect from 1st April, 2019 and by the then the claimant was still the respondent's MD.

21. Concerning the claimant's salary, she stated that according to his payslip found at page 141 CBD, his net salary was Kshs. 3,367,031/51 for the month of April and that the salary for June was stated as Kshs. 2,575,008/45 and that it was less than the previous salary. Concerning bonus she stated that the claimant was entitled to the same but subject to the discretion of the Board. That the minimum was USD 250,000 and maximum was USD 700,000. According to her the claimant paid himself bonus in 2018 and this was abuse of his position. The show cause letter however made no reference to the payment but the Board never approved the bonus.

22. RW2 further stated that the claimant was paid COLA increment for 2017 to 2019. These were deducted because the claimant was an expatriate and not entitled to COLA.

23. In re-examination she stated that the settlement agreement did not apply to the claimant and that the management was negotiating on their own. Further that the claimant was an expatriate on work permit. Further it did not apply to contract employees. She further stated that the respondent clawed back what it felt was wrongfully paid to the claimant. Concerning the bonus payment document, it was her evidence that the was unsigned and the respondent did not know who authored the same. It was not in the respondent's records. The bonus for 2018 was never approved. She further stated that the claimant was. The final authority on payments so he approved payments to himself. Further that the respondent always clawed back payments the claimant irregularly received or advances.

24. Concerning bonus, she clarified that bonus was conditional upon the employee achieving the strategic objectives of the company and was at the discretion of the Board. Regarding underpayment, it was her evidence that the statement did not show if the payment was from Kenol/Kobil and that the respondent never received dispute over the computation of the claimant's terminal dues.

Submissions

25. The claimant's counsel Mr. Khaseke submitted among others that for termination of employment to be fair, it must be for justifiable and valid reasons and the procedure followed must be fair. In this regard Counsel relied on section 43(1) of the *Employment Act* and further the cases of Kenya Revenue Authority v. Reuwel Waithaka Gitahi & 2 Others [2019] eKLR. According to Counsel, the reason given by the respondent for termination of the claimant's employment was poor performance. Counsel noted that whereas the Court's recognize poor performance as a reason for termination of employment, they have given guidance on what steps should be taken by an employer before terminating an employee on account of poor performance. In this regard counsel relied on the case of National Bank of Kenya vs. Samuel Nguru Mutonya [2019] eKLR and Jane Samba Mukala v Ol Tukai Lodge where the Court stated that where poor performance is shown to be the reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the Act. The employer must show that in arriving at the decision of noting poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance and further measures they have taken to address poor performance.

26. According to Counsel, the respondent's HR Manual covers performance appraisals (pages 132-134 CBD). Further the settlement agreement dated 9th April, 2019 which the respondent entered into with its employees upon acquisition by Rubis Energy, stipulated that employees non-performance was based on annual performance appraisals, reasonable key performance indicators, clear job description, facilitation with tools of work and employee being subjected to performance improvement program. Further, according to the HRM, formal periodic appraisal was to be conducted once a year (pages 82 and 84 of HRM). The HRM provided that the respondent's supervisor would communicate to the employee in advance, the performance standards and ethical elements of the job and conduct the appraisal sessions in accordance with the established standards of the organization among others.

27. According to Mr. Khaseke, it was common ground that there were no strategic objectives for 2019 agreed between the respondent's board and the claimant which would have informed the basis for his appraisal and the standard against which his performance would be measured. In absence of 2019 strategic objectives, the respondent failed to satisfy the very basis for which an appraisal would be conducted as required by law and their own HRM. Counsel lamented that the respondent commenced an appraisal process, five months into the year in which there were no performance targets against which it could be based. Besides the said poor performance was neither brought to the attention of the claimant nor was he accorded an opportunity to remedy his performance prior to being placed on suspension and issued with a Notice to Show Cause.

