



REPUBLIC OF KENYA



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**Timaflo Limited v Mungai (Employment and Labour Relations Cause E014 of 2023 & E005 of 2024 (Consolidated)) [2025] KEELRC 87 (KLR) (24 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 87 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU**

**EMPLOYMENT AND LABOUR RELATIONS CAUSE  
E014 OF 2023 & E005 OF 2024 (CONSOLIDATED)**

**ON MAKAU, J**

**JANUARY 24, 2025**

**BETWEEN**

**TIMAFLO LIMITED ..... CLAIMANT**

**AND**

**JOSEPH GITAU MUNGAI ..... RESPONDENT**

**JUDGMENT**

1. The Claimant employed the Respondent from 2011 to 5<sup>th</sup> May 2023 when his services were terminated for gross misconduct. As at the time of the termination, the respondent was serving as the Finance Manager and his monthly salary was Kshs. 685,452. It alleged that during his employment, the Respondent applied and obtained from its various staff loans and financial credits which were serviceable through a check off system. As at the time of his exit, he had an outstanding debt of Kshs. 7,194,767.05. Therefore, the claimant brought this suit praying for the following reliefs:
  - a. Kshs. 7,194,767.05 with interest at prevailing commercial rates from date of filing of the suit until payment in full.
  - b. Costs of the suit with interest
  - c. Any other or further relief the court may deem fit to grant.
2. The respondent denied liability to pay the said loan and averred that Kshs. 5,000,000 of the same was a bonus paid to him on 11<sup>th</sup> July 2022 for his good performance. He denied ever applying for a loan of Kshs.5,000,000, which is a requirement under the company loan policy. Consequently, he prayed for the suit to be dismissed with costs for being frivolous, scandalous, incompetent and for lacking reasonable cause of action.



3. In addition, the respondent filed another suit Nyeri ELRC No.E021 of 2023, ( (now Meru ELRC No. E005 of 2024) alleging that the claimant had unfairly and unlawfully terminated his employment contract without justifiable reason and without following a fair procedure. He further averred that the employer subjected him to discrimination and unfair labour practices on racial grounds during his employment. Therefore, he prayed for the following reliefs against the employer:
  - a. A declaration that the termination of his employment was wrong, unfair, unlawful and unconstitutional.
  - b. A declaration that the Claimant is guilty of unfair labour practices including racial discrimination.
  - c. That he be awarded general damages for unfair labour practices, discrimination and violations.
  - d. Compensation for unlawful termination equivalent to 12 months' gross salary amounting to Kshs. 8,225,424/=.
  - e. Payment in lieu of notice equivalent to 3 months' gross salary of Kshs. 2,056,356/=.
  - f. Severance pay amounting to Kshs. 5,140,890/=.
  - g. Unpaid leave for 40 days amounting to Kshs. 913,936/=.
  - h. Costs of the claim.
  - i. Interests on all the payment above, as from the date of judgement until payment in full.
  - j. Any other relief that the Court may deem fit to grant in the interest of justice.
4. The claimant filed a Response to the Claim on 26<sup>th</sup> September 2023 denying the alleged unfair termination of the claimant's employment. On the contrary, it averred that it had a valid reason for the termination and it followed all the laid down procedures before the termination. It denied the alleged violation of the respondent's rights and averred that the same has not been pleaded with precision. It reiterated that the respondent owed it a loan of Kshs. 7,194,767.05 which remains unsettled. For the said reasons, it prayed for the respondent's suit to be dismissed with costs.
5. The two suits were consolidated by consent on 5<sup>th</sup> February 2024 and direction given that the proceedings would be under this file. During the hearing the claimant called four witnesses and the respondent relied on his own evidence. Thereafter, both sides filed written submissions, which I have considered in this judgment.

#### **Claimant's case**

6. CW1, Lydia Wachiku Macharia, is the Claimant's Human Resource Manager. She adopted her written statement dated 19<sup>th</sup> June 2023 in this suit and her statement in the respondent's dated 9<sup>th</sup> October 2023 as her evidence in chief. She then produced the lists of documents dated 19<sup>th</sup> June 2023, 11<sup>th</sup> October 2023 and 13<sup>th</sup> January 2024 as exhibits in support of the Claimant's case.
7. In brief, she stated that she worked for the claimant from 2006 to 2013 as the HR Manager and rejoined it in same capacity in June 2023. She confirmed that the respondent was employed on 12<sup>th</sup> November 2011 as a Farm Account and worked until March 2023 when he exited.
8. She further stated that, on request, the claimant gives financial accommodation and loans to its employees and it has put in place a loan policy. Under the policy:



- a. An eligible employee obtains a loan application form, fills it and returns it to the HR Management Office.
  - b. Loan document, including application and approval is done by the HR Management Office.
  - c. The HR Management Office submits the loan application to the senior management for approval.
  - d. Upon approval, the HR Management Office draws a loan contract between the manager and the company, noting the interest of the company in the property being financed where that is the case. The property should not be used as security for any other loan.
  - e. The loan contract will stipulate the loan repayment terms. The repayment will be in equal installments, and will be deducted from the employee's salary through monthly payroll deductions.
  - f. Deductions are effected by the Farm Account's Office.
  - g. Loan repayment is for a period of 6 years, but employees are encouraged to clear the loan at the shortest period.
  - h. In the event a manager leaves employment before the loan is repaid in full, the manager will clear the loan balance, or the manager's terminal dues will be used to offset the loan balance.
9. Finally, she stated that the financial accommodation and the loans are serviced through check-off system on the employees' monthly salaries.
  10. In cross examination she admitted that a loan had to be applied for, as per the policy. She further admitted that there was no application for the Loan of Kshs 5,000,000 by the respondent and further there was no approval of the same by the Managing Director. She admitted that the said documents were missing on the company records. She clarified that loan applications by senior managers are approved by the Managing Director Mr. Simon Van der Burg but small amounts were approved by the General Manager.
  11. She admitted that paragraph 6 of the Claim in this file (E014 of 2024) talks of a loan of Kshs. 2,000,000 and averred that the Finance Manager would be competent to testify on the same.
  12. She confirmed that the company pays bonus upon approval by the company Directors who also determines the amount payable. She confirmed also that the Managing Director and the General Manager were the directors of the company. She contended that loans advanced to the respondent could be traced from the payroll but then confirmed that there was a remittance advice with a narration that the said money was as bonus pay.
  13. She confirmed that the company's Bank Statement Exhibit 3 (page 80 of the Claimant's Bundle) showed bonus payment for December 2021 including Judy Ndai who was paid bonus of Kshs.7,000,000, the respondent Kshs. 5,000,000, Thairu Kshs. 500,000 and Thomas (CW3) Kshs.100,000. She confirmed that the Kshs.5,000,000 bonus was not the amount being claimed as loan.
  14. As regards, disciplinary process against the respondent, she admitted that she was not in the company then, and therefore she did not know the circumstances under which the respondent's employment was terminated.



