



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 878 OF 2015

LUKAS AKUNGA OMARIBA.....CLAIMANT

VERSUS

TATU CITY LIMITED.....RESPONDENT

JUDGMENT

1. The Claim herein was filed on 22.5.2015 and it seeks the following reliefs:

- a. **A declaration that the termination of the Claimant's employment by the Respondent was unfair and unlawful.**
- b. **12 months compensation for unlawful termination; Kshs. 2,189,687.50x 12 = Kshs. 26,276,250.00**
- c. **One month's notice pay – Kshs. 2,189,687.50**
- d. **32 days' pay in lieu of accrued leave days not taken- Kshs. 3,503,500.00**
- e. **Medical Insurance premium with AETNA International for the year 2015; \$ 13,336 x 94.80**
- f. **Bonus for the year 2014 – (pegged on year 2013 payments) = Kshs. 26,050,000.00**
- g. **The Respondent be compelled to issue the Claimant with the Certificate of service.**
- h. **An order for payment of costs for this claim.**
- i. **Interests on the above sums at court rates until payment in full.**

2. The Respondent filed its defence and counterclaim on 30.7.2018 contending that the termination of the claimant's employment was fair and lawful by reason of his gross insubordination to the Respondent's Board of Directors, absenteeism and breach of confidentiality and the duty of fidelity. As a result of which the relationship between the parties had deteriorated with time.

3. In the counter-claim, the respondent alleged that the Claimant retained company property including electronic information, correspondence and documents and has refused to return them despite demand. It further contended that following the termination, the Claimant has deliberately contravened the confidentiality of his employment contract by divulging and sharing sensitive information about the Respondent with third parties. Consequently, it sought the following reliefs:

- a. **Delivery up to the Respondent by the Claimant of all electronic information, correspondence and documents relating to the Respondent contained in the Claimant's personal laptop unconditionally.**
- b. **Delivery up to the Respondent of two mobile phones, Apple iPhone 5s and Apple iPhone 5c, or alternatively, an order that the Claimant pays to the Respondent a sum of money equivalent to the replacement costs thereof.**
- c. **A permanent injunction restraining the Claimant from further breach of the confidentiality Clause under the Employment Contract.**
- d. **Costs of the suit.**

4. The Claimant did not file a reply to the counter-claim. Nevertheless, the matter proceeded to full hearing when both parties gave evidence and thereafter filed written submissions.

Claimant's case

5. The Claimant testified as Cw1 and stated that he was the Chief Executive Officer (CEO) of the Respondent until 5.2.2015 when he was dismissed summarily. He testified that on the said date, he had attended a Board meeting which was adjourned and upon returning to his office he received an email informing him of the termination of his employment. He contended that the termination was abrupt and no reason was given. He was also informed by the security persons that they had instructions from their bosses not to allow him back to the office and as such he has never gone back to collect his personal documents.

6. He further testified that the Board meeting did not discuss his dismissal and it was never an agenda for the meeting. He also explained that the Directors' resolution to fire him was made without any meeting of the directors and it was challenged in **Tatu City and Others v Stephen Jorungi HCCC No. 46 of 2015** where the Court held that the resolution was illegal in a Ruling which was neither appealed against nor set aside.

7. He stated that his monthly salary was Kshs. 2,189,687 but he was not paid the same after the termination. He further stated that there were negotiations for him to be paid 10 months' salary totaling Kshs. 21, 896, 875 and 32 leave days being Kshs. 3,503,300 plus payment of his medical premium being USD 13,336.00 but the respondent did not comply in spite of him making follow ups. He denied that he declined the offer of Kshs.25,400,375 as terminal benefits. He contended that the bonus for the year ending December 2014 was finalized and all the other staff were paid, except him. He further contended that he was not issued with a certificate of service.

8. He denied the allegation that he absented himself from work, and that his conduct was unbecoming. He further contended that he had in fact received good performance rating and a bonus of Kshs. 26 Million. He further denied receiving any notice to show cause on the issues raised in the defence.

9. With respect to the counter-claim, he denied having any property belonging to the company and contended that he never had access to the office. He further denied divulging any sensitive information of the company to a 3rd party.

