



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 637 OF 2019**

**(Before Hon. Justice Dr. Jacob Gakeri)**

**ERASTUS CHEGE MWANGI.....CLAIMANT**

**VERSUS**

**KENYA RAILWAYS CORPORATION.....RESPONDENT**

**JUDGMENT**

1. The claim herein was initiated vide a Statement of Claim dated 30<sup>th</sup> September 2019. The Claimant, was employed by the Respondent on 30<sup>th</sup> December 2011 as an Assistant Land Surveyor (Management Trainee) and rose up the ranks to the position of a Principal Land Surveyor in February 2018. He avers that his employment was unlawfully and/or unfairly terminated by the Respondent vide a letter dated 23<sup>rd</sup> September 2019.

**Claimant's Case**

2. The Claimant seeks the following reliefs:

- a. An Order quashing and/or annulling the following actions and decisions of the Respondent, namely:
  - i. The termination of the Claimant's employment as Principal Land Surveyor;
  - ii. The withholding of the Claimant's salaries and benefits for the month of September 2019;
  - iii. The withholding of half of the Claimant's (*sic*) from February 2019 to August 2019;
- b. Reinstatement of the Claimant as the Respondent's Principal Land Surveyor (without any loss of benefits);
- c. Alternatively, and without prejudice to prayers (a) and (b) above:
  - i. Twenty-four month's gross salary as damages for unlawful, unfair and illegal termination;
  - ii. Three-hundred and eleven-months' gross salary being the Claimant's salaries for the unexpired employment term;
  - iii. One month's gross salary for each completed year of service;
  - iv. Release of the Claimant's accrued pension and other benefits;
  - v. Release of the Respondent's portion of the Claimant's accrued pension for the unexpired employment period of three-hundred and eleven-months;
  - vi. Payment for untaken leave days;
  - vii. Life-time golf membership at Kenya Railways Golf Club;

viii. Life-time medical benefits for the Claimant and his family; and

ix. Certificate of service;

d. The costs of and incidental to these proceedings;

e. Interest on the items set out in prayer (c) (i), (ii), (iii), (iv), (v) and (vi) above at court rates with effect from the date of filing these proceedings to the date of full and final settlement; and

f. Such other, further, additional, incidental and/or alternative reliefs as the Court may deem just and expedient.

3. The Claimant avers that the Respondent was in the process of acquiring land, through the National Land Commission, for the construction of the Standard Gauge Railway – Phase 2A. Part of the land proposed to be acquired for the Project involved a tract of land within the Ngong sub-county comprising the following parcel numbers:

(a) Ngong/Ngong/18545

(b) Ngong/Ngong/18546

(c) Ngong/Ngong/18547

(d) Ngong/Ngong/18548

(e) Ngong/Ngong/18549

4. The Claimant avers that the National Land Commission had proposed payment of compensation for the dominant development found in Parcel No. Ngong/Ngong 18549. The Claimant states that the development and/or parcel, the Claimant states fell outside the proposed SGR corridor.

5. The Claimant states that the Respondent's Board approved the National Land Commission's compensation proposal and forwarded the money intended for compensation to the Commission for onward disbursement to the affected persons.

6. He avers that on 10<sup>th</sup> December 2018, a team from the Respondent comprising of engineers, surveyors such as himself and social environmentalists made a site visit to the above parcel of land in order to determine the extent to which it was affected by the intended SGR Project.

7. The Claimant states that on 8<sup>th</sup> January 2019, he briefed the Respondent's General Manager for Infrastructural Development (GMID) of the outcome of the site visit. Specifically, he states that he highlighted that some of the developments on parcel number Ngong/Ngong/18549 were not affected by the intended construction.

8. He states that on 10<sup>th</sup> January 2019, the team prepared a report detailing the visit together with its recommendations. He also adds that he verbally briefed the Acting Managing Director of the contents of the report and also invited the GMID to visit the site property to familiarize himself with the situation on the ground.

9. On 11<sup>th</sup> January 2019, the Claimant states that he forwarded the report to the GMID and proposed that the National Land Commission withholds compensation for the earmarked parcels pending the Respondent's evaluation of the options contained in the Recommendation section of the report.

10. The Claimant avers that thereafter, he drafted a letter, with the GMID's approval addressed to the National Land Commission for the Respondent's Acting Managing Director's action. He also made an informal request to the commission to pend payments on the earmarked parcels before receiving further instructions from the Respondent.

11. The Claimant states that the above letter was informed by the need to protect the needs and interests of the Respondent and the public at large and with the knowledge that the payments made would not be reimbursed by the recipients. He states that inadvertently, such an outcome would adversely expose the Respondent, the Commission and the officers involved to audit queries and possible criminal prosecution.

12. It is further averred that on 15<sup>th</sup> January 2019, the Respondent served the Claimant with a show cause letter informing him that he had been charged with gross misconduct arising from sharing unauthorized information with the public.

13. He avers that he responded to the letter on 21<sup>st</sup> January 2019 denying the allegations and clarifying that he had the approval of the GMID and that the National Land Commission did not fall within the category of the public and was a key stakeholder in the SGR project. Additionally, he contends that the decision to informally request the Commission to pend payments did not amount to unauthorized disclosure of confidential information under the Respondent's Human Resource Policy and Procedures Manual.

14. The Claimant states that on 30<sup>th</sup> January 2019, the Respondent issued him with a letter excluding him from any matters germane to project land compensation. He was also forbidden from engaging with any Project Affected Persons on land compensation matters on behalf

of the Respondent. Additionally, the Respondent issued a letter to the Commission with the SGR contractor in copy informing them that the Claimant was no longer authorized to represent it in SGR project sites and any land compensation matters.

15. He states that on 31<sup>st</sup> January 2019, he received a letter informing him that he had been interdicted from employment pending finalization of the case against him.

16. That on 13<sup>th</sup> March 2019, the Respondent's Investigation Committee issued invited him to appear before it on 15<sup>th</sup> March 2019 with a view to shedding light on the allegations made against him. He contends that the letter constituted unfair labour practice because it neither furnished him with sufficient details of the allegations nor accorded him sufficient time to prepare his response.