15. In re-exam, she stated that the Kshs.5,000,000 was paid on 11<sup>th</sup> July 2022 and it is different from the amount paid in December 2021. She contended that bank narrations is done by the Finance Manager and in this case, the respondent did it.
16. CW2, Eunice Mumbi is the claimant's Assistant Farm Accountant. She adopted her witness statement dated 19/6/2023 (in E014 of 2023) and 14<sup>th</sup> September 2023 (in E005 of 2024) as her evidence in chief. In brief, she stated that the claimant has a loan policy for its staff which requires that when an employee applies for a loan, all the documentation and approvals are completed by the HR Office, and handed over to the Accounts Department for implementation. The Accounts Department then vets the documents for completeness and accuracy and proceeds to implement the loan approval by;
  - i. Opening a loan account;
  - ii. Computing and effecting the monthly deductions;
  - iii. Maintaining employee loan statements in the computer system;
  - iv. Generating monthly pay-slips indicating deductions;
  - v. Generating loan schedules indicating loan balances; and
  - vi. Updating loan balances during annual audits.
17. She stated that, during the respondent's tour of duty, he made applications and requests for financial accommodations and loans which were granted as follows:
  - a. 23<sup>rd</sup> April 2012 Kshs. 550,000
  - b. 3<sup>rd</sup> May 2012 Kshs. 500,000
  - c. 15<sup>th</sup> May 2012 Kshs. 349 550
  - d. 21<sup>st</sup> August 2012 Kshs. 500,000
  - e. 19<sup>th</sup> October 2012 Kshs. 500,000
  - f. 29<sup>th</sup> November 2012 Kshs. 500,000
  - g. 16<sup>th</sup> January 2013 Kshs. 500,000
  - h. 13<sup>th</sup> February 2013 Kshs. 500,000
  - i. 19<sup>th</sup> March 2013 Kshs. 500,000
  - j. 3<sup>rd</sup> May 2013 Kshs. 500,000
  - k. 13<sup>th</sup> August 2013 Kshs. 300,000
  - l. 19<sup>th</sup> March 2015 Kshs. 50,000
  - m. 4<sup>th</sup> May 2016 Kshs. 56,000
  - n. 5<sup>th</sup> August 2016 Kshs. 1,000,000
  - o. 25<sup>th</sup> May 2018 Kshs. 2,000,000
  - p. 9<sup>th</sup> January 2020 Kshs. 1,193,200
  - q. 29<sup>th</sup> January 2020 Kshs. 1,193,200



- r. 20<sup>th</sup> July 2020 Kshs. 2,100,000
  - s. 8<sup>th</sup> July 2022 Kshs. 5,000,000
  - t. 4<sup>th</sup> January 2023 Kshs. 2,000,000
18. She stated that the said money was disbursed by cash transfers from and cheques drawn on the claimant's bank account number 64420XXXX domiciled at the NCBA Bank Kenya PLC Nanyuki branch to the respondent's bank account number 01003XXXX domiciled at Standard Chartered Bank Kenya, Nanyuki Branch. The loans were serviceable through payroll check-off system and as at the time of her exit, the respondent had an outstanding loan balance of Kshs. 7,194,767.05. She relied on the company's bank statement, Exhibit 6, to fortify the alleged loan advances. She further relied on the staff loan schedules prepared and signed by the respondent indicating the name and the amounts owed to the company, including himself (Exhibit 7a-d).
19. On cross examination, she stated that the payment process was initiated by herself or the Respondent followed by the approval which was done by the general manager or director. Authorization was the third step which was to be done by two directors and the signatory Judy Ndai, HR Manager. She stated that one could not go to the third step before the second step was done.
20. She stated that the payment of bonuses was decided by the directors and the senior management. She acknowledged that there was a policy on loans that required loan applications to be in writing. She confirmed that there was no loan application for the sum of Kshs. 2,000,000.00 advanced on 8.7.2022 and that the same was indicated as a bonus in the bank statement. She contended that the said narration was an error.
21. However, she acknowledged that the payment was approved by the general manager and the narration must have been there. She contended that if the narration was wrong, the same could be approved erroneously. She confirmed that the company bank statement showed that four people were paid bonuses but the same was not complete. If it was complete then it would have shown who was paid fringe benefits and taxes.
22. In re-exam, she stated that there was no evidence that the approval for payment of the Kshs. 2,000,000 was done by the general manager. She added that payment of Kshs. 5,000,000 was paid to the Respondent through a transfer. She acknowledged that there were no loan application documents and contended that the payment originated from finance but the narration was done by the Respondent.
23. CW3, Thomas Frauser, is the claimant's General Manager and also a Director. He adopted his written statement dated 9/10/2023 (in E005 of 2024). In brief, he confirmed that respondent was employed as the Head of the Accounts Department with a competitive pay and benefits reflecting his senior position. He further contended that the respondent was among a team of managers who were drawn from all races and there was no discrimination case ever reported in the company. He denied the alleged discrimination against the respondent and averred that he was equally treated with all other managers and even better in some instances like medical insurance and education benefits.
24. He further stated that the respondent and Judy Ndai (HR & Administration Manager) were in charge of generating Payroll which was hard to monitor because the two managers guarded it jealously, and in an opaque manner. They were also very close and always consulting each other. They also misapplied the company loan policy to their advantage and those close to them, which led to some loans increase without approval.