10. Upon cross-examination, he testified that his letter of employment provided for the procedure for termination but it was not followed. He contended that the allegations leading to his termination did not feature in other cases involving the Respondent or those where he has been sued. He testified that HCCC No. 230 of 2015 was filed while he was discussing the settlement of his terminal dues.

11. He maintained that his benefits did not lapse after his dismissal. He admitted that he had no evidence that bonus had been approved. He also admitted that his good performance approval reports are not in court and explained that he did not have access to the office to obtain the same.

12. He acknowledged that as the CEO he had access to confidential information and was under a duty to exercise confidentiality. He further acknowledged that at the time of his termination the Respondent's Board was divided and contended that he was dismissed by a faction of the Board. He denied that the Board was unable to transact business and contended that they were holding board meetings except the last one, which was disrupted by one board member. He stated that the Board's issues are pending before other courts.

13. He confirmed that his name was mentioned in the Police Report dated 24.8.2015 but contended the Report did not recommend for his prosecution together with the other named persons. He further denied being involved in any fraudulent transfer of shares or being mentioned in the Ruling to HCCC 230 of 2015 as having been involved in fraudulent activities. He testified that he was sued in **HCCC No. 230 of 2015** as the 21st Defendant and the allegation against him was that, after his dismissal, there was discovery of his failure to handover confidential information.

14. He denied the alleged failure to co-operate with the police and contended that he filed a Petition in the High Court, 7 months after his dismissal to stop his arrest and obtained a Court order. However, he withdrew the Petition and was never charged.

15. On re-examination, he stated that the allegations contained in the pleadings and the bundle of documents were not set out in the termination letter or the Board resolution. He maintained that he signed the agreement with the Respondent for payment of some dues but the Respondent defaulted in payment and after serving it with a demand notice, he was enjoined in **HCCC No. 230 of 2015**. Finally, he contended that he was never called by the Respondent to discuss the allegations that have been made against him

Respondent's Case

16. Mr. Christopher John Barron testified as RW1. He stated that he works for Rendeavour Limited the controlling shareholder of the Respondent and he represents Rendeavour Ltd (Rendeavour) in the Respondent.

17. He testified that the Claimant was asked for information by Rendeavour but was persistent in refusing to give the information which amounted to insubordination, as pleaded in the defence, and consequently he was dismissed. He further testified that the Claimant was also making negative comments towards Rendeavour's directors and staff. However, he admitted that the termination letter did not cite any of the reasons for termination.

18. He contended that the Claimant was being coached on what to do by Mr. Nzioka one of the Respondent's directors, therefore they did not accord him any hearing before termination. He further contended that because of the friction among the Directors, it was difficult to conduct a meaningful disciplinary hearing.

19. He contended that the Claimant is not entitled to bonus and medical insurance because he was terminated for misconduct.

20. Upon cross-examination, he admitted that he was the Operations Manager when the Claimant was dismissed and that he was reporting to the Claimant. He further admitted that he was not a member of the Board and he never attended the board meetings. He confirmed that the Claimant attended the Board meeting held on 28.1.2015 as the CEO of the Respondent.

21. He contended that the decision to terminate the Claimant was made by majority of the Board members on 5.2.2015 by a resolution circulated via email. He confirmed that the letter of termination was served upon the Claimant on the same day via email. He admitted that this was done after the initial telephone Board meeting attended by the Claimant on the same day. Again he admitted that the Minutes of the Board meeting held on 28.1.2015, the Notice of the meeting of the Board on 5.2.2015 and the amended agenda for the meeting did not have any agenda to discuss the Claimant.

22. He contended that the letter of termination was done under the provisions of the law and the termination clause in the claimant's contract of employment. He admitted that he had no letter addressed to Claimant on the complaints set out in the defence and reiterated that the Claimant was not taken through a hearing on the said complainants.