17. That on 19<sup>th</sup> July 2019, he received a letter directing him to appear before the Respondent's Human Resource Management Advisory Committee on 29<sup>th</sup> July 2019 for a hearing.

18. He avers that the above proceedings were malicious and an afterthought in light of the timing of the interdiction letter and scheduling of the disciplinary proceedings.

19. The Claimant states that the Respondent's Acting Managing Director terminated his employment on 27<sup>th</sup> September 2019, which decision he avers was unjust and inequitable since it arrived at without compliance with due process. Relatedly, it did put into consideration the exemplary service and dedication with which the Claimant had served the Respondent during his eight years of service. He also avers that the termination was preceded by harassment and unfair disciplinary proceedings contrary to the law and was not based on valid grounds.

### **Respondent's Case**

20. The Respondent filed its Reply to the Statement of Claim dated 4<sup>th</sup> November 2019 accompanied by a Witness Statement sworn by Asava Kidama, the Human Resources Manager on 31<sup>st</sup> January 2020. The Respondent denies all the allegations brought forth by the Claimant.

21. The affiant avers that while the Respondent was indeed in the process of acquiring land for construction of the SGR – Phase II and there was a decision to put on hold compensation for the allocated parcels following meetings with the relevant teams.

22. The Respondent maintains that the Claimant drafted a letter without the management's approval and endorsement and shared confidential information which had been reserved for further clarification. That the Claimant's action was in breach of the Respondent's Human Resource Policies.

23. The Respondent contends that the Claimant's termination was fair and procedural, that he was accorded a proper and fair hearing and all procedures were complied with as required by the law.

24. With respect to the payment of terminal dues and benefits, the Respondent reiterates that the Claimant is aware of the attendant procedures which he is yet to comply with.

25. The matter proceeded for hearing before this Court on 4<sup>th</sup> and

26<sup>th</sup> October 2021.

### **Evidence**

26. The Claimant testified as CW1 in support of his claim and adopted his witness statement dated 30<sup>th</sup> September 2019 as his evidence in chief and was cross examined.

27. He confirmed that although he was the Acting Assistant Manager at Kenya Railways as at the date of termination, he had not filed any letter of appointment. That he used to receive an acting allowance.

28. He further confirmed that he called the National Land Commission to stop payment in the public interest. That the draft letter to the General Manager for Infrastructural Development (GM-ID) was informed by the report of the investigation team. He also confirmed that he had implied authority to share the information with National Land Commission and was by so doing observing the law. That he had drafted the letter to the Supervisor on his advice and that the Supervisor GM-ID would forward the same to the Managing Director for further action. That he gave the information to National Land Commission to save tax payer's money, the absence of written approval to do so notwithstanding.

29. That although the National land Commission and the Respondent were distinct legal entities, they related on a daily basis on matters germane to the SGR and communication was by phone. That he was invited for a hearing and allowed to have a representative of his choice and had requested for documents by word of mouth which were never provided.

30. Finally, the Claimant confirmed that he did not report the matter to the Ethics and Anti-Corruption Commission (EACC) or the Directorate of Criminal investigations before giving the information to the National Land Commission. That after termination he filed an appeal and received a response that the appeal had been rejected.

31. On re-examination, the Claimant stated that he directed his appeal to the Chairman of the Board of Directors of the Respondent as well as the Acting Managing Director. That the Respondent's Human Resource Policies and Procedures had no definition of the phrase confidential information and had given the information to protect the Respondent and the Government. He testified that the Respondent was the principal beneficiary as well as the public at large. That the SGR did not pass through the property and construction was not delayed.

32. **RW1, MR. ASAVA KADIMA** adopted the witness statement and testified that he was the General Manager Human Resource and Administration of the Respondent having joined the organization in January 2010. That in 2018, the Claimant was the Principal Land Surveyor in 2018 and did not serve in any other capacity. That the Claimant was terminated because he shared confidential information with a third party.

33. He testified that the Claimant was issued with a notice to show cause and responded in writing, was invited to a hearing, participated and was subsequently terminated on 23<sup>rd</sup> September 2019. That the Claimant was interdicted on 31<sup>st</sup> January 2019 for purposes of investigation. A committee was appointed, and the Claimant was invited and appeared with a fellow employee Mr. Chimera Washidudu and the Claimant's submissions were recorded.

34. That the Committee was satisfied that the Claimant had shared confidential information with the National Land Commission before it had been approved for sharing and was terminated after reinstatement to his position and had to be paid all dues till the date of termination.

35. On cross examination the witness confirmed that his duties encompassed all human resource issues but had no role in land acquisition in any capacity. He further confirmed that he was aware of allegations of corruption in relation to compensation as regards the SGR – Phase I as reported in the media but was unaware that the Chairman of the National Land Commission had been suspended for allegations of involvement in corruption.

36. He confirmed that all members of staff had access to the Respondent's Human Resource Manual and all terminations had to be in compliance with the manual. That the term confidential was not specifically defined in the Respondent's manual but the Claimant had been terminated for sharing unauthorized information with the National Land Commission. That the Respondent had a Code of Conduct for its employees and all were bound to abide by it failing which disciplinary action would be initiated.

37. That paragraphs 10.4(1) and (2) of the manual encapsulated the core values, principles and requirements including Article 10 of the Constitution of Kenya 2010, Chapter 6 and Part II of the Leadership and Integrity Act 2012 as well as the Public Officers Ethics Act 2009.

38. That paragraph 10.5 is on the rule of law. The witness confirmed that violations of the Code of Conduct in pages 33 and 234 of the manual amounted to gross misconduct.

39. RW1 confirmed that he was unaware of what was at stake for the Respondent but admitted the contents of the management report whose preparations he was privy to, that parcel Ngong/Ngong 18549 0.12 hectares was valued at Kshs.252,119,381 million.

40. The witness testified that he was aware that whistle blowers were protected by law if the same is in the public interest in Section 14(1) of the Access to Information Act, 2016.

41. The Witness further confirmed that the Respondent had followed due process in the termination of the Claimant and he had been provided with the documents he requested for. That the Claimant was not given an opportunity to examine witnesses who appeared before the Committee contrary to paragraph 11.4 (h) of the Human Resource Policy and Procedure Manual, 2017.