25. He contended that the respondent occupied a position of trust in the company but he abused it. He had initiating rights to the company bank accounts at the NCBA Bank Kenya PLC and he could initiate any amounts.
26. He further stated that the respondent absented himself from duty from 15<sup>th</sup> March 2023 to 23<sup>rd</sup> March 2023 without permission and when the Managing Director called him, he said that he had left the company with no intention of reporting back. However, he reported back on 22<sup>nd</sup> March 2023 and on 23<sup>rd</sup> March 2023, was suspended and then handed over to CW2. Thereafter, he was taken through disciplinary process for the charge of absenting himself from work without leave for 8 days from 14<sup>th</sup> to 22<sup>nd</sup> March 2023. He attended disciplinary hearing on 27<sup>th</sup> April 2023 and after the hearing, he was found guilty as charged. Never the less, the company reduced the sentence from summary dismissal to a termination.
27. He contended that the termination was fair because the reason for the same was valid and fair procedure was followed. He maintained that there was no discrimination against the respondent.
28. On cross examination he stated that the respondent had worked with the Respondent for 8 years with no prior disciplinary cases. He stated that on 14/3/2023, he was present in the meeting with the Respondent and contended that the Respondent was on duty but he left in the afternoon. He stated that Judy was suspended first and he left with Judy after the meeting with the two. He stated that the Respondent was expected to be in a meeting with the auditors but he left.
29. He further stated that during the said meeting on 14<sup>th</sup> March 2023, the Respondent gave account documents, namely, schedules of payment of management accounts but Simon, the managing Director was not happy with the deductions and therefore he tore the documents and threw them away. Thereafter, Respondent met with the auditors before getting into another meeting with Simon, and in his (CW3) absence. He stated that the Respondent reported to work the next day and left with Judy without informing anyone.
30. He confirmed that the Respondent went back to the farm on 22<sup>nd</sup> March 2023 upon a request to assist in preparation of the payroll. On 23<sup>rd</sup> March 2023 he was issued with a suspension letter signed by Simon.
31. He confirmed that the Respondent at the disciplinary was charged with various charges but was dismissed for absenteeism. He denied that the Respondent was ordered by Simon to leave the farm. He confirmed that the Respondent was charged for failure to deduct fuel expenses but he was dismissed for absenteeism. He stated that the panel had 3 members and one witness was called to prove the absenteeism. He stated that he could not remember whether the Respondent stated that he was verbally sent away by Simon.
32. In re-examination, he stated that, he was the supervisor of the respondent and further confirmed that the respondent just walked away without informing the supervisor.
33. CW4, Bernard Gikundi Mwarania is a business man and also a Consultant and Expert in Management since 2005. He adopted his written statement dated 9<sup>th</sup> October 2023 (in E005 of 2024) as his evidence in chief. In brief he stated that on 22<sup>nd</sup> March 2023, he was asked to advise the claimant and offer support on the following areas:
  - a. Implementation of the company's vision and mission.
  - b. Review organizational structure and filling of arising vacancies.
  - c. General administration.



- d. Human resource management including staff welfare.
  - e. Compliance standards.
  - f. Company corporate social responsibility.
  - g. Training and development.
  - h. Performance management.
  - i. Policies and procedures.
  - j. Monitoring and evaluation.
34. He stated that he was in the panel constituted to hear the respondent's disciplinary case on 24<sup>th</sup> April 2023, but it never took place because the respondent reported to the farm but declined to take part in the hearing. He was charged with three offences including absence from work without leave for eight days from 14<sup>th</sup> March 2023 to 22<sup>nd</sup> March 2023.
35. Another hearing was rescheduled to 27<sup>th</sup> April 2023 and the respondent attended the hearing. The employer tabled documentary evidence to support the charges and called CW2 as a witness. At the end of the hearing the respondent was found guilty of absencing himself from duty without official leave and on 5<sup>th</sup> May 2023, a decision of summary dismissal was reached but it was reduced to a termination. The respondent was given a copy of the handwritten proceedings.
36. On cross examination, he stated that he was a former military Lieutenant Colonel and held a Masters degree in leadership and sustainability. He stated that the Respondent was said to be absent in March 2023 and although he was not part of the company, he obtained the information from investigation. He stated that the second charge was failure to do a loan statement according to the company loan policy. However, he did not produce the offending loan statement as an exhibit in court.
37. He confirmed that he recorded the minutes of the disciplinary hearing and after the hearing the Respondent was found guilty of the offence of absencing himself from work without leave. He further confirmed that the Respondent told the disciplinary panel he had been orally sent away by Simon who was the Managing Director and the major shareholder. He admitted that there were circumstances surrounding the absence of the respondent which he could not explain because he was not there.
38. He also confirmed that on 22/3/2023, the Respondent was called back by Simon to prepare the payroll. He confirmed that there were no previous complaints about the Respondent that he knew.
39. In re-exam he reiterated that he sat at the disciplinary hearing and the Respondent made his statement in defence but upon evaluation, he was found guilty and then he was dismissed.

### **Respondent's case**

40. RW1 Joseph Gitau, stated that he is an Accountant by profession and the Claimant was his employer for 11 years. He adopted his written statements dated 11<sup>th</sup> July 2023 and 15<sup>th</sup> December 2023 as his evidence in chief. He also produced the documents in the lists dated 11<sup>th</sup> July 2023 and 12<sup>th</sup> October 2023 as exhibits.
41. In brief, he stated that he was dismissed for being absent from duty from 15<sup>th</sup>-22<sup>nd</sup> March 2023 which was not true as he had been verbally sent away by Simon the Managing Director. He explained that on the material date, Simon asked him for the loan schedules and when he gave him, he tore them and hit him with the pieces and described him as an African who could not manage finances.