23. He confirmed that the unilateral resolution to dismiss the Claimant was challenged in the commercial court and it was declared unlawful. He further confirmed that the respondent company had not filed any suit against the Claimant when he left employment. He testified that HCCC 230 of 2015 was on the change of shareholders and the issues in that suit were the ones that led to the termination of the Claimant's employment. He testified that, though the plaint was amended to include the Claimant as the 21st Defendant in the suit, there was no specific prayer against him.

24. He contended that the company made an offer to the claimant for the payment of his dues after the termination but it was not accepted. He admitted that the Claimant wrote an email to Jochum Horn confirming that a meeting could be held to finalize the terms of the settlement of the terminal dues but there was no response from the respondent.

25. He further admitted that there was an offer to the claimant on the payment of bonus and medical insurance. He contended that though the Claimant was entitled to bonus, he was not aware that all staff had been paid bonus for the year 2014 save for the Claimant. However, he confirmed that he (Rw1) had been paid his bonus. He admitted that he had no evidence that the Claimant was paid salary in lieu of notice.

26. With respect to the counter-claim, he testified that he was aware that the Claimant was locked out of the office after the termination.

27. On re-examination, he testified that the Respondent's Board has the prerogative to employ and explained that the reason for not communicating the reasons for the dismissal was because the same had been explained in the resolution.

28. He contended that the Respondent had the discretion on payment of bonus but failed to explain how the discretion is exercised. Finally, he reiterated that the Claimant was not given a hearing because he did not act professionally.

Claimant's submissions

29. The Claimant submitted that the import of section 45 of the Employment Act is that before terminating the services of an employee, the employer must give good reason for arriving at the said decision. He submitted that though the resolution is the one that supposedly had the reason for his termination, he was neither aware nor notified of the reason. In the upshot, he submitted that he was not notified of any valid reason for the termination and he was not accorded any hearing on the same.

30. In addition, he argued that the reason stated in the defence differs from that in the Board resolution. He further argued that the move to join him as a defendant in HCCC No. 230 of 2015 informs that there was no reason to justify his termination.

31. He submitted that the attempt to explain the reasons in a defence filed three years after termination is preposterous. He relied on **Alice Wanjiku Mbugua v Path Care Kenya Limited [2018] eKLR** where the Court held that the reasons for termination must be existing and must be communicated to the employee in writing./

32. He argued that fair process dictates that any person against whom an adverse action is intended to be taken, must be notified of the charges/claims necessitating such action against him and called upon to render the representations to the claims.

33. He relied on section 45 (2) (c) of the Employment Act and **Pamela Nelima Lutta v Mumia Sugar Company Limited [2017] eKLR** where the Court held that fair procedure is provided for under section 41 of the Employment Act.

34. He argued that he was never taken through any process prior to having his services terminated. He cited **Mary Saru Mwandawiro v Kenya Ports Authority [2016] eKLR** that the right to fair hearing before dismissal for misconduct is not an option.

35. He submitted that section 43 of the Employment Act mandates an employer to prove the reasons for termination failing which the termination is deemed unfair within the meaning of section 45 of the Act. He argued that the respondent has failed to prove valid reason and fair process.

36. He submitted that the Supreme Court in **Kenfreight (EA) Limited v Benson K Nguti [2019] eKLR** dismissed the appeal and reiterated that termination of a contract is subject to the provisions of the Act and must be premised on valid reason and fair process. He further relied on the Court of Appeal decision in **National Bank of Kenya v Samuel Nguru Motanya [2019] eKLR** that the procedure to be followed when terminating employment is set out under sections 41, 43 and 45 of the Act.

37. He argued that he is entitled to 12 months compensation because the reasons for his termination were assigned in the Respondent's defence several years after his termination. He further argued that he is entitled to notice pay pursuant to clause 8.2 of his letter of employment.

38. He submitted that the Respondent did not dispute the claim for accrued leave worth Kshs. 3,503,500. He argued that the draft agreement prepared by the Respondent provided for payment of USD 13.336 towards settlement of medical cover thus the Respondent is estopped from disputing this claim.

39. He relied on Clauses 4.2 and 4.3 of the contract of employment and averred that having been terminated in February 2015 he is entitled to bonus pay for the year 2014 at the sum of Kshs. 26,050,000. He submitted that he was treated in a discriminatory manner since the Respondent decided to withhold his bonus pay yet it paid other employees.