42. The witness also confirmed that whereas the notice to show cause was served upon the Claimant on 15<sup>th</sup> January 2019 and interdiction on 31<sup>st</sup> January 2019, termination was conducted on 23<sup>rd</sup> September 2019 almost 8 months later, contrary to paragraph 11.14(b) of the Manual which prescribes 6 months.

43. In re-examination, the witness stated that he could not comment on issues of corruption at the Respondent's workplace as he had not authority to do so.

#### **Claimant's Submissions**

44. Counsel for the Claimant submitted the Respondent had no valid or genuine reason to terminate the Claimant and that the Respondent had failed to justify the grounds for dismissing him. In addressing the question of burden of proof, Counsel relied on the provisions of Section 47(5) of the Employment Act as well as the Court of Appeal decision in **Cooperative Bank of Kenya Limited v Banking Insurance & Finance Union (K) (2017) eKLR**.

45. Counsel also submitted that the burden of proof lies on the employer to show that the reasons for termination were valid and in the absence of such proof, the termination shall be deemed unfair as provided by Section 43(1) of the Act.

46. Counsel submitted that a fair process in addressing any allegations against the employee does not sanitize the invalidity and unfairness of the reasons for termination. Reliance was also made on the decision in **Peter Wangai v Egerton University [2019] eKLR** where the Court held that a sham trial process cannot sanitize an unfair termination.

47. As regards the allegation of disclosure of confidential information to the public, Counsel urged that the National Land Commission was a key stakeholder in the land acquisition process and as such, did not constitute the public as contended by the Respondent.

48. In addition, it was submitted that Clause 10.12.1 of the Human Resources Policy and Procedures Manual permitted the disclosure of information concerning the affairs of the Respondent to persons connected with the Respondent where such disclosure is required in the course of their duties or such disclosure as is authorized by the Managing Director.

49. The Claimant argues that the contention by the Respondent that the Claimant was terminated for divulging confidential information to the public was misconceived in law and fact on account that –

(a) The National Land Commission is a constitutional outfit established to manage public land on behalf of National and County Governments and assist in compulsorily acquisition of land for government projects and as such cannot be the general public;

(b) The National Land Commission was a key stakeholder in the land acquisition for the SGR Project. That indeed the Respondent forwarded public funds to the National Land Commission for compensation of project affected persons;

(c) The National Land Commission and the Respondent are enjoined by the Constitution and legislation to uphold integrity and diligence and ensure that tax payers get value for their money;

(b) That paragraph 10.12.1 of the Respondent's Manual permitted the disclosure of information concerning the Respondent to persons connected with the Respondent where the disclosure was required in the course of their duties.

50. In addition, Counsel maintained that the impugned letter to the Commission did not constitute any Trade Secrets, or confidential information capable of legal protection. He submitted that Section 16 of Access to Information Act, 2016 provides that a person shall not be penalized in relation to any employment as a result of having made disclosure of information which the person obtained in confidence in the course of that activity, if the disclosure is in the public interest.

51. Counsel submitted that the Claimant's actions were protected under international legal instruments. The ILO Termination of Employment Convention, 1982 sets out basic principles on protection of whistle-blowers at the work place.

52. Counsel urged that the Claimant's actions were beyond reproach since they were in consonance with the true spirit and intent of the Constitution and other laws. As such, Counsel submitted that the provisions of the Respondent's Manual cannot take precedence over the Constitution and statutory instruments enjoining the Claimant and other public officers to observe, promote and adhere to the principles of good governance, integrity, transparency and accountability.

53. It is further submitted that the disclosure by the Claimant is encouraged by the Constitution of Kenya 2010, Access to Information Act, Bribery Act 2016, Anti-Corruption and Economic Crimes Act 2003 and the Public Officer Ethics Act 2003. That the theme of public interest is sufficiently embodied in the Constitution of Kenya.

54. Counsel submitted that specifically Section 16(1) of the Access to Information Act, 2016 permitted disclosure of confidential information if made in the public interest and no penalties shall be levied such as dismissal from employment. Section 16(2) of the Act states that disclosure is deemed to be of public interest if it is made to a law enforcement agency or to an appropriate public entity. That the National Land Commission is a public entity.

55. Finally, Section 16(5) of the Act permitted disclosure of information relating to inter alia violations of law, mismanagement of public funds, corruption and abuse of office.

56. That the Respondent's Human Resource Manual permitted disclosure of such information.

57. The High Court decision in **Michael Sistu Mwaura Kamau v Ethics & Anti-Corruption Commission & 4 others [2017] eKLR** was relied upon to urge that courts have been emphatic that corruption undermines values of good governance, integrity, transparency and accountability, human dignity, human rights, equity, equality and social justice. That every person bears the responsibility to wage war against corruption. That the Claimant's disclosure was actuated by public interest to prevent loss of funds and it would have been difficult for the Respondent to recover the funds after payment.

58. Counsel concluded by urging that apart from not having a genuine reason to terminate the Claimant the Respondent failed to follow due procedure as stipulated in its Manual. He argued that the same was unfair and placed reliance on the decision in **Kenfreight (E.A) Limited v Benson K. Nguti (2016) eKLR**. He urged the court to allow the claim and the prayers sought therein.

### **Respondent's Submissions**

59. Counsel submitted that the Claimant was not part of management of the Respondent and could not therefore communicate on its behalf. That paragraph 10.12.1 of the Manual prohibited employees from disclosing information relating to the affairs of the Respondent unless required to do so in the course of duty or authorized by the Managing Director and the Claimant required approval to make the disclosure he made to the National Land Commission. That the informal request to the National Land Commission to pend the payment violated paragraph 10.12.1 of the Manual.

60. It is submitted that by reporting the matter to the police, the Claimant behaved in a reprehensible manner since he was still going through the disciplinary process and his conduct amounted to gross misconduct. Reliance was made on the High Court decision in **Okiya Omtata Okioti & 2 others v Attorney General & 3 Others (2014) eKLR** where certain documents relied upon by the Petitioners were expunged by the Court on the premise that they had been obtained in clandestine which manner violated Article 31 of the Constitution, right to privacy. That the Claimant had procured the information he disclosed unlawfully.