28. On the issue of bad faith and malice, counsel submitted that the allegation of poor performance was malicious and in bad faith and was a flimsy excuse to terminate the claimant's employment. Counsel further submitted that on 1st April, 2019 Mr. Bergeron was appointed as the respondent's group Managing Director and the appointment was to take effect on 1st June, 2019. As at the time Mr. Bergeron's appointment, the claimant was still respondent's duly appointed MD and was serving his final year under his 2017 contract of employment. It was the same Mr. Bergeron who sent the claimant on leave of absence with effect from 22nd May, 2019 until 30th June, 2019. Further, whereas the respondent disputes that Mr. Bergeron was appointed on 1st April, 2019, it had not tendered any evidence to dispute the authenticity of the letter of appointment dated 1st April, 2019. The respondent instead filed the employment contract dated 9th July, 2019, the question then would be if the claimant was terminated on 8th July, 2019 and immediately thereafter, the following day, Bergeron was appointed to replace him, when did his recruitment take place? Did the respondent's recruit the claimant's replacement even before deciding on the allegations of poor performance? The inevitable answer would be that the respondent had already resolved to terminate the claimant's employment.

29. Counsel further submitted that the respondent held two Board meetings where in one the agenda item was claimant's resignation(pages 140, and 150-151 CBD). After the claimant declined to resign unless the balance of his 2018 bonus was addressed, he was sent on leave of absence on 22nd May, 2019 contrary to the respondent's HR- Manual which clearly sets out instances when an employee can go on a leave of absence (pages 118-119 CBD). In concluding this point counsel submitted that the foregoing demonstrated that there was sufficient evidence that the termination of the claimant was malicious.

30. On the issue of procedural fairness, Counsel submitted that save for the Notice to Show Cause, the respondent never accorded the claimant an opportunity to defend himself against the allegations in a disciplinary hearing yet the obligation to accord an employee the right to defend self before termination was not optional. It was a mandatory requirement of the law and could not be overlooked. The respondent therefore failed to meet the mandatory requirement of section 41 of the *Employment Act* and the provisions of its HR-Manual (page 78 of the CBD).

31. Regarding entitlement to the reliefs sought, Counsel submitted on the issue of underpayment for 2019 that the claimant's net salary for the period beginning April, 2019 was Kshs. 3,367,031.51. As at June, 2019, the salary was still the same however the respondent failed to pay the full amount and instead made a payment of Kshs. 2,652,360.08 withholding the balance of Kshs. 741,670.71 without any explanation whatsoever. This according to Counsel was a violation of the claimant's right to full pay as protected under section 17 and 18 of the *Employment Act*. On the issue of the balance of the bonus, Counsel submitted that under clause 8 of the contract, the claimant was entitled to a minimum bonus of USD 250,000/- and a maximum of USD 700,000. The bonus though a discretion of the respondent's Board, the Board recommended that the claimant be paid an additional bonus of USD 400,000 for his exemplary performance and a USD 50,000 ex-gratia payment for the 17 years he diligently served the respondent. Despite the recommendation, the respondent refused to pay the pay the claimant.

32. According to Counsel, the claimant's performance was always acknowledged by the Board and this was evident from the increment in the bonus amount paid since 2014. That is to say USD 340,000 in 2014, USD 500,000 in 2015, USD 525,000 in 2016 and USD 550,000 in 2017. As for 2018, the respondent's Board assessed the claimant's performance against the strategic objectives and arrived at a decision to pay him the maximum bonus under his contract in the memo dated 4th April, 2019 addressed to the Board (pages 182-184 CBD).