40. He argued that he was forced to file the suit after negotiations failed and urged the court to award costs since costs follow the event. He also submitted that he is entitled to interests on the amount sought since they became due to him upon termination. Finally he urged the court to grant him a certificate of service.

Respondent's submissions

41. The Respondent acknowledged that the Claimant's termination was without notice. It however maintained that the circumstances surrounding the eventual termination, its patent criminal conduct and fraudulent activity necessitated quick remedial action from it.

42. It relied on **McKinley v BC Tel [2001] 25.C.161** where the Canadian Supreme Court held that the criteria to be included in determining whether summary dismissal was justified includes whether the employee's conduct gave rise to a breakdown in the employment relationship, whether conduct violated an essential condition of the employment contract; whether the conduct resulted in breach of faith inherent to the work relationship; and if the conduct was inconsistent with the employee's obligations to the employer.

43. Therefore, it submitted that in the circumstances of the case, it was entitled to dismiss the Claimant with immediate effect to ensure that he did not threaten its operations. It further submitted that it was justified to summarily dismiss the Claimant for gross misconduct under section 44 of the Employment Act.

44. It also submitted that the claimant did not contest specific instances of insubordination explained by Rw1 which included the failure to carry out a tender process of a joint venture, refusal to disclose details of negotiations, discussions carried out with potential purchaser's and the failure to attend board meetings of Rendevour.

45. It relied on **Christopher Kariuki Gikonyo v Cargo Services Centre East Africa BV T/A Swissport Cargo Services Kenya [2015] eKLR** where the court stated that for a charge of insubordination to hold an employee must have committed an act of willful disobedience of precise and unequivocal instructions.

46. It argued that the Claimant was entitled to 24 days annual leave but he neither sought permission to be absent from work nor claimed the days as annual leave. It therefore submitted that the Claimant's conduct constitutes gross misconduct and to buttress this position it relied on **Consolata Kemunto Aming'a v Milimani High School [2019] eKLR**.

47. It submitted that the Draft Settlement Agreement exchanged between the parties was in the nature of a without prejudice offer which did not become effective since it was never accepted between the parties.

48. It argued that in considering whether to award compensation under section 49 (1) of the Employment Act, the Court is to be guided by section 49 (4) of the Act. It also relied on the Supreme Court decision in the **Kenfreight Case [Supra]** where it affirmed that where a court finds a termination of employment was unfair, it must consider the appropriate remedy.

49. It further relied on the Court of Appeal's finding in **Captain Aviation Limited v Captain Mohammed Noor [2015] eKLR** and this court's finding in **Kirdha Limited v Peter Salai Kituri [2020] eKLR** that in granting an award, courts should be guided by section 49 (4) of the Act.

50. It argued that the circumstances under which the termination took place and the conduct of the Claimant precipitated his eventual termination and therefore he is not entitled to any reliefs.

51. It submitted that should the Claimant be found to be entitled to any relief, then the same should be limited to an award of one month's salary under section 49 (1) (a) of the Act as reasonable compensation. It submitted that the Court of Appeal in **Ronald Kimatu v Ukulima Sacco Society Ltd [2011] eKLR** held that where the contract was terminable by one month's notice, an award of one month's salary in lieu of notice was reasonable compensation. It further relied on **Peter Molo Akumu Gould v Kenya Commercial Bank Limited [2014] eKLR**.

52. It further submitted that the Claimant was paid one month's salary in lieu of notice and being appropriate compensation, he has already been fully compensated.

53. It submitted that the medical insurance is not a cash benefit and he is not entitled to it because this was a benefit due to him whilst employed by the Respondent.

54. It also submitted that the board of the Respondent exercised its discretion to deny the Claimant a bonus and as such, it urged the court not to derogate the Respondent's discretion by awarding him a bonus. It relied on **Stephen K Kachila v Bamburi Cement Limited [2015]**

eKLR where the Court found that an employee cannot compel an employer to pay a discretionary bonus if the discretion is not exercised in his favour. It further argued that the Claimant has failed to provide a substantive record to justify the figure prayed for.