61. The sentiments of the Court in **Baseline Architects Limited & 2 others v National Hospital Insurance Fund Board Management [2008] eKLR** were relied upon to underscore the importance of freedom of communication between government officials. The Respondent submitted that sharing of information on compensation would endanger lives of Kenyans.
62. It was submitted that the Claimant obtained the information irregularly and should have followed the correct procedure since he was not privy to the information as an individual. That the Claimant should have written a confidential letter to the EACC under Section 65 of the Anti-Corruption and Economic Crimes Act. That the Claimant reported the matter to the EACC for nefarious reasons. The decision in **Marilyn Muthoni Kamau & 2 others v Attorney General & another (2016) eKLR** was relied upon to urge that the articles of the Constitution should be read harmoniously so that each sustains the other as opposed to destroying it. That the Respondent's right to privacy was violated. Counsel submits that the Claimant violated the Official Secrets Act, and the Public Officer Ethics Act by disclosing information to the National Land Commission and reporting the matter to the EACC.
63. On the reason(s) for termination, Counsel urges that the Claimant shared confidential information in violation of the Human Resource Manual and thus committed a misconduct which justified his termination.
64. It is further submitted that the Claimant did not adhere to the Respondent's procedure on appeals in that he was obligated to lodge the same within six weeks of the termination on 23<sup>rd</sup> September 2019. Paragraph 11.24 of the Human Resource Manual prescribed the appellate procedure, but the Claimant by passed it. That the Claimant filed the instant suit on 30<sup>th</sup> September 2019, seven days after the termination.
65. On procedural fairness, reliance was made on the decision in **Pamela Nelima Lutta v Mumias Sugar Co. Ltd (2017) eKLR** where Onyango J. restated the tenets of a fair termination as valid reason and fair procedure.
66. Reliance was also made on Section 45(2) of the Employment Act as was the decision in **Amos Kitavi Kivite v Kenya Revenue Authority (2020) eKLR** on the requirements of Section 41 of the Employment Act.
67. It was submitted that the Respondent acted in consonance with paragraph 11.18 of its Human Resource Manual on matters relating to procedure before termination. That the Claimant was accorded ample time to respond to the notice to show cause and made representations at the hearing and had a representative as well.
68. As regards the definition of confidential information, reliance was made on the words of Rika J. in **Leland Salano v Intercontinental Hotel (2013) eKLR** on disclosure of information obtained in the course of employment by an employee during and after termination. That an employee must not exploit such information unfairly or disclose it to the detriment of the former employer's business.
69. Further reliance was made on the High Court decision in **Magdalene Kiboi & 17 Others v Engen Kenya Limited (2019) eKLR**. Counsel urges the Court to cast doubt on the Claimant's real intention in filing the claim based on the Report of the Investigation Committee where allegations of kickbacks and blackmail were allegedly made. That the Claimant was after all not an anti-corruption crusader as he alleges.
70. It is also submitted that, the Claimant did not testify on the newspaper article by one David Mwere dated 23<sup>rd</sup> January 2020 on investigations by the EACC on payment of Kshs.252 million to a company named Kongasis Limited.
71. Finally on jurisdiction, it is submitted that the Claimant's case is geared towards ousting the jurisdiction of the Court in that his action of sharing confidential information is justifiable as he was preventing loss of public funds, a matter best suited for constitutional petition.
72. The Respondent prays for dismissal of the suit with costs since the Claimant was guilty of gross misconduct and the Respondent applied the prescribed procedure to conduct the termination rendering it substantively and procedurally fair.

### **Analysis and Determination**

73. After careful consideration of the pleadings, evidence on record, submissions by Counsel and the law, the issues that commend themselves for determination are: -
- a) Whether the Claimant's termination was unfair;
  - b) Whether the Claimant is entitled the reliefs sought.
74. This case turns on whether the termination of the Claimant's employment contract was substantively and procedurally fair. As regards the fairness or otherwise of the Claimant's termination, Section 45(1) of the Employment Act provides that no employer shall terminate the employment of an employee unfairly.
75. Section 45(2) of the Act is emphatic that 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.

76. Undoubtedly, Section 45 of the Employment Act is unequivocal that for a termination of employment to be fair, it must pass the test for substantive and procedural fairness and the jurisprudence from this Court and the Court of Appeal is consistent as explained in **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** –

*“For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason of the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”*

77. Relatedly in **National Bank of Kenya v Anthony Njue John [2019] eKLR** the Court of Appeal cited with approval the sentiments of the Court in **Janet Nyandiko v Kenya Commercial Bank Limited [2017] eKLR** as follows –

*“Section 45 of the Act makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and that the same was related to the employee’s conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.*

*The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41, ...”*

78. Similar sentiments were expressed by the Court of Appeal in **CMC Aviation Limited v Mohammed Noor [2013] eKLR** as well as the **Standard Group Limited v Jenny Luesby [2018] eKLR**.

79. In terms of Section 45, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid, that the reason for the termination must be a fair reason and that the same was related to the employees conduct capacity compatibility or alternatively that the employer did not act in accordance with justice and equity.

80. On procedure, Section 41 of the Employment Act provides that –

**(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.**

81. The import of Section 41 of the Act was explained in **Janet**

**Nyandiko v Kenya Commercial Bank Limited (supra).**

#### **Reason(s) for Termination**

82. It is not in dispute that the Respondent employed the Claimant on 30<sup>th</sup> December 2011 as an Assistant Land Surveyor (Trainee) at Kshs.81,400/- per month and would be due for appointment as an Assistant Land Surveyor Manager after 1½ years subject to recommendation by the Head of Division and was appointed on 23<sup>rd</sup> September 2013 at Kshs.133,200/- per month. The terms of employment were reviewed to Kshs.158,280/- effective 1<sup>st</sup> March 2018.