42. With nothing else to do there, he returned to his office but at 12 noon, Simon called him to his office and ordered him to leave the farm immediately. He then called the HR manager to inform her about his predicament and she advised him to go away as ordered but report back on the following day, 15<sup>th</sup> March 2023 at 8am.
43. When he reported the following day as advised by the HR Manager, he found Simon at the car park and he again told him that he did not want to see him in the farm. As a result, he gave the cheque books plus the locker keys to Eunice (CW2). As he was leaving he met Judy (HR Manager) who informed him that she had also been sent away.
44. He stated that Simon called him on 22<sup>nd</sup> March 2023 and asked him to report on 23<sup>rd</sup> March 2023 and he complied. He worked until 27<sup>th</sup> March 2023 during which period he prepared the Payroll. However, on 27<sup>th</sup> March 2023 he was given a letter dated 23<sup>rd</sup> March 2023 sending him on leave and instructing him to hand over to Eunice (CW2).
45. He contended that, he was paid the full salary in March 2023 and the master roll indicated that he was on leave for the 8 days he was away.
46. He stated that the Kshs. 5,000,000 alleged to be loan was a bonus given to him by Simon, but was told to hold it in the loan account until audit was done and then it be written off. He contended that the bonus was approved and contended that the Fringe benefits tax for July 2023 would show that all the six people who received bonus was written off. He stated that a notice to produce the same was issued but the Claimant failed to comply.
47. He admitted that the debt of Kshs. 2,000,000 contending that was in respect of a lorry KBY 479Y which he bought on credit.
48. On cross-examination he stated that he was reporting directly to Simon the Managing Director. He reiterated that after being sent away by Simon, he called the HR manager who advised him to return the next morning. He denied being absent and maintained that he was sent away by the managing Director.
49. He admitted that he had loan account at page 52 of the Claimant's documents and the entry for Kshs. 5,000,000 was indicated as a loan by the Accounts Assistant. He confirmed that the loan balance as at December 2022 was Kshs. 5,260,110.05. He denied having prepared the staff debtors list at page 81 of his bundle and further disowned the signatures on it. He contended that he left the staff loan debtors list in the office.
50. He confirmed that he was the accountant when the bonuses were being paid and that he never paid taxes on the bonuses and he never paid taxes on the bonus. The taxes would be paid when the loan was written off and treated as a bonus. He stated that the bonus taxes were paid in September 2023 when the audit was complete. He contended that page 4 and 5 of his documents showed bonuses for 2022 and 2021.
51. He stated that the reason for not declaring the bonuses was so as to reduce the corporation's tax which was pegged on the company profits. He added that if the fringe benefits tax return was produced in court, as requested vide the Notice to Produce, then the evidence would have been clear.
52. He admitted that his pay slip for March 2023 indicated a loan balance of Kshs. 7.2 million and a Sacco loan of Kshs. 2.1 million but explained that the thsaid staff loan was inclusive of the bonus pending to be written off after the audit. Further that, he had more shares in the Sacco than the Sacco loan. He maintained that bonuses were first treated as loans but later credits was given.



## Submissions

53. It was submitted for the Claimant that it is entitled to recover the sum of Kshs. 7,194,767.05 from the Respondent being loans advanced to him during his employment. It was further submitted that the Claimant maintained a running loan account in respect of every employee enjoying loan facility including the Respondent. In the loan account, all credits advanced were recorded including, items purchased on credit from the company, cost of servicing cars, cost of purchase of spare parts and so on.
54. It was submitted that the Claimant had produced the loan account statement Exhibit 9 dating back to 23rd April 2012 and exhibit 26 evidencing some of the Respondent's transactions. It was submitted that the loan account statement was clear that the closing balance of the Respondent's loan account as at 31<sup>st</sup> March 2023 was Kshs. 7,194,767.05 and the respondent never adduced any evidence to prove his allegation that the loan was written off at the end of the financial year in July 2023.
55. It was argued that the Respondent ought to have called the director who he allegedly wrote off the outstanding loans for other employees, including his. For emphasis, reliance was placed on the case of Ahmed Abdullahi Mohamad & another v Mohamad Abdi Mohamad & 2 others [2018] eKLR at paragraphs 41-44 where the court discussed the doctrine of the missing witness.
56. It was further submitted that clause 13 of the Claimant's loan policy dictated that in the event a manager left employment before settling staff loan, he /she was bound to pay the same or use terminal benefits to offset the loan balance. However, under clause 14 a loan balance would be written off in the event of the employee's death. Consequently, it was submitted that the respondent did not qualify for his loan to be written off.
57. On the other hand, it was submitted that the Respondent only contested the amount of Kshs. 5,000,000 on ground that the same was a bonus. Therefore, uncontested sum of Kshs. 2,194,767.05 is due and owing to the Claimant.
58. Despite the foregoing, it was submitted that the said Kshs. 5,000,000 still reflected as a loan according to the documentary evidence adduced including payslip and the debtor's schedule prepared by the Farm Accountant and verified by the consultant internal auditor Mr. John Trundell. For emphasis, the Court was therefore urged to adopt the approach of the UK High Court of Justice in National Union of Mineworkers v IEMO [2019] EWHC 1359 (Comm) at paragraphs 28-31 on assessment of contentious factual evidence.
59. It was further argued that the Respondent did not produce evidence in support of his contention that the same was a bonus but indicated as a loan for accounting purposes. It was contended that the Respondent did not at any point contest the correctness of the entries in any of the documents referred to above and it was evident that after the disbursement of the sum of Kshs.5,000,000, he was servicing the same without any protest. The doctrine of estoppel was therefore invoked to urge that the Respondent having treated the Kshs. 5,000,000 as a loan during his employment, he was estopped from alleging it to be a bonus. For emphasis, reliance was placed on Doge vs Kenya Cannery Ltd [1989] KLR 127 and Muti vs Kenya Finance Corporation & Another [2004] 2EA 182.
60. It was submitted that had the Respondent been awarded bonus of Kshs. 5,000,000 as he alleged, then the same would have been subjected to income tax and thereby reduced to a net of Kshs.3,500,000. It was further submitted that the bonuses were not posted to the loan accounts, except the portion of which went towards the loan reduction. It was argued that since the whole sum of Kshs.5,000,000 was posted to the loan account, it meant that it was not bonus but loan.