55. In respect of the counter-claim, it submitted that the Claimant did not respond to it thus it should be allowed as prayed. It argued that clause 8.4 of the Employment contract is explicit that he was required to return all the requested information and company property. It relied on **Samuel Uche Ajaegbu v Eagle Vet Kenya Limited [2018] eKLR** where the court held that if there is a contractual provision requiring an employee to return items to an employer, the property in the items would not pass and a counterclaim for the property would succeed.

56. It further submitted that the Claimant is bound by the contract of employment and the court is empowered to enforce the terms of the confidentiality clause under Clause 11 of the contract. Finally, it urged the court to dismiss the suit with costs and allow its counter-claim with costs.

Issues for determination and analysis

57. The uncontested facts are that vide an Employment Agreement dated 1.6.2012, the Claimant was appointed as the Respondent's General Manager, Urban Management and Advisor to the Board of Tatu City and later rose to the position of CEO which he held until 5.2.2015 when his employment was terminated. The main issues for determination are:

- a. *Whether the termination was unfair and unlawful.*
- b. *Whether the Claimant is entitled to the reliefs sought.*
- c. *Whether the counter-claim is merited.*

Whether the Claimant's termination was unfair and unlawful.

58. Section 45 (2) of the Employment Act sets out the requirements for considering if a termination is unfair. The section states 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.”

Reason for the termination

59. The Claimant's contention is that his termination was abrupt and no reason was given in the letter dated 5.2.2015. Rw1 testified that the decision to terminate the Claimant's employment was made by majority of the Board members on 5.2.2015 as per the resolution produced in court.

60. The Respondent's Resolution signed by 2 of its Directors stated that:

“ CIRCULAR WRITTEN RESOLUTION OF THE DIRECTORS OF THE COMPANY PASSED BY A MAJORITY PURSUANT TO THE PROVISIONS OF ARTICLE 114 OF THE COMPANY'S ARTICLES OF ASSOCIATION WHICH STATES THAT A RESOLUTION SIGNED BY A MAJORITY OF DIRECTORS, SHALL BE AS VALID AND EFFECTUAL AS IF IT HAD BEEN PASSED IN A MEETING OF DIRECTORS.

BACKGROUND

It is noted that the relationship between the Company and Lucas Akunga Omariba, the current Chief Executive Officer (“CEO”) has deteriorated over a period of time to the extent that there is now an irretrievable breakdown between the Board of Directors and Lucas Akunga Omariba.

In view of this it is felt that it is in the best interest of the Company to terminate the employment of Lucas Akunga Omariba and to appoint an acting CEO to manage the company for the foreseeable future.

We the undersigned, HEREBY RESOLVE as follows:

1. TERMINATION OF THE EMPLOYMENT OF THE LUCAS AKUNGA OMARIBA

1.1. THAT it is in the best interests of the Company to terminate the employment of Lucas Akunga Omariba and consequently the employment is hereby terminated with immediate effect

1.2. THAT Stephen Jennings is hereby authorized to sign a letter substantially in the form tabled with this resolution, notifying Mr. Omariba of the immediate termination of his employment and to ensure that such letter is delivered to Mr. Omariba (including in electronic form).” [Emphasis Added]

61. The letter of termination dated 5.2.2015 only stated that the Board of Directors had resolved to terminate the Claimant’s employment. The Respondent in its defence laid out reasons which it believed were manifest and led to the Claimant’s termination. None of the reasons stated in the defence were explained in the letter of termination.

62. Rw1 in his testimony indeed confirmed that the termination letter did not set out the reasons for termination. He further agreed that the Agenda and the Minutes of the Reconvened Meeting of 5.2.2015 did not include the Claimant’s termination. It is therefore apparent that no reason was given or explained to the Claimant before the termination or vide the termination letter as required under sections 41, 43 and 45 (2) (a) and (b) of the Employment Act. It is now trite law in this country that, even when the employment relationship is untenable, the reasons for separation must be set forth.