83. It is also common ground that the Claimant was interdicted on 31<sup>st</sup> January 2019, directed to surrender the Respondent’s equipment on 4<sup>th</sup> February 2019, invited to a disciplinary hearing scheduled for 22<sup>nd</sup> July 2019 by letter dated 10<sup>th</sup> July 2019 and was terminated on 23<sup>rd</sup> September 2019. The letter of termination stated in part –

*“It has been alleged that, on or about 7<sup>th</sup> January 2019, you initiated a draft letter addressed to further the Chairman, National Land Commission and further shared the information contained in the letter that had not been authorized or signed by the Managing Director. This amounted to gross misconduct under Human Resource Policy 10.16.1(iii). This is therefore to inform you of the Corporation’s decision to lift your interdiction from the date it was effective and subsequently terminated your employment with effect from 23<sup>rd</sup> September 2019.”*

84. It is discernible from the letter that the reasons for termination were twofold: –

ii) Initiating a draft letter to the Chairman, National land Commission.

iii) Sharing the information contained in the letter that had not been authorized or signed by the Managing Director.

85. Paragraph 10.16.1 of the Respondent's Human Resource Manual provides that –

*“While in the course of their duties, employees will be exposed to confidential information. In such cases, they will be expected to uphold strict standards in regard to confidentiality of information.”*

86. Under paragraph 10.16.2 –

*“Disciplinary action will be taken against any employee proven to have divulged confidential information without the permission of the corporation.”*

87. The show cause letter dated 15<sup>th</sup> January 2019 stated that the Claimant had initiated a draft letter to the Chairman National Land Commission on Compulsory Land Acquisition for the Nairobi/Naivasha SGR Project: Proposed design row and withholding payments of some affected properties to be signed by the Managing Director. That the Head of Department had declined to endorse the draft because the letter was not factual hence the draft was incomplete for signature by the Acting Managing Director. That the Claimant shared the draft letter that had not been approved by the management with the public which amounted to gross misconduct. The Claimant was accorded an opportunity to make representations before disciplinary action could be taken. He had three (3) days to do so and was at liberty to request for another three (3) days' extension if necessary.

88. The Claimant responded by a memo dated 21<sup>st</sup> January 2019 where he explained in detail the issue at hand and his role as well as the reasons why he acted in the manner he did. Specifically, the National Land Commission had proposed compensation for developments within parcel Ngong/Ngong 18549 not affected by the SGR to the tune of Kshs.241 million and query put to the National Land Commission on 8<sup>th</sup> November 2018 went unresponded to. In the meantime, the Respondent's Board sat on 5<sup>th</sup> December 2018 and approved compensation for all the parcels of land including Ngong/Ngong 18549. Funds were remitted to the National land Commission on 4<sup>th</sup> January 2018.

89. A five (5) men team from the Respondent paid a site visit to establish the facts on parcel Ngong/Ngong 18549 and prepared a report showing that developments on parcel Ngong/Ngong 18549 were not affected by the SGR. Only 0.032 hectare of the 0.12 hectare was affected but the National Land Commission had agreed to pay for the entire plot and developments thereon and the Respondent's Board of Directors had approved the payment. The team recommended three options to ensure that the proprietor obtained appropriate compensation. The report was handed over to the General Manager for Infrastructural Development (GM-ID) on 11<sup>th</sup> January 2019. The Claimant stated that he briefed the GM-ID and the Acting Managing Director by word of mouth on 8<sup>th</sup> and 10<sup>th</sup> January 2019 respectively and even visited the site with the GM-ID on 10<sup>th</sup> January 2019. He testified that the GM-ID had agreed that a draft letter be done to the National Land Commission and the Claimant drafted the same and requested the National Land Commission through the phone not to make payments on the stated parcels until directed by the Respondent.

90. The Claimant denied having shared any information with the public as alleged. The Respondent's Human Resource Manual does not define the term “public” used in paragraph 1.2.2(i). In addition, the National Land Commission is part of the government as opposed to the public and the Claimant had communicated with the National Land Commission to safeguard the interests of the Respondent, otherwise he would have failed in his duties.

91. As regards originating the draft letter to the National Land Commission, the Claimant stated that he had done so with the approval of the GM-ID to whom he forwarded the draft for approval and had been briefed by the Claimant. Relatedly a copy of the report by the team had been shared as was a memo dated 11<sup>th</sup> January 2019 on the actionables including a request to the National Land Commission to withhold payment pending clarification by the Respondent. The Claimant's evidence on the initiation of the draft letter to the National Land Commission remains uncontroverted.

92. As regards sharing of unauthorized information, the termination letter states he shared the information that had not been authorized or signed by the Managing Director. The letter is silent on the person(s) with whom the contents of the letter were shared. The notice to show cause made reference to the public which the Claimant denied.

93. As submitted by the Claimant, the National Land Commission is a constitutional commission established by Article 67(1) of the Constitution of Kenya 2010 to discharge the functions set out in Article 67(2) including to manage public land on behalf of the national and county governments. Section 5(2)(a) of the National Land Commission Act 2012 confer upon the National Land Commission power to alienate land on behalf of and with consent of the national or county government.

94. Since the term public has been construed to mean the whole of the public or a section of the public, it is evident that the National Land Commission cannot be described as public. Neither the termination letter nor the notice to show cause identify the person to whom the unauthorized information was communicated. Specifically, the name and designation. It is common knowledge that state and public officers communicate regularly in the ordinary course of their activities.

95. More significantly, the National Land Commission and the Respondent are both public institutions and the two were in a partnership in the SGR Project from Mombasa to Naivasha. The two were to work seamlessly to ensure that the project was realized. Whereas the National

Land Commission alienated the land for the project the Respondent provided the funds to compensate affected persons. Communication between the officers of the two bodies was inevitable. In the Court's view, the telephone communication made by the Claimant to the Director of Valuation and Taxation at the National Land Commission cannot be deemed to have been made to the public.

96. Relatedly, on disclosure of information, paragraph 10.12.1 of the Human Resource Manual states that –

*“An employee must not disclose any information concerning the affairs of the Corporation or its employees or show or release any official document to any person not connected with the Corporation or even insiders, unless he is required to do so in the course of his duties, or such disclosure as is authorized by the Managing Director. Individual invitations to give technical advice or present papers should be channeled through the Managing Director.”*

97. This paragraph impliedly permits employees of the Respondent to disclose information to persons connected with the Respondent if exigencies of duty demand.

98. As submitted by the Counsel, the Claimant was involved in the SGR Project land acquisition and the National Land Commission was a partner in the exercise. The request to pend payments awaiting the outcome of the proposals made by the management team was made by the Claimant in the ordinary course of his duties.

99. Although paragraph 11.16.11(iii) of the Respondent's Human Resource Manual identifies *“unauthorized use or disclosure of confidential information”* as gross misconduct, the Manual has no definition of the phrase confidential information and no evidence was led to show that the information disclosed was in fact confidential as between the Claimant and the recipient. Relatedly, acquisition and compensation for land for purposes of the SGR Project was not a secretive matter. It was common knowledge that land owners along the corridors would be and were compensated using public funds and knowledge of the amount paid to a land owner by an official of the National Land Commission would not be detrimental to the Respondent's business.

100. The decision in **Leland Salano v Intercontinental Hotel (supra)** relied upon by the Respondent is unhelpful in that the information shared in this case was not detrimental to the Respondent's business. Relatedly, the Respondent adduced no evidence to establish that the SGR – Phase II was delayed or interrupted by reason of the Claimant's telephone call to the National Land Commission.

101. For the foregoing reasons, the Court is satisfied that the Respondent has not established that the information disclosed by the Claimant was confidential or that he originated or initiated the draft letter to the Chairman of the National Land Commission without approval of the GM-ID.

102. The Respondent's contention that by sharing the information the Claimant not only violated the provisions of Section 10 to the Public Officers Ethics Act that require officers to discharge their duties transparently and in an accountable manner but comitantly the Respondent's right to privacy, which violated the principle of harmonization in the construction of articles of the Constitution of Kenya, the Respondent did not allege or adduce evidence that its right to privacy was violated. See **Marilyn Muthoni Kamau & 2 others v Attorney General & another (supra)**. Similarly, by sharing the information with the National Land Commission the Claimant was arguably acting in a transparent and accountable manner. In his view, the disclosure was necessary for the National Land Commission to appreciate that although the Respondent's Board of Directors had approved payments, the process had loose ends.

103. According to the Claimant, the disclosure to the National Land Commission was protected by the provisions of the Access to Information Act, 2016 and specifically Section 16(1) of the Act which provides that *“A person shall not be penalized in relation to any employment, profession, voluntary work, contract, membership of an organization, the holding of an office or in any other way, as a result of having made or proposed to make a disclosure of information which the person obtained in confidence in the course of that activity, if the disclosure is of public interest.”*

104. Under Section 16(2) of the Act, a disclosure is deemed to be of public interest if it is made to a law enforcement agency or to an appropriate public entity. It is common ground that the National Land Commission and the Respondent are public entities rendering services for the benefit of the public.

105. Granted that the Claimant shared the information with the Director of Valuation and Taxation at the National Land Commission to protect the Respondent from loss and by the extension the public, it appears to the Court that a case may be made that the disclosure was in the public interest as ordained by Section 16(1) of the Access to Information Act.

106. As regards disclosure of information and sharing between public officers, there is judicial authority to the effect that *“... it is of utmost importance that public service should function properly and to my mind it cannot do so unless commonplace communications between one civil servant and another are privileged from production. It would also seem to me that it would be an injustice to civil servants to hold that they are so timid that they would not write freely and candidly unless they know what they wrote could in no circumstances whatsoever ...”* See **Baseline Architects Limited & 2 others v National Hospital Insurance Fund Board Management (supra)**.

107. The freedom to communicate does not imply that internal codes, rules or policies or procedures should not be complied with. Each case should be adjudged on the basis of its facts and circumstances of the case.

108. The allegation by the Respondent that the Claimant obtained the information he shared with the National Land Commission illegally is difficult to follow for the simple reason that the Claimant was at all material times an employee of the Respondent and his character or status did not change until he was terminated. Consequently, the decisions in **Okiya Omtata Okioti & 2 others v Attorney General & 3 Others (supra)** as well as **Okiya Omtata Okioti & 2 others v Attorney General & 4 Others (supra)** on illegally obtained evidence are of little assistance to the disposition of this matter.

109. Finally, the Court has scanned through the Claimant's response to the notice to show cause, communication to the GM-ID on the report on parcel Ngong/Ngong 18549 and statement to the Directorate of Criminal Investigations dated 26<sup>th</sup> February 2019. The consistency of the Claimant is evident on what transpired. It is also discernible that he was doing so in good faith and no evidence was adduced to demonstrate that he had a personal motive or benefit. He is consistent that he shared the information to protect his employer and by extension public resources in consonance with the values enshrined in the Constitution of Kenya 2010.

110. It is important to note that the Claimant did not act alone. A team of persons investigated the parcels of land in question and prepared a report which the Claimant shared with the Head of Division and briefed him together with the Acting Managing Director.

111. The Claimant did not deny having shared the information with the National Land Commission, a partner organization in the SGR Project land acquisition. The Claimant testified that "*I was in a position of do or you don't, you are damned.*"

112. For the above reasons, the Court is satisfied that the Respondent has not proved on a balance of probabilities that it had a valid and fair reason to terminate the Claimant. Having had no previous disciplinary issues and coupled with his conduct in the matter in question, it was incumbent upon the Respondent to treat the Claimant more fairly than it did. The Respondent had a variety of other forms of punishment it could have imposed on the Claimant as opposed to termination of employment. Paragraph 11.17 of the Human Resource Manual provides the options that were available to it.

113. As regard the appeal to the Respondent as mandated by paragraph 11.2.4 of the Respondent's Human Resources Policy and Procedures Manual, the Claimant filed his appeal outside the prescribed period of six weeks after termination. The termination letter informed the Claimant that he had the right to appeal the decision within six weeks. He arguably did not exercise the right to appeal as prescribed as submitted by the Respondent. But more significantly, the Claimant had already filed the case herein having done so seven days after communication of the Respondent's decision to terminate his employment contract. The appeal was unsuccessful. Contrary to the Claimant's assertion, there is no obligation for the employer to accord the Claimant a hearing on appeal. It is not a judicial process.