61. To support the foregoing the arguments, reliance was placed on the case of Philip Omukule v Trapoz Contrators Ltd [2021] eKLR and James Orwaru Nyaundi v Kilgoris Klassic Sacco Limited [2022] eKLR where the court held that an employee is entitled to issue to the employer a notice to produce documentary evidence which is in the possession or control of the employer, to prove his allegation. In this case, it was submitted that the respondent did not issue a proper Notice to Produce upon the claimant. Consequently, it was submitted that the Claimant's failure to furnish the relevant documents should not be blamed on it.
62. In view of the foregoing matters, it was submitted that the claimant is entitled to the loan of 7,194,767.05 plus interest thereon. For emphasis, reliance was place on the case of B.O.G Tambach Teachers Training College v Mary Kipchumba [2018] eKLR where the court held that a party who has been deprived of the use of goods or money to which he is entitled, should be compensated for the said deprivation through an award of interest.
63. As regards the respondent's claim for unfair termination, it was submitted that there was substantive justification and procedural fairness as enunciated in the case of Walter Ogal Anuro vs Teachers Service Commission [2013] eKLR. It was submitted that the respondent was accused of irregularities in the payroll administration and absence from work without leave from 14<sup>th</sup> March to 22<sup>nd</sup> March 2023, as a result of which he was sent on compulsory leave pending investigations. He was then invited to a disciplinary hearing which was conducted on 27<sup>th</sup> April 2023 as evidenced by the handwritten proceedings produced by the respondent as Exhibit D 8.
64. It was submitted that, during the disciplinary hearing, the respondent confirmed that he left the farm on 14<sup>th</sup> March 2023 after Simon called him a crooked thief. The respondent was quoted as having said that "he was called a crooked thief and as a dedicated employee, he left the farm. It was further submitted that the respondent reported back on 23<sup>rd</sup> March 2023 after receiving a call from Simon of 22<sup>nd</sup> March 2023. It was also submitted that the respondent did not challenge the foregoing evidence during the hearing before this court.
65. In view of the foregoing matters, the claimant was, under section 44(4)(a) of the Employment Act, entitled to summarily dismiss the respondent for absenting himself from work without leave or lawful cause. However, the employer exercised its discretion by reducing the summary dismissal to a termination vide the letter date 5<sup>th</sup> May 2023.
66. As regards the reliefs sought, it was submitted that there was nothing unconstitutional about the impugned termination and the Court was urged to find that the allegation falls short of the threshold of constitutional pleading enunciated in Anarita Karimi Njeru v Republic [1979] eKLR and affirmed in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKL. It was submitted that the Respondent did not plead with precision how the Claimant engaged in unfair labour practices and racial discrimination; and no evidence was led to prove the same. He even never mentioned the alleged discrimination in his witness statement dated 14<sup>th</sup> December 2023
67. In view of the submissions above that the termination was fair, it was contended that the respondent was not entitled to compensation for unlawful termination. However, it was submitted that, in the event the Court was of a contrary view, an award of two months compensation would be sufficient considering that the Respondent contributed to his termination and further that he secured a comparable job as an Accountant at the Cottage Hospital Nanyuki, immediately after exiting the claimant. For emphasis, reliance was placed on the case of Anunda v Tiger Force Security Services Limited (Cause 73A of 2018) KEELRC 3273 (KLR) (13 December 2023) (Judgement), and Kiambaa



- Dairy Farmers Co-operative Society Limited v Rhoda Njeri & 3 others [2018] eKLR among other authorities.
68. As regards the claim for salary in lieu of notice, it was submitted that the Respondent's contract provided for pay of not less than 30 days, therefore he was only entitled to thirty days pay and not three months pay. It was further argued that his monthly pay was made up of a basic salary of Kshs 513,388 and house allowance of Kshs. 77,008 totaling to Kshs. 590,396.
69. About the claim for severance pay, it was submitted that the same must fail because under section 40 (1) (g) of the *Employment Act*, such benefit is only meant for an employee who is declared redundant. For emphasis reliance was placed on the case of Ephantus Ndirangu Murage v Memusi Trading Limited [2015] eKLR.
70. As regards the claim for Kshs. 913,936 for the accrued leave of 40 days, it was submitted that the Respondent is entitled to only Kshs. 776,376 only.
71. Finally, the court was urged to order each party to bear own costs guided by the decision in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR.
72. On the other hand, it was submitted for the Respondent that the termination of his employment was unfair, unjust, unlawful and contrary to the *employment Act*. It was acknowledged that, on 14<sup>th</sup> March 2023 the respondent was summoned by Simon on allegation that he had neglected to effect efficient systems for the administration of staff loans. He was then asked for the schedule of the staff deductions and he gave it to Simon who tore it into pieces and ordered him to proceed on leave. The respondent remained away from work until Simon called him back on 21<sup>st</sup> March 2023.
73. It was further submitted that by a letter dated 23<sup>rd</sup> March 2023, the respondent was sent on a compulsory leave pending investigation into the allegation that he absented himself from work for 8 days from 14<sup>th</sup> to 22<sup>nd</sup> March 2023, and also irregularities in the management of staff loans contrary to the company loan policy of 1<sup>st</sup> September 2020. It was contended that when the respondent was invited to a disciplinary hearing on 24<sup>th</sup> March 2023, he was informed that the report of the investigation did not implicate him. However, despite being commended for his good service, he was unduly influenced to tender his resignation in exchange for a good exit package but he declined.
74. It was submitted that, another hearing was scheduled on 27<sup>th</sup> April 2023 but the respondent was not heard and instead new charge was made against him that he had demanded a 14% salary increment from the General Manager. He was also denied a copy of the investigations report and also a chance to call his witnesses to defend his case. Consequently, it was submitted that the termination was unfair contrary to section 45(1) and section 41 of the *Employment Act*. For emphasis, several authorities were cited including Kenfreight [E.A] Ltd v Benson K. Nguti [2016] eKLR.
75. As regards the claim for loan of Kshs. 7,194,767.05, it was submitted that the Claimant did not produced any evidence to prove the same. It was argued that the claimant did not adduce any written application from the Respondent requesting for a loan of Kshs. 5,000,000/= as required under clause 11 of the Company loan policy. It was observed that CW1 and CW2 admitted in their testimonies that there was no written application for the Kshs. 5,000,000 from the Respondent. Consequently, it was submitted that there is no way the management could not approve a loan without a formal application.
76. Reliance was made on sections 107 and 109 of the *Evidence Act* together with the principle of law that he who alleges must prove, in support of the argument. The Court was further urged to follow the holding in the case of Muriungi Kanoru Jeremiah vs Stephen Ungu M'mwarabua [2015] eKLR.



77. Contrary to the allegation by the claimant, it was submitted that the sum of Kshs. 5,000,000 deposited in his bank account on 11<sup>th</sup> July 2022 was bonus as indicated in the claimant's bank statement produced as exhibit. It was submitted that the bonuses are approved by the Managing Director while the narration of the payment is done by the Accountant with the approval of the General Manager. Consequently, it was argued that the amount of Kshs. 7,194,767.05 was not feasible as the Kshs. 5,000,000 was a bonus and the rest was the loan the respondent was serving as per agreement between himself and the Claimant.
78. It was submitted that the Respondent issued the Claimant with a Notice to Produce dated 9<sup>th</sup> October 2023 requiring it to produce in court the Fringe Benefits Tax Return for December 2022, June and July 2023, which would have proved that the Kshs. 5,000,000 paid to the respondent was a bonus and not a loan, but it failed to comply with the notice. As such, reliance was placed on section 112 of the *Evidence Act*, the cases of Kenya Akiba Microfinancing Limited vs Ezekiel Chebii & 14 others [2012] eKLR and Kimotho vs Kenya Commercial Bank [2003] 1EA to urge the court to make an adverse inference against the claimant that, if the Fringe Benefit Tax Returns were produced as required, they would have proved that the sum of Kshs. 5,000,000 was a bonus and not a loan.
79. Lastly, it was submitted that the Respondent is entitled to the reliefs sought in his claim since he has proved that his employment was unfairly terminated by the claimant.