63. I gather support from **Kenfreight (E.A.) Limited v Benson K.Nguti [2016] eKLR** where the Court of Appeal held that:

“...The Employment Act, for example, introduced and prescribed minimum terms which the parties must consider as they contract. It established the concept of fair hearing and placed a duty on an employer to give reasons before dismissing or terminating the services of an employee. These developments are a stark departure from the traditional power of the employer to terminate or dismiss at will as demonstrated in the earlier decisions of the courts.” [Emphasis Added]

64. Further, the Court of Appeal in **Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR** held that:

“It is our further view that Section 41 provides the minimum standards of a fair procedure that an employer ought to comply with...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 in 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.” [Emphasis Added]

65. Section 43 and 45 of the Employment Act require an employer to prove the reason(s) for termination. In my opinion, this burden was not discharged and therefore the Claimant’s dismissal was unfair.

Procedure

66. Rw1 testified that due to the friction in the Board of Directors, it was difficult to conduct a meaningful disciplinary hearing. In re-examination, he stated that the Claimant was not given a hearing because he did not act professionally.

67. Additionally, the Respondent in its submissions relied on the **McKinley case [Supra]** to argue that it was entitled to summarily dismiss the Claimant under section 44 of the Employment Act because of the nature of the misconduct by the claimant.

68. Section 41 of the Employment Act provides:

“(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.”

69. I have held before and I dare repeat herein that a disciplinary hearing is not an option before dismissal of an employee for a cause. Under section 41 of the Employment Act, an employer is required in mandatory terms, to give his employee an opportunity to defend himself before terminating his employment contract.

70. The Court of Appeal in **New Kenya Co-op Creameries Limited v Olga Auma Adede [2019] eKLR** held:

“The repeated use of the word “shall” in section 41 makes it clear that the section is a mandatory provision...In our view, section 41 provides for a physical interaction in the disciplinary process and therefore, the hearing provided under section 41 of the Employment Act which is a mandatory provision, must be an oral hearing.”

71. The division in the Board of Directors needed not to be used as the scape goat for not convening a disciplinary hearing. The Respondent should have made an effort to accord the Claimant an opportunity to respond to the allegations that had rendered his relationship with the Board of Directors irretrievably breakdown. Having considered the circumstances of the case, I am of the firm opinion that the termination of the claimant’s employment was not done in accordance with a fair procedure.

Whether the Claimant is entitled to the reliefs sought.

72. Based on the findings above the termination of the claimant’s employment contract was substantively and procedurally unfair, the Claimant is entitled to a declaration that his termination of employment was unfair and unlawful as prayed.

12 months compensation

73. The Claimant submitted that he is entitled to the award of 12 months’ salary compensation because no reason was given for the termination yet it placed adverts communicating his termination. The Respondent on the other hand, submitted that one month’s salary is appropriate compensation considering that the claimant contributed to the termination through misconduct. I have already made a finding of fact that the respondent did not assign any reason for the termination of the claimant’s employment in the termination letter and it did not prove any valid reason by evidence. Consequently, it remains my view that he did not contribute to the termination through misconduct. Indeed, the Respondent did not rebut the claimant’s evidence that he was never recommended for prosecution in relation to the alleged fraud.

74. However, considering that he served the company for about three years without any warning letter and the fact that after the separation, he has not secured an alternative job, I award him 10 months, salary as compensation for the unfair termination under section 49(1) of the Employment Act. I have also considered the fact that after the separation, he has not secured an alternative job. Under the same provision, I award the claimant the one month salary in lieu of notice as provided under section 8.1 of the contract of employment and section 36 of the Employment Act. The letter of termination also offered to pay the Claimant one month’s salary in lieu of notice but Rw1 testified that he had no evidence that the Claimant received the amount.

32 days’ pay in lieu of accrued leave

75. The Respondent submitted that no evidence was led to establish how the 32 days’ leave were made up. The letter of termination stated that the Claimant was entitled to payment of the leave days that he had earned but he had not taken.