### **Procedures of Termination**

114. The sentiments of Onyango J. in **Pamela Nelima Lutta v Mumias Sugar Co. Ltd (supra)** relied upon by the Respondent are instructive. In the words of the Learned Judge:

*"What constitutes fair termination is a matter that is now well settled by the wealth of Jurisprudence of this court and the Court of Appeal. There are two elements that must be satisfied by the employer, fair procedure and valid reason."*

115. The specific elements of Section 41 of the Employment Act were clearly demarcated by Radido J. **Loice Otieno v Kenya Commercial Bank Ltd [2013] eKLR**, as follows: –

*"In my view, an employer must demonstrate as a matter of fact that it:*

- (i) Explained to the employee in a language the employee understood the reasons why it was considering the termination*
- (ii) Allowed a representative of the employee, being either a fellow employee or a shop floor representative to be present during the information/explanation of the reasons*
- (iii) Heard and considered any explanations by employee or his representative*
- (iv) Where the employer has more than 50 employees as required by Section 12 of the Employment Act, that it had and complied with its own internal disciplinary rules."*

116. Similar words were echoed by Makau J. in **Amos Kitavi Kivite v Kenya Revenue Authority (2020) eKLR** as submitted by the Respondent. I now proceed to apply the principles to the instant case.

117. It is submitted that paragraph 11.18 of the Respondent's Human Resource Manual prescribed the procedure to be complied with in cases of dismissal without warning, that the Head of Human Resource and Administration shall issue a show cause letter, the employee shall be given reasonable opportunity to respond to the charges and the matter is then handed over to the Human Resource Management Advisory Committee (HRMAC) for deliberation, conduct disciplinary hearing and make recommendations.

118. It is common ground that the Respondent issued a show cause letter dated 15<sup>th</sup> January 2019 and the Claimant responded through a memo dated 21<sup>st</sup> January 2019. That a special committee was constituted to investigate the matter and invited the Claimant to shed more light by a memo dated 13<sup>th</sup> March 2019 and he appeared on 15<sup>th</sup> March 2019 and was subsequently invited by the HRMAC and permitted to bring a representative, one Chimera Washidudu. The Claimant requested to an extension to 24<sup>th</sup> July 2019 and the request was acceded to and the HRMAC subsequently recommended termination of the Claimant.

119. The Respondent submits that it followed the prescribed procedure in terminating the Claimant who was accorded ample opportunity to defend himself.

120. The Claimant faulted the disciplinary process on the ground that although the interdiction took place on 31<sup>st</sup> January 2019, disciplinary hearing took place on 2<sup>nd</sup> July 2019, that the delay was inordinate. Secondly, the Human Resource Manual provided for the process to be

complied within six months and finally the Respondent did not communicate the reasons for the decision of the Committee. Finally, some documents he requested for were not furnished.

121. On the timing of the disciplinary hearing in relation to the interdiction, the Claimant appreciated the fact that an investigation committee was formed and he appeared before it in March 2019 and a report prepared. Relatedly, the Claimant did not allege or adduce evidence to demonstrate the delay was prejudicial or occasioned unfairness.

122. As regards the reason for the decision, the Claimant did not make a request and did not allege that the same were denied upon such request.

123. On documents requested for and not supplied, the Claimant confirmed on cross examination, that he had no evidence that he requested for them.

124. For the above reasons and analogous to the Respondent's submission, the Court is satisfied that the Respondent has on a balance of probabilities established that it conducted the Claimant's termination in conformity with the provisions of Section 41 of the Employment Act. The Claimant was accorded two opportunities to present his defence and explain himself.

125. This finding is consistent with the sentiments of my brother Nzioki Wa Makau J. in **Samuel Mwangi Wachinga v Enderasha Farmers' Co-operative Society [2018] eKLR** where he expressed himself as follows: -

*“It is not each hearing that is undertaken in compliance with Section 41 of the Employment Act that will have a witness for the employee present. Quite often, employees chose to go alone and the mere fact that there was no witness does not of itself invalidate the hearing. **Even the absence of the letter of invitation to the hearing is not sufficient cause to disregard the process undertaken if the process is one that gave the employee an opportunity to be heard and present his defence.**”*

[Emphasis added]

126. The Court is persuaded that the Claimant's termination of employment was procedurally fair.

#### **Reliefs**

127. The Claimant seeks several reliefs and the Court awards as follows:

(a) Having found that the Claimant's termination of employment was unfair and unlawful, a declaration to that effect is hereby made and as a consequence the Claimant is entitled to: -

(i) Salary for the days worked in the month of September 2019 if not already paid.

(ii) The unpaid portion of the salary from February 2019 to August 2019.

#### **(b) Reinstatement**

128. The remedy of reinstatement is provided for by Section 49(3)(a) of the Employment Act, 2007 and may be decreed if the circumstances of the case justify. However, Section 49(4)(c) of the Act enjoins the Court to consider the practicality of reinstatement or re-engagement as a relief. In **Kenya Airways Limited v Alex Wainaina Mbugua [2019] eKLR**, the Court of Appeal stated that –

*“Section 49(4) of the Employment and Labour Relations Act obligates a court before ordering reinstatement to consider;*

*“the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; the practicability of recommending reinstatement or re-engagement; the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances; the opportunities available to the employee for securing comparable or suitable employment with another employer; any conduct of the employee which to any extent caused or contributed to the termination; any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination.”*

129. Similarly in **Kenya Airways Limited v Allied & Aviation Workers Union Kenya [2014] eKLR**, Murgor, JA cited with approval and the sentiments of the New Zealand Court of Appeal in **New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School [1994] 2 ERNZ 414** as follows:

*“Whether ... it would not be practicable to reinstate [the employee] involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future. It is not uncommon for this Court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate in the sense of being impracticable to reinstate the employment relationship. Practicability is capability of being carried out in action, feasibility or the potential for the re-imposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequence.”*

130. These sentiments were cited with approval by the Court of Appeal in **Kenya Airways Limited v Alex Wainaina Mbugua (supra)** as

well in **Judicial Service Commission v Joseph Riitho Ndururi [2021] eKLR**.

131. The Court is in agreement with these sentiments since they represent the law on the remedy of reinstatement.

132. From the evidence on record the Claimant testified that he was mentally disturbed and traumatized and the interdiction, in particular crippled him financially and on termination, he had no salary to meet his financial obligations including mortgage payments for some time.