33. Regarding the memo dated 4th April, 2019 recommending the payment of the bonus, Counsel submitted that whereas the respondent in its amended Memorandum of reply and counterclaim and RW2 stated in her statement that the Board did not approve the payment of the bonus to the claimant in 2018, the witness did not contest the document relied on by the claimant at paragraph 39 of his witness statement. Further during the pretrial conference, the respondent never disputed the said document DO-23 relied on by the claimant. Counsel contended that whereas the claimant asserted his entitlement to 2018 bonus, the respondent has denied his entitlement and stated that it reviewed the claimant's performance and determined that he did not warrant any bonus yet did not produce in court the said determination. In this regard Counsel relied on the case of Abigael Jepkosgei Yator & Another vs. Chinal Hanan International Co. Ltd [2018]eKLR in which the Court placed the responsibility of keeping employment records on the employer and to produce the same where there are legal proceedings

34. Regarding the question of six month's salary in lieu of notice, counsel submitted that clause 14 of the employment contract provided for the same where a termination was with immediate effect. On six month's salary benefit, counsel submitted that since the respondent invoked clause 14 of the contract, clause 17 automatically fell in place which entitled the claimant to payment of net salary benefit of six months' equivalent. Regarding leave, Counsel submitted that section 28 of the Act provided for not less than 21 days of leave with full pay and this was further captured under clause 10 of the claimant's contract. As at the time of termination the claimant had accumulated 71.015 unutilized leave days. Counsel further submitted as per clause 22 of the contract of employment, the claimant was entitled to a relocation allowance of USD 10,000.

35. On the issue of compensation for unfair termination, Mr. Khaseke submitted that the claimant had demonstrated that he was unfairly terminated hence entitled to be compensated and urged the Court to award 12 months' maximum compensation since the termination was not only substantively unfair but also procedurally flawed and actuated by malice as demonstrated earlier.

36. Regarding benefits under settlement agreement, Counsel submitted that the agreement was intended to give job assurance to employees that there would be no termination of employment for the period

unless on account of proven non-performance or gross misconduct. The respondent terminated the claimant's employment on alleged non-performance which he had shown was invalid and unfair. The claimant was thus entitled to payment as per the settlement agreement clause 2.2 thereof.

37. On the Counterclaim, counsel submitted that one of the basis for the counterclaim was that the payment was unlawful. The respondent had a practice of paying minimum bonus as submitted earlier. Further that the respondent's own documents (p.14 RSD) show that the claimant was paid an advance bonus of USD 250,000 in December, 2017 and a balance of USD 300,000 in May, 2018 after his performance was evaluated.

38. On the issue of COLA, counsel submitted that this was not provided for in the contract but in the respondent's HR-Manual (p.92 of CBD) under the heading "salary increments". On this basis, the claimant's salary was increased on annual basis through COLA awarded by the respondent (DO-3 p.38-40 CBD). The COLA adjustments were communicated by the respondent's HR annually to all members of staff (p33 and 35 CBD)

39. The respondent's Counsel Mr. Nyaribo on the other hand submitted that by a contract of employment dated 1st January, 2017 executed by the claimant, he was to work for the respondent until 31st December, 2019 and that the contract provided (clause 14) among others that either party could for "no cause" terminate the contract by giving not less than 6 months' notice in writing or payment in lieu. According to counsel, the termination took place under the said clause 14 which allowed termination for no cause. Counsel further submitted that the respondent having invoked the termination clause, the issue of whether the termination was procedurally or substantively fair could not arise. In that regard Counsel relied on the case of Manuel Anidos v. Kinangop Wind Park Limited (in Receivership) [2019] eKLR and Kenya Revenue Authority v. Menginya Salim Murgani [2010] eKLR which underscored the doctrine of freedom of contract and mutuality of rights and obligations for both parties because a contract of service is not a yoke of slavery or a contract of servitude.

40. In the alternative Counsel submitted that the termination of the claimant's contract was procedurally fair and in accordance with section 45(2) and (4) of the *Employment Act*. According to Counsel, through a letter dated 27th June, 2019 the claimant was issued with a show cause letter which set out in sufficient detail the allegations against him. He was subsequently suspended for ten days. This was in accordance with clause 13 of the contract of employment. The claimant through a letter dated 28th June, 2019 acknowledged the receipt of the show cause and suspension letter. He requested for additional information and extension of time within which to respond. The request for additional documents was acceded to but the extension of time was declined. Counsel further submitted that the claimant responded to the show cause letter through an undated lengthy and detailed response. The respondent's Board considered the response and came to the conclusion that the claimant's employment be terminated with immediate effect and issued him with a termination letter dated 8th July, 2019. The claimant did not appeal the termination despite the fact that his contract provided for it. Counsel therefore submitted that the termination of the claimant's employment was therefore procedurally fair.

41. On the issue whether there was fair and or procedural reason to terminate the claimant, Mr. Nyaribo submitted that the allegations the claimant faced ought to be considered in the light of strategic objectives for 2018 and 2019; the claimant's position as the Group MD of the respondent with overall executive authority of the respondent, his position as the Chair of Executive Committee answerable to the Board and the fact that the respondent was a listed company at the NSE.

42. According to Counsel, all financial indicators were significantly decreasing due to poor management and wrong business decisions; the gross profit had plunged to -27%; earnings before interest,

depreciation and amortization (EBIDTA) was down by -39%; operating in was down by -46% and respondent's income went down by -52%. Further there was a cash loss of USD 9,712,000 which was occasioned by cash flow being down at -75%. It was further Mr. Nyaribo's submission that the Claimant on the other had conceded that the respondent's profit dropped by -27% during his tenure; that he had not been in strategic leadership and could therefore not make strategic business decisions; that indeed there was decline in EBIDTA; operating income was down by -46% and cashflow was down by -75%.

43. The respondent contended that the claimant had a fiduciary obligation to the respondent to always act in its best interest, employing reasonable diligence and skills expected of an executive in his position. In failing to discharge the aforesaid duty, counsel submitted, the claimant was in flagrant breach of clause 4.1.2 of the employment covenants in his contract. Once the claimant took the mantle of the Group MD, the claimant ought to have known that whatever happened under his leadership was ultimately his responsibility. Counsel therefore submitted that in the light of background set out, the Court should consider the reasonableness of the claimant's conduct in determining whether the termination of his employment was unfair and unlawful. In this regard Counsel relied on the case of Evans Kamadi Misango v. Barclays Bank of Kenya Ltd [2015]eKLR.

44. On the issue of discrimination, counsel submitted that the claimant was not singled out for termination on account of poor performance of the respondent while performance was a collective responsibility of the executive committee. According to Counsel, the claimant in his capacity as the Group MD was the senior-most executive personally responsible for the financial performance of the Company. Indeed, in recognition of his responsibility he was to secure a benefit as a bonus in the event the strategic objectives of the respondent were met. The executive committee which the claimant chaired was in his capacity as MD was there to assist the him in decision making process. The primary responsibility and decision making authority therefore lay with the claimant and he could not avoid responsibility and allege collective responsibility especially where the benefits of success were solely his.

45. Concerning the issue of clawing back the bonus for 2018 when all other employees were paid and claim for additional bonus, Counsel submitted that bonus was discretionary and was not an entitlement. It was dependent on the respondent's board assessment of the claimant's achievement of the strategic objectives for the year 2018 and the quantum was not fixed. The respondent further contended that the Board never approved the claimant's bonus for 2018 hence the court did not have the capacity to compel the respondent to pay the balance of the bonus. In this regard Counsel relied on the case of Nicholas Mbuya & 4 others v. Alice Gesare Moninda [2015] eKLR where the Court stated that our labour laws were silent on the issue of bonus payment hence liability if any must be construed within the meaning and intent accorded by the parties under their contract. Counsel further relied on the case of Manuel Anidos v. Kinangop Wind Park Limited (in Receivership) [2019] eKLR where the court dismissed a claim for discretionary bonus because the conditions precedent for eligibility had not been met.

46. Regarding supporting documents for the bonus claim, counsel submitted that the claimant alleged that the chairman of the board approved the payment through a memo dated 4th April, 2019 however the author of the document is unknown since it is not signed by the alleged author and the document was not issued on the respondent's letterhead.

47. On the issue of COLA, counsel submitted that this was erroneously paid to the claimant hence the clawback was justified. The claimant was part of management hence was not entitled to COLA. By its very definition, COLA was provided to cushion local staff from inflation and currency exchanges. The claimant's contract was denominated in US dollars thus insulating him from inflation and currency

variations. Further the contract of employment did not provide for COLA. The respondent was therefore entitled to clawback COLA.

48. Mr. Nyaribo further submitted that the claimant was entitled to payment of six months' salary in lieu of leave, relocation allowance, air tickets and cost of shipping luggage. These were indeed factored in the claimant's terminal dues upon termination of his contract but were set-off against dues owing to the respondent from the claimant. Regarding the number of leave day claimed by the claimant, counsel submitted that the claimant was entitled to 59.59 days and that the claimant was only entitled to contractual 30 days leave hence his claim for 71.05 days would suggest that he never went on leave for more than three years which was an impossibility.

49. Regarding claim for compensation under clause 2.2.1 of the settlement agreement, Counsel submitted that the settlement agreement was not applicable to the management team. The minutes of the meeting of 9th April, 2019 on agenda No. 2 (redundancy pay), it was agreed that in the event of eligible employees were terminated for any reason except gross misconduct, they would be accordingly compensated. However it was clear that management cadre employees were explicitly excluded. The claimant as the group MD was in management besides the redundancy package would not only apply in the event an employee was terminated for poor performance as in the case of the claimant.

50. Counsel further submitted that the settlement agreement was not signed by the respondent but by Jean Bergeron who was the Group MD of Rubis Energie SAS, the entity purchasing the respondent. The claimant never took part in the process of election of representatives of the employees to negotiate with Rubis Energie SAS and neither did any member of management cadre. This was because there was consensus and agreement that the negotiations only related to covering lower cadre employees.

51. On the issue of claim for compensation for unfair termination, the respondent submitted that the termination of the claimant's service was substantively and procedurally fair as previously submitted hence the claimant is not entitled to any compensation. Alternatively if the claimant should be entitled to any compensation this should be limited to 2 months' salary because the contract had six month's to expire by effluxion of time and the fact that termination occurred through a no-fault clause under the claimant's contract and other circumstances surrounding the termination including termination on account of poor performance.

52. On the question whether the respondent is entitled to the reliefs sought in the counterclaim, Counsel submitted that upon termination, the respondent computed the dues payable to the claimant as set out in the final dues calculation document and the amount came to USD 267, 835.93 however under clause 19 of the employment contract, the respondent was entitled to set-off or deduct any monies owed to it by the claimant. The respondent deducted the advance bonus of USD 250,000 wrongfully paid and COLA wrongfully paid to the claimant and the deductions came to USD 335,555.20. This left a balance of USD 67,719.27 which the respondent claims together with interest at Court rate.

Determination

53. The Court having considered the pleadings, evidence and submission by counsel that were detailed and elucidating, takes the view that the main issues which if determined would resolve the dispute herein are:

    a. Whether the respondent had valid reasons for terminating the claimant's service and if so whether the termination was carried out through a fair procedure.

    b. Whether the respondent was justified in clawing back monies paid to the claimant on account of bonus and COLA.

c. Whether claimant was entitled to benefit under the settlement agreement

d. Whether the respondent is entitled to judgment on the counter-claim

e. What is the appropriate remedy to grant to the successful party in the circumstances.

54. On the first issue of fairness or otherwise of the termination, the respondent terminated the claimant's service on account of poor performance. By a letter dated 27th June, 2019 (page 154-CBD) addressed to the claimant by the Board and signed by the Board Chair Mr. James Mathenge, the claimant was put on suspension and asked to show cause why disciplinary action should not be taken against him as a result of the allegations detailed in the letter. The accusations as per the letter were that:

a. All financial indicators were significantly decreasing due to poor management and wrong business decisions;

b. The gross profit of the company was down by -27%

c. Earnings before interest, depreciation and amortization (EBIDTA) was down by -39%

d. Operating income was down by -46%

e. Net income was down by -52% generating a net loss for Kenol/Kobil Group of -6,457,000 USD.

f. The free cashflow was also down -75% generating a loss of cash for the Kenol/Kobil Group of -9,712,000.00 USD

55. Upon receipt of this letter, the claimant via a letter dated 28th June, 2019 (page 17 RBD) requested for additional information and extension of time to respond. The documents were supplied by the respondent through a letter dated 28th June, 2019 (same day as the request) but extension of time to respond was declined. The claimant subsequently responded to the Show Cause Letter through an undated letter (page 20 RBD). In the letter, the claimant complained that:

i. He had reason to believe that the suspension and the notice to show cause were issued as an afterthought, in bad faith and contrived to unlawfully terminate his employment after he declined to resign unless his terminal dues in accordance with his contract, were paid in full.

ii. On 13th March, 2019 after Rubis Energy had acquired the respondent, its Group MD Mr. Cochet Christian informed him over dinner that he had to leave Kenol/Kobil Group MD position because the company could not afford his salary.

iii. On 9th April, 2019 Mr. Jean-Christian Bergeron was brought in the company as his replacement even before his term at Kenol/Kobil expired.

iv. On 21st May, 2019 the Board held a special meeting, after issuance of only 4 days' notice and among the agenda items, much to his surprise, were to receive resignation of the current managing director and appointment of a new Managing Director.

v. On 10th June, 2019 the Board held a meeting in which yet again among the agenda items were to consider the exit terms of the current MD and appointment of the new MD.

vi. The Board was alleged to have conducted an inquiry into his performance between January and May, 2019 without interviewing him or seeking information from him before coming up with the alleged findings stated in the letter.

56. In response to the accusations in the show cause letter the claimant stated among others that:

i. Allegation on decreasing financial indicators due to poor management and wrong business decisions were too broad and vague. He had sought clarification on the specific decisions that he made that were deemed to be wrong and poor and why but no response and clarification was given hence he was unable to effectively respond.

ii. On the issue of gross profit, he stated that the source of the workings annexed to the letter of 28th June, 2019 were unknown. He noted that they were not audited profit and loss accounts prepared by the company's auditors as such he could not vouch its authenticity and reliability.

iii. According to him the Company was still profitable for the period stated in the letter because in 5 months the net profit was still about USD 6 million only that the margin of profit had reduced. It was his view that reduction in profit should not be a huge cause for alarm as the company could easily recover the 2nd half year and post increased profitability as was the case in 2018 when the company posted a net profit of USD 26,977,220 and of this USD 16,510, 420 was attributable to the 1st half of the year.

57. By a letter dated 8th July, 2019, the respondent reacted to the claimant's response to the accusations contained in the show cause letter among others that:

i. On issue number 1, you took the view that you were unable to respond to these allegations because it was too broad and vague, the company finds the response unsatisfactory and diversionary.

ii. On the issue of gross profit, you concede the margin of profit had reduced and suggest that there should no cause for alarm as the company will recover in the 2nd half of the year but no explanation was proffered as to why the gross profit went down. No historical data was offered to support the assertion that performance would improve in the 2nd half of 2019 and indeed prorated data showed that the 5 months were the worst since 2015. The respondent took a similar position regarding other responses made by the claimant that he conceded the drop in various heads of earnings for the respondent but suggested improvement without providing any data.

iii. The respondent in conclusion stated that the allegations of poor performance had been substantiated and proceeded to terminate the claimant's contract with immediate effect.

58. Ordinarily it is not within the domain of the Court to go into a merit review of a decision by an employer to terminate the service of an employee. This principle was stated in the often quoted dictum of Lord Denning MR in the case of British Leyland UK Ltd v. Swift [1981]IRLR 91 Where learned law Lord stated:

> 'The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which an employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him"

59. Some measure of merit review is however necessary to understand and appreciate the reasonableness or otherwise of the decision to dismiss. In the matter before me the claimant took the view that the

respondent had a predetermined decision to dismiss him and gave a chronology of facts, briefly set out above, as to why he thought so. First of all, he was told by the incoming owners of the respondent that he had to leave because his salary was expensive and the respondent could not afford him. Second, he was terminated because he refused to resign unless his terminal dues including bonus were paid as per the contract including balance of bonus for 2018. Thirdly, the respondent's act of hiring Mr. Bergeron as the MD while his contract was still valid.

60. It is important to note the following events: a) At page 13 RBD filed on 21st January, 2020, the respondent announced changes in its Board by appointing Mr. Jean-Christian Bergeron as a member of the Board with effect from 21st May, 2019. This was done through a public announcement in the Daily Nation Newspaper of 30th May, 2019. b) At page 14 of RBD, by an email dated 21st May, 2019, the said Mr. Bergeron penned an email to the claimant capturing their alleged discussions and agreement with the claimant that the latter would be excused from coming to the office from 22nd May, until, 30th June, 2019 and further informing him that his remuneration and benefits would be payable in accordance with his contract of employment. The claimant confirmed the content of the email and reiterated that he was looking forward to payment of his remuneration and benefits in accordance with his contract of employment. c) By a letter dated 27th June, 2019, signed by the respondent's Board Chairman, Mr. Mathenge (page 15 RBD), the claimant was placed on suspension and concurrently issued with a notice to show cause why disciplinary action should not be taken against him. The suspension letter/show cause notice listed six accusations against the claimant to which he was required to respond and further informed him that the suspension was intended to allow the respondent complete the investigatory process in order to determine appropriate disciplinary action against him.

61. The claimant as noted above requested for additional documents and more time to respond. The additional documents were provided but the respondent declined extension of time to respond. By a letter dated 8th July, 2019, the respondent terminated the claimant's service citing poor performance and stating that the allegations of poor performance cited against him in the show cause letter had been proved. Meanwhile it is useful to note that by a letter dated 1st April, 2019, the respondent appointed Bergeron as the Group MD with effect from 1st June, 2019, a position still held by the claimant.

62. In the case of Jane Samba Mukala vs Oltukai Lodge Ltd [2010]eKLR, the court observed as follows;

> Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act*, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance...It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place. It will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established. (emphasis supplied)
>
> Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.

63. Ms. Vosevwa for the respondent informed the Court that no formal appraisal was done for the claimant and further the HR Manual set out the appraisal process. She also informed the Court that the claimant was not rated. It was further claimant's evidence and which was not denied by the respondent that

no targets were set for 2019. The Court further noted that no previous appraisals were produced to compare with the allegations of poor performance in 2019. As was observed in Jane Samba Mukala case above, it does not suffice to just say that one has been terminated for poor performance. The effort leading to this decision must be established. In this matter the respondent failed to sufficiently establish the effort and the process leading to the termination of the claimant's service on account of poor performance. From the chronology of the events leading to the termination of the claimant's service set out above, one cannot help taking the view that they were choreographed by the incoming owners to terminate the claimant's service to give room for Mr. Bergeron of Rubis Energie, to replace him.

64. Section 45(1) of the *Employment Act* prohibits unfair termination of employment. A termination of employment shall be deemed unfair if the employer fails to prove that the reason is a valid and fair reason. In this case, it may well be that the respondent wanted to get rid of the claimant to give room for Rubis Energie to recruit an MD of their choice. They were however obliged to follow the law in terminating his service. From the evidence, the claimant was agreeable to exiting his employment through resignation provided he was paid his terminal dues as per the contract of employment. It is unclear why this option was never explored mutually between the parties. This was an employee who had served the respondent for close to 17 years and annually got paid bonus as a sign of appreciation for his good performance. How he suddenly became a poor performer 5 months into 2019 and when the respondent was being acquired by Rubis Energie can only be understood in the context of premeditated arrangement to have change of guard at the respondent at whatever cost. It had nothing to do with the claimant's performance. From the foregoing the Court inevitably reaches the conclusion that the termination of the claimant's service was unfair on account of failure by the respondent to prove that the reasons for termination were valid and fair as required by section 45(1) of the *Employment Act*.