### **Determination**

80. Having considered the separate claims, the responses, the evidence tendered, authorities cited and the law, the main issues falling for determination are:
- a. Whether the court has jurisdiction over the claimant's loan claim.
  - b. whether the respondent owes the Claimant a loan of the Kshs. 7,194,767.05;
  - c. whether the termination of the Respondent's employment was unfair and unlawful;
  - d. whether the claimant violated respondent's right to fair labour practices, right to fair administrative action and freedom from discrimination.
  - e. whether the parties are entitled to the reliefs sought in their respective Claims.

### **Jurisdiction over the Claimant's loan claim**

81. The Respondent challenged the Claimant's claim on the ground that the same was based on a commercial cause of action but the Claimant maintained that the Court has jurisdiction as the loan was between an employer and an employee. The Court presumes that the said objection was abandoned after the claimant's suit was consolidated with the respondent's suit and he thereafter failed to raise the issue again during the hearing and submissions.
82. Suffice it to say that this Court derives its jurisdiction from Article 162(2) of *the Constitution* and the ELRC Act under section 12 which states as follows:

“ 12. Jurisdiction of the Court

1. The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this



Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including-

- a. disputes relating to or arising out of employment between an employer and an employee;
- b. disputes between an employer and a trade union;
- c. disputes between an employers' organization and a trade union's organization;
- d. disputes between trade unions;
- e. disputes between employer organizations;
- f. disputes between an employers' organization and a trade union;
- g. disputes between a trade union and a member thereof;
- h. disputes between an employer's organization or a federation and a member thereof;
- i. disputes concerning the registration and election of trade union officials; and
- j. disputes relating to the registration and enforcement of collective agreements."

83. Besides, the issue whether this court has jurisdiction over staff loans was ably answered by Rika J in *Banking Insurance & Finance Union (Kenya) v Consolidated Bank of Kenya Limited* (Industrial Court Cause No 900 of 2012) as follows:

"The loan agreement in the context of this dispute flowed from an employment relationship. The dispute over the charge created to secure the staff loan, is a matter of employment. The Environment and Land Court is not entirely divested of jurisdiction, but would in the view of this Court not be the appropriate forum.....to determine the final issues that may arise out of this dispute."

84. Again, in *Abraham Nyambane Atsiago v Barclays Bank of Kenya* [2013] eKLR, the Court held as follows:

"The question then is what constitutes a dispute relating to or arising out of employment between an employer and an employee. Is it confined to issues that are ordinarily found in employment contracts or does it extend to all matters emanating from the employment relationship?"

By its nature, the employment relationship generates a multiplicity of rights and obligations, some of which are not to be found in the express provisions of the employment contract. In my view, all these fall under employment and labour relations as intended by the law makers. To rule otherwise would be to create a situation where an employer or an employee traverses different courts to enforce different rights arising from the employment relationship. That in my view could not have been the intention of the legislators."



85. I agree with the foregoing decisions and proceed to hold that the court is clothed with the jurisdiction to determine matters of staff loans between employers and their employees since they flow from the employment relationship. In the instant case, the jurisdiction was even invoked by the respondent when he invited the Court to determine whether the sum of Kshs. 5,000,000 was a bonus or a loan.

#### **Claimant's Loan of Kshs. 7,194,767.05**

86. The Claimant contended that as at the time of the separation, the Respondent owed it Kshs. 7,194,767.05 in loan but the Respondent maintained that the Kshs. 5,000,000 out of the said amount was a bonus and not a loan as claimed. He contended that the same was indicated as loan for tax purposes and it was to be written off at the close of the financial year. He further argued that the Fringe Benefits Returns, which the Claimant failed to produce, would have proved that position. The Claimant denied the alleged failure to produce the said documents and averred that it was not issued with a clear notice to produce.

87. It is not in dispute that the Claimant issued its staff with loans governed by its loan policy and made deductions from their monthly pay and bonuses. What is in dispute is whether the Kshs. 5,000,000 out of the claim of 7,194,767.05 was a loan or a bonus.

88. The claimant maintained that the sum of Kshs. 5,000,000 was a loan and not a bonus and produced a payslip prepared by the respondent indicating the said sum as a loan. It also produced Account Quick Report and Loan Schedules that indicated that the said sum was loan and not bonus.

89. The respondent poked holes on the foregoing explanation by contending that the claimant did not produce any written loan application (form) duly approved by the managing Director or General Manager as required by the Loan Policy. He further relied on the claimant's Bank account statement for 1<sup>st</sup> – 31<sup>st</sup> July 2022 (page 79 - 80 of its further List of documents) that indicated that on 11<sup>th</sup> July 2022 he was paid a bonus of Kshs. 5,000,000.

90. I have considered the foregoing contentions and the admission by CW1 and CW2 that the claimant's bank statement (page 80), indicated that four managers including the respondent were paid bonus. CW1 and CW2 further confirmed that there was a remittance advice with a narration that the payment was a bonus which must have been approved by the General Manager (CW3).

91. The claimant did not produce any written evidence to prove that the respondent applied for the alleged loan of Kshs. 5,000,000 as required by its own loan Policy. It also failed to produce any evidence to prove that the management considered and approved the loan of Kshs 5,000,000 in favour of the respondent. Besides, the claimant has never made any accusation against the respondent and the other managers paid bonus in July 2022, of fraud or stealing the money credited to their accounts as bonus on 11<sup>th</sup> July 2022.

92. Having carefully considered the facts of the case, I am satisfied that the claimant has failed to rebut the evidence by the respondent that it had a practice of extending bonuses to staff and treat the same as loan until the end of financial year for tax purposes. Consequently, I agree with the respondent that the sum of Kshs. 7,194,756.05 indicated in the his Payslip for March 2023 was inclusive of the bonus of Kshs.5,000,000 paid to him on 8<sup>th</sup> July 2022.

93. I am also convinced by the respondent that the claimant deliberately failed to produce the Fringe Benefit Tax Returns requested vide the Notice to Produce purposely to deny the Court crucial evidence about the bonus payment to its staff. Consequently, I make an adverse finding that the failure to produce the said evidence was because it would be against its case and in favour of the respondent.



94. I gather support from Kenya Akiba Microfinancing Limited vs Ezekiel Chebii & 14 others [2012] eKLR and Kimotho vs Kenya Commercial Bank [2003] 1EA where the court held that a court is entitled to make an adverse inference against a party, who having the custody or control of a document fails or refuses to produce it as evidence.
95. Having considered the foregoing matters, I am satisfied that the claimant has failed to prove that the said Kshs. 5,000,000 was a loan and not a bonus. It follows that the only claim which the claimant has established is Kshs.2,194,767.05. The respondent admitted Kshs. 2,000,000 as owing in respect of a lorry purchased on credit in January 2023, and then adduced no evidence to prove that he settled the rest of the claim.

### **Unfair termination of employment**

96. For a termination to pass muster, it must be justified by a valid and fair reason and fair procedure must be followed. Section 45 (1) & (2) of the [Employment Act](#) provides as follows:

“45. Unfair termination

- (1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove:
  - (a) that the reason for the termination is valid;
  - (b) that the reason for the termination is a fair reason—
    - i. related to the employee’s conduct, capacity or compatibility; or
    - (ii) based on the operational requirements of the employer; and
  - (c) that the employment was terminated in accordance with fair procedure.”

97. Section 41 of the Act provides that:

“41. Notification and hearing before termination on grounds of misconduct

1. Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the



person, if any, chosen by the employee within subsection (1), make.”

98. Further section 43 of the Act provides that:

“ 43. Proof of reason for termination

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

3. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

99. Section 41 as read with section 43 requires that before terminating the services of an employee the employer must explain to the employee in a language they understand the reasons for the intended termination and then accord him/her a fair opportunity to defend himself/herself. These basic tenets have been upheld in a legion of Court decisions in this country including *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR where the court held that:

“ Four elements must thus be discernible for the procedure to pass muster:-

- i. an explanation of the grounds of termination in a language understood by the employee;
- ii. the reason for which the employer is considering termination;
- iii. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
- iv. hearing and considering any representations made by the employee and the person chosen by the employee.”

100. Again, in *George Musamali v G4S Security Services Kenya Ltd* [2016] eKLR it held that:

“ 14. A termination of employment takes two stages. First there must be a valid and justifiable reason for termination and once this is established, the termination must be carried out in accordance with the procedure laid down in the employers’ human resource manual or as set out in the *Employment Act* or both. The most important thing to be ensured is that there is a valid or justifiable reason for termination and that the termination must be conducted by following a fair procedure. This includes furnishing the employee with the charges he or she is facing and affording them an opportunity to defend themselves. It does not matter whether the employee’s guilt is apparent on the face of the record. He or she must be heard no matter how weak or useless his or her defence might seem to be. However, the conduct of the disciplinary hearing does not have to take the rigour of a Court trial. It suffices that the



employee was notified of the charges and afforded an opportunity to respond before the decision to dismiss is made.”

101. The Respondent argued that the termination of his employment was unfair for want of a valid reason and due process. The Claimant on the other hand argued that the termination was procedurally and substantively fair as there was a valid reason and the Respondent was accorded a fair hearing. The termination letter stated as follows:

Dear Sir

Termination of Employment

You therefore absented yourself from duty without official leave from 15<sup>th</sup> March 2023, upto 22<sup>nd</sup> March 2023. Total time absent 8 days.

Absence from duty without official leave is gross misconduct, and calls for summary dismissal. However, the farm exercises its discretion to reduce the summary dismissal to termination of employment from 27<sup>th</sup> April 2023.

You are entitled to the following:

1. Days worked.
2. Annual leave due.
3. 45 days' pay in lieu of notice.
4. Travelling allowance (one way).
5. Certificate of service.
6. Sacco savings.

Deductions from your dues will be as follows:

1. 8 days absence.
2. Statutory dues, as applicable.
3. Company loans.
4. Sacco loan,  
...”

102. The first question that arises is whether the reason cited above was valid or whether the respondent absented himself from duty without official leave or lawful cause from 15<sup>th</sup> to 22<sup>nd</sup> March 2023. The respondent denied the allegation and maintained that he was sent away by the Managing Director Mr. Simon. He explained that on 14<sup>th</sup> March 2023, Mr. Simon asked him for the Schedule of Staff loans deductions but when he gave him, he tore it into pieces and called him an African who cannot manage finances.
103. The respondent went back and continued with his work until noon when Mr. Simon called him to another meeting of the two and where he told him to leave his Farm immediately. CW3 confirmed that he was present when Mr. Simon tore the Schedule of deductions and the respondent went back to his work with the auditors. He further confirmed that the Respondent and Mr. Simon held a second meeting in his absence and therefore he did not know what transpired in that meeting.



104. The respondent further testified that after being sent home by Mr. Simon on 14<sup>th</sup> March 2023, he called the HR Manager, Ms Judy Ndai to inform her about his predicament, and Judy advised him to come back the following day 15<sup>th</sup> March 2023. When he returned to work on 15<sup>th</sup> March 2023, he met Mr. Simon at the Car Park and who told him that he did not want to see him in his farm. As such he handed over the chequebook and locker keys to CW2. None of the defence witnesses was present at the car park when Mr. Simon told the respondent that he did not want to see him in the farm.
105. CW2 confirmed that the respondent went to the office on 15<sup>th</sup> March 2023 and handed over cheque book and went to meet Judy. CW3 also confirmed that the respondent returned to the office on 15<sup>th</sup> March 2023, met Judy and then left. Mr. Simon did not give evidence in this case and therefore, I find that the respondent has not rebutted the respondent's evidence that he was sent away by Mr. Simon on 14<sup>th</sup> March 2023, and again on 15<sup>th</sup> March 2023 when he reported back following the advice by the HR Manager that he should report back. Besides, the respondent testified that he was paid the whole salary for March 2023, and that the Attendance register indicated that he was on leave during the 8 days he was being accused of absence from duty.
106. The claimant has relied on the handwritten notes taken by CW4 during the respondent's disciplinary hearing as prove that the respondent was not sent away by anyone. I have perused the said minutes (Exhibit D.8) and seen the statement quoted by the claimant in its written submissions, thus: "As a dedicated employee, I left the farm".
107. There is however nothing to attribute that statement to the respondent. From page two, the notes indicates names followed by what each person stated. Page two to five of the notes contains the representations by Simon, page six are the representations by Thomas, page seven are the representations by Eunice and page eight is the verdict by Simon. There is nothing to prove that the representations on page one were made by the respondent. The page indicates the names of the persons present and nothing shows that the statement "As a dedicated employee, I left the farm" where uttered by the respondent.
108. Having also considered the chronology of the events as explained by CW2, CW3 and the respondent in their testimonies, the said statement is strange. I say so because, all the witnesses testified before this court that the respondent did not leave the farm immediately after Simon tore the Loans deduction Schedules. They indeed confirmed that the respondent returned to his work until noon when Simon called him for another meeting of the two. They further confirmed that the respondent reported to work on 15<sup>th</sup> March 2023, handed over cheque book, met with Judy Ndai and then left the farm. Based on the foregoing observations, I reiterate that the claimant has not proved that the respondent absented himself from duty as alleged in the termination letter. Consequently, I hold that the claimant has failed to prove the reason cited for the termination and as such the termination was unfair within the meaning of section 45 of the Employment Act.
109. As regards the procedure followed there is evidence to show that the respondent was served with a letter dated 25<sup>th</sup> April 2023 inviting him for a hearing on 27<sup>th</sup> April 2023. The letter indicated the offence he was to defend himself and informed him of the right to be accompanied by a staff of his choice, the right to call witnesses and the right to give evidence in defence. There is no evidence that the respondent protested about the procedure adopted by the employer either before, during or after the disciplinary hearing. CW2 and CW3 were panellists during the hearing and they testified that the hearing was fair and the respondent made his representation before a verdict to terminate his contract was reached.
110. Applying the foregoing facts to the express provisions of section 41 of the Employment Act, supra, I find that the termination of the respondent's employment contract by the employer was in accordance



with a fair procedure. I gather support from Kenfreight (EA) Limited V. Benson K. Nguti [2016] eKLR, where the Court of Appeal held that: -

“It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that reason related to the employee’s conduct, capacity and compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure...

Apart from issuing proper Notice according to the contract (or payment in lieu of Notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service”.

### **Constitutional violations**

111. The respondent pleaded that his constitutional rights to fair labour practices, right to fair administrative action and right not to be discriminated contrary to Article 41, 47 and 27 *the Constitution* were violated. The claimant contended that the claim based on constitutional violation did not meet the legal threshold of a pleading founded on violation of *the constitution* as was established by the Court in Anarita Karimi Njeru v Republic. I agree with the claimant’s submission. Besides, the respondent never submitted on the alleged violations and therefore, I treat the same as abandoned.

### **Reliefs sought**

112. In view of my finding that the claimant has proved the loan balance of Kshs. 2,194,767.05, I award it the same.
113. On the other hand, I find that the respondent having proved a case of unfair termination, he is entitled to remedy under section 49 of the *Employment Act* being compensation for unfair termination plus salary in lieu of notice. The claimant served for eleven years, and his contract Provided for a notice period of 45 days after serving more than 5 years. Further the claimant acknowledged in the termination letter, that the respondent was entitled to 45-days’ pay in lieu of notice.
114. According to his pay slip for March 2023, his gross salary was Kshs. 685,452 but except the item of basic salary of 513,388 and house allowance of Kshs.77,008, the rest were not fixed payments and they were dependent on the actual performance by the employee. Consequently, I hold that the respondent’s correct monthly gross salary was Kshs. 590,396 and 45-days’ salary in lieu of notice equals to Kshs. 885,594.
115. I gather support from the case of Postal Corporation of Kenya v Andrew K.Tanui (2019) eKLR, supra, where the Court of Appeal held that:-

“Gross salary would then be the amount calculated by adding up one’s basic salary and allowances, before deductions of taxes and other deductions.”



116. Again, in the case of *Richard Erskine Leakey & 2 others v Samson Kipkoech Chemai* [2019] eKLR, the court of Appeal held that:

“55. In our view, there are certain allowances that are dependent on actual performance of the contract of employment. When calculating damages due to an employee in the event of unfair or wrongful termination, it is only the emoluments or gross salary of the employee that should be taken into account not allowances and privileges dependent on actual service and performance of the contract.”

117. As regards compensation, I have considered that the respondent served for 11 years and the termination was not grounded on a valid reason. Consequently, I award six months' gross salary as compensation for the unfair termination equaling to Kshs.3,542,376.

118. It was alleged in the claimant's written submissions that the respondent secured another comparable job immediately after exiting the claimant. However, the said allegation was made from the bar and therefore not substantiated by evidence. I also find it to be prejudicial to the respondent as it was raised in the written submission after the close of the hearing when the respondent had no opportunity to make a rebuttal.

119. The claim for severance pay is not merited in the circumstances of this case because the termination was not on account of redundancy. Such relief is only meant for employees whose services are terminated on account of redundancy. The appropriate relief would have been service pay under section 35 (5) of the *Employment Act* which provides:

“(5) An employee whose contract of service has been terminated under subsection (1) (c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.”

120. However, even if the respondent prayed for service pay, the same would still fail because his pay slip for March 2023 showed that he was a member of his employer's pension scheme and also the NSSF, and therefore he was disqualified from the said benefit by dint of section 35(6) of the *Employment Act*.

121. On the claim for 40 days' leave, the same is not disputed and the termination letter acknowledged that any accrued leave would be compensated. Further the claimant submitted that the respondent was entitled to Kshs.776,376 for the accrued leave. Therefore, I award the 40, leave days x Kshs. 590396/30 = 787,194.66.

122. Since both parties have succeeded in the respective suits, I direct that each side shall bear own costs of the suit.

### **Conclusion and disposition**

123. I have found that the claimant's case of unpaid loan is partially successful to the extent of Kshs2,194,767.05. I have further found that the respondent has proved his claim of unfair termination and unpaid terminal dues. Consequently, I enter judgment in the following terms:

- a. The respondent to pay the claimant Kshs. 2,194,767.05 being the balance of his company staff loan.
- b. The claimant to pay the respondent the following:
  - i. Salary in lieu of notice Kshs. 885,594.00



- ii. Compensation Kshs. 3,542,376.00
  - iii. Leave Kshs. 787,194.66
- Total Kshs.5,215,164.66

124. In the end, I decree that the claimant shall pay the respondent Kshs.5,215,164.66 less kshs. 2,194,767.05 leaving a net of Kshs. 3,020,397.61 The sum will attract interest at court rates from the date of filing his suit until payment in full as it is in the nature of liquidated claims. The award is also subject to statutory deductions.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 24TH DAY OF JANUARY, 2025.**

**ONESMUS N MAKAU**

**JUDGE**

Order

**THIS JUDGMENT HAS BEEN DELIVERED TO THE PARTIES VIA TEAMS VIDEO CONFERENCING WITH THEIR CONSENT, 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.**

**ONESMUS N MAKAU**

**JUDGE**