133. However, the Claimant led no evidence on how he overcame the hiccup since he appeared to have gone over it. Relatedly, his communication with the National Land Commission antagonized the two institutions and the Acting Managing Director had to write to the Commission to explain the circumstances regarding the Claimant's communication.

134. Granted that the Claimant instituted the action seven (7) days after termination long before exercising his right of appeal as advised by the termination letter, it appears that the relationship between the Claimant and the Respondent was strained.

135. Finally, the Claimant's submissions did not highlight the remedy of reinstatement or re-engagement as the principal remedy in this suit. The issue of practicability among others were not canvassed. It is not in dispute that the Claimant contributed to the termination. Although the Respondent is a large organization with various departments, the Claimant's profession means that he could only fit in the Department of Survey.

136. For the above reasons, the Court is satisfied that reinstatement is not an appropriate relief in the circumstances of this case.

**(c) 24 months' gross salary as damages for unlawful compensation**

137. Section 49(1)(c) of the Employment Act provides that –

**(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—**

**(a) ...;**

**(b) ...;**

**(c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.**

138. It is unclear under what law the claim for 24 months' gross salary is grounded on and none was urged before the Court. In the circumstances, the Court will rely on the provisions of Section 49(1)(c) of the Employment Act.

139. Having found that the Claimant's termination of employment was unjustified, the Claimant is eligible for compensation under Section 49(1)(c) of the Act. The Court has taken into account the following: -

(i) The Claimant was an employee of the Respondent for a duration of about 7 years and 8 months and wished to continue as evidenced by seeking the remedy of reinstatement and the notice of motion dated 30<sup>th</sup> August 2019.

(ii) The Claimant had no previous record of misconduct or notice to show cause or warning.

(iii) The Claimant gave the information to the National Land Commission in good faith and in the belief that he was protecting the Respondent and by extension public resources.

(iv) The Claimant substantially contributed to the termination.

(v) The Claimant anticipated that he would remain in the Respondent's employment for a long time.

(vi) The employment contract was terminable by three (3) months' notice and the Claimant had been in probation for a long period.

140. In the circumstances the Court is satisfied that the equivalent of six months' gross salary is fair.

141. A similar quantum of compensation was awarded by the Court of Appeal in **OI Pejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR** as well as in **Freight In Time Limited v Rosebell Wambui Munene [2018] eKLR**. In both decisions, the Court of Appeal reduced the level of compensation from the maximum award of 12 months' gross salary awarded by the Trial Court.

**(d) Three hundred and eleven months' gross salary being the Claimant's salaries for the unexpired employment term**

142. This is a claim for anticipatory earnings whose entitlement and legal justification have not been provided. The Court of Appeal and this Court have previously held that a claim for anticipatory earnings in termination of employment contracts has not legal justification. See sentiments of the (then) Industrial Court in **Engineer Francis N. Gachuri v Energy Regulatory Commission [2013] eKLR** on the payment

of damages to the date of retirement, and the Court of Appeal decisions in **Elizabeth Wakanyi Kibe v Telkom Kenya Limited [2014] eKLR** as well as **D. K. Njagi Marete v Teachers Service Commission [2020] eKLR**. In the latter case, the Court of Appeal stated that –

*“Thus, it is clear to us that the claim for anticipatory benefits was not anchored in law, ...”*

143. Finally, the claim for earnings which the Claimant would have enjoyed in future is not sustainable since the contract between him and the Respondent was terminable by three (3) months’ notice of either party or payment in lieu of notice. The claim is **dismissed**.

**(e) One month’s gross salary for each completed year of service**

144. As a public officer, the Claimant is required to be a member of the National Social Security Fund (NSSF) in addition to any other pension scheme an employer may have for its employees. The Claimant adduced no evidence that he was not a member of the NSSF.

145. More significantly, the Claimant is a member of a pension scheme as the reliefs sought confirm as well as paragraph 11 of the letter of appointment dated 30<sup>th</sup> December 2011. The claim is **disallowed**.

**(f) Release of Claimant’s accrued pension and other benefits**

146. Since the Claimant was a member of the Kenya Railways Provident Fund and was enjoined to contribute 10% his basic salary while the employer contributed 16% to the Fund, the release of pension is governed by the Deed between the Respondent and the Fund Managers which particulars the Claimant is deemed aware of and should comply with. The issue was not canvassed in Court. The claim is **disallowed**.

**(g) Release of the Respondent’s portion of the Claimant’s pension for the “unexpired employment” period of three hundred and eleven months**

147. This claim appears to the Court to be founded on assumption that pension could accrue even in circumstances in which an employee is not in the employment. It is also informed as an anticipatory benefit and was not canvassed. The claim is **disallowed**.

**(h) Payment of untaken leave days**

148. The letter of termination of employment stated that; *“Your dues will include: your earned but unutilized leave days.”*

149. Although the Claimant led no evidence that he had any pending leave days before termination including the number and when they accrued, the Respondent appear to admit that he may have had pending leave days.

150. In addition, RW1 testified that the Claimant was to be paid all dues up to the date of termination. **Claimant be paid for any unutilized leave days.**

**(i) Lifelong golf membership at Kenya Railways Golf Club**

151. The Claimant led no evidence of his entitlement to this relief or the terms and conditions under which membership of the Club was determined by the employer. The claim is **disallowed**.

**(j) Lifelong medical benefits for the Claimant and his family**

152. The Claimant led no evidence on this relief or the circumstances in which it was offered or extended to an employee by the Respondent. The claim is **disallowed**.

**(k) Certificate of service**

153. The Respondent to issue the Claimant a certificate of service within 30 days of this judgment.

**Conclusion**

154. In the final analysis judgment is entered for the Claimant in the following terms: -

- (a) Salary for the days worked in September 2019, if not already paid.**
- (b) Unpaid portion of the Claimant’s salary from February 2019 to August 2019, if not already paid.**
- (c) Equivalent of six (6) months’ gross salary as compensation for unfair termination.**
- (d) Payment for unutilized leave days unless already paid.**
- (e) Certificate of service to issue.**

(f) **Costs of this suit.**

(g) **Interest at Court rates from the date of judgment till payment in full.**

155. Orders accordingly

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 27<sup>TH</sup> DAY OF JANUARY 2022**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**