65. The next issue is whether the respondent was justified in clawing back monies paid to the claimant on account of bonus and COLA. The claimant in his evidence before the Court conceded that bonus was the discretion of the Board but the quantum was decided by the remuneration committee through the chair. Although he stated that the Chairman approved the 2018 bonus and that they exchanged email about it with the Chairman, no such email was presented before the Court. He further stated that he had nothing to show that the letter purportedly written by Mr. Mathenge on behalf of the Board originated from there and he conceded that it was not written on the respondent's headed paper. He further stated that the bonus was paid in December, 2018 before the accounts were published. In the face of these concessions by the claimant and lack of clear and authenticable background documentation on the payment of bonus, the court agrees with the respondent that the payment of the advance bonus of USD 250,000 was irregular and the respondent was therefore justified in clawing back the same.

66. On the COLA issue, it was the respondent's position that the claimant being an expatriate was not entitled to COLA. A memo to dated 12th April, 2018 (page 35-37 CBD at p.36) addressed to staff members on COLA, stated that all international expatriates were not eligible to COLA. It was not in dispute that the claimant was an Israel national working in Kenya and his salary was designated in United States Dollars. He was therefore an expatriate hence was not eligible for COLA, the respondent was therefore justified in clawing back any monies paid to him on account of COLA.

67. The claimant was equally not eligible to benefit from the settlement agreement between the respondent's staff and Rubis Energie because from the minutes of the meetings between the staff of the respondent and Rubis Energie it is clearly showed that the target staff were lower cadre and not those in management. It was not in dispute that Mercy Githinji, Ismael Opande (RW1), Joyce

Toroitich and Conrad Molenje were not in management and that they were elected to represent non-management staff in the negotiations with Rubis Energie. The claimant was the Group CEO and it would have been odd that lower cadre staff were elected to lead negotiations on employee terms of service and job security including the Group CEO. Besides the minutes of the meeting between the respondent's staff and Rubis Energie dated 9th April. 2019 (page 49 RBD) was clear that the respondent would give the staff concerned two years job security with exception of those with proven professional nonperformance. By April, 2019 the claimant was on the tail end of his three year contract and could not have been factored in the negotiations. His contract was a fixed term contract renewable by the Board subject to performance among other factors. To include him in the settlement agreement and guarantee him job security for at least two years would have amounted to irregular extension of his contract which was about to come to an end.

68. Regarding the question whether the respondent is entitled to judgment on the counterclaim, the answer would be the affirmative but subject to set-off on account the finding of the Court as above that the claimant's service was unfairly terminated. In that regard, the circumstances of the termination of the claimant's service as already considered above and the Court's observations and finding thereon, justifies maximum compensation of twelve month's salary as provided under Section 49(1)(c) of the *Employment Act*.

69. The Claimant's salary as per the contract entered into by the parties on 1st January, 2017 was USD 28,000 per month. The respondent is therefore liable to pay the claimant USD 336,000 less the USD 67,719.27 being the judgment on the counterclaim. That is to say the sum of USD 268,280.73. This award shall be subject to taxes and statutory deductions where applicable but shall attract interest at Court rates from the date of the judgment until payment in full.

70. The Claimant shall further have costs of the suit.

71. It is so ordered.

DATED AT NAIROBI THIS 6TH DAY OF SEPTEMBER, 2024 DELIVERED VIRTUALLY THIS 6TH DAY OF SEPTEMBER, 2024

ABUODHA NELSON JORUM

JUDGE