76. Clause 7.1 of the Employment Agreement provided that the Claimant is entitled to 24 days as annual leave. Clause 7.1 (f) of the Employment Agreement provides that if he was to leave the Respondent having taken fewer leave days he would receive the appropriate pro-rata adjustment to his salary.

77. The Respondent being the custodian of the Claimant’s employment particulars under section 74 of the Employment Act was expected to provide evidence such as leave or records to ascertain the exact number of accrued leave days. However, it did not produce any evidence to disprove the claim for leave allegedly earned. The Claimant is therefore entitled to payment of 32 days’ leave at the sum of Kshs. 3,503,500.00.

Medical Insurance Premium

78. The Claimant sought this claim for the year of 2015. I agree with the Respondent that though the Claimant was entitled to this claim under clause 6.1 of the Employment Agreement, the benefit ceased upon termination. The claim was included in the unexecuted mutual separation agreement but that “agreement” was never conclusively deliberated upon. Therefore, this claim fails.

Bonus for the year 2014

79. The Claimant testified that the bonuses for the year 2014 had been approved but were not disbursed. He prayed for Kshs. 26,050,000 on ground that the same figure was paid to him in the year, 2013. Rw1 confirmed that the claimant was entitled to bonus for 2014 and that there was indeed an offer made to him for the payment of bonus and medical insurance. Rw1 confirmed that he had personally received his bonus payment but denied knowledge that all staff had been paid bonus for the year 2014 except the Claimant.

80. The Claimant referred to the Mutual Separation Agreement which also provided for the payment of this claim. However, as stated above, this mutual agreement was in the preliminary stages of discussions and was never executed.

81. Having considered the material presented to the court, it is without doubt that bonus is a discretionary payment as per Clause 4.2 of the claimant’s contract of employment. It follows therefore that the court cannot order its payment unless the same is expressly approved by the employer, and a specific amount or a formula for assessing the same is provided in evidence. It is must also be appreciated that bonus payment is depended on many factors including performance of an individual employee as well as corporate performance of the employer and as such the sum payable may not be a fixed amount every year. Consequently, I decline to award the claimant the bonus of Kshs. 26, 050,000.00 as prayed because the same has not been proved on a balance of probability.

Certificate of Service

82. The Claim for a Certificate of Service is granted since it is a right under section 51 of the Employment Act for every employee who serves his employer for a continuous period of more than four consecutive weeks.

Whether the counter-claim is merited

83. The Respondent sought for the return of property owed to it and a permanent injunction restraining the Claimant from breaching the confidentiality clause.

84. The Claimant did not respond to the counter-claim. I have considered the evidence presented in support of the counter-claim and found that pursuant to Clause 8.4 of the Employment Agreement the Claimant should return the Respondent's property after exiting the company. However, the property set out in prayer (a) of the Counter-claim, has not been pleaded with precision and as such that prayer is declined.

85. With respect to the two mobile phones, the Claimant is directed to return the same or in the alternative pay to the Respondent, half purchase price of both iPhone 5s and iPhone 5c as the replacement cost considering the fact that he had used the same for business of the respondent before the termination and also the fact that the same has depreciated from the date of the termination. The said amount should be deducted from the dues owed to the Claimant upon proof of the purchase price.

86. Regarding the permanent injunction, such relief is granted on merit and upon a party adducing evidence at the hearing of the main suit. Whereas the claimant admitted that his contract of service bound him to not to divulge confidential information, I find that the Respondent has not demonstrated the kind of information that is at stake and has also not proved the extent of information shared with third parties or the risk to its business. Consequently this prayer is dismissed.

Disposition

87. For the reasons stated above, I enter judgment in for the claimant as follows:

Claimant

Notice	kshs. 2,189,687.50
Compensation	kshs. 21,896,875.00
Leave	<u>kshs. 3, 503,500.00</u>
Total	<u>Kshs. 27,590,062.50</u>

88. The award is subject to statutory deductions and half purchase price of the said two phones. The claimant will have costs of the suit plus interest at court rates from the date hereof.

Dated, signed and delivered at Nairobi this 30th day of July, 2021.

ONESMUS N. MAKAU

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 15th April 2020, this Judgement has